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THE
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REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinion in 14 So. This list does not include cases where an opinion has been filed on the denial of the rehearing.]

Richmond & D. R. Co. v. Greenwood (Ala.) 14 So. 495.

THE
SOUTHERN REPORTER.
VOLUME 15.

(46 La. Ann. 499)

ASHLEY v. SCHMALINSKI et al. (No. 11, 462.)

(Supreme Court of Louisiana. March 26, 1894.)

EQUITY—RESCISSION OF CONTRACT—FRAUD.

1. The law will not maintain a contract, the consent to which, of one of the parties, is the result of error as to the substance of the contract,—the error being caused by artifices and fraudulent representations of the other party,—or if the frauds (not his, directly) have been participated in or made effective by him. Rev. Civ. Code, arts. 1847, 1848; 1 Story, Eq. Jur. §§ 189, 191-193, 195; *Tyler v. Black*, 13 How. 232.

2. When the party seeking relief, on grounds of fraud, against an alleged unconscientious contract of exchange, has employed an agent, on whose information respecting the property, the subject of the exchange, the party depended, the fact of the employment of the agent, and that the contract had been executed on the faith of his information, will not furnish any defense to the defendant, the other party to the contract, if, by his acts and conduct, he furnished the motive for the agent not to give his principal information actually withheld by the agent, and which, if given, would have prevented the execution of the contract, and thus protected the principal.

(Syllabus by the Court.)

Appeal from district court, parish of Rapides; James Andrews, Judge.

Action by Martha A. Ashley against Elise Schmalinski and others to set aside an exchange of property. From the judgment rendered, plaintiff appeals. Modified.

W. H. Jack, H. H. White, and M. H. Carver, for appellant. White & Thornton, for appellees.

MILLER, J. The plaintiff, Martha A. Ashley (wife of W. H. Jack), brings this suit to set aside, for fraud, an exchange of her property, in the town of Alexandria, for certain lands, in the parish of Rapides, of Elise Schmalinski, wife of Samuel Schmalinski. Besides Schmalinski and wife, the plaintiff joins as defendants Adolph Strous, H. M. Loomer (charged to have been accomplices in the fraud), and B. Ehrstein, to whom Schmalinski and wife mortgaged the proper-

ty conveyed to them in the exchange, the petition denying that Ehrstein is a bona fide holder, for value, of the mortgage note. The fraud alleged is, substantially, that the exchange of plaintiff's property was procured by false and fraudulent representations and artifices of Strous and Loomer as to the character and value of the lands of Schmalinski and wife; that the lands were practically of no value, and plaintiff's dwelling was worth \$8,000; that, beyond this, the plaintiff was defrauded of a large portion of the lands by a corrupt agreement between Strous and Schmalinski; and that the lands so acquired by Strous were all that possessed any value. And plaintiff charges that, Strous and Loomer being instruments of Schmalinski and wife, they all participated in the alleged fraudulent representations and artifices. The relief asked is the annulling of the exchange; that the transfer of plaintiff's property by Schmalinski and wife be enjoined; that the mortgage to Ehrstein be set aside; that plaintiff recover certain taxes on the Schmalinski lands, and other expenses incident to the exchange, paid by plaintiff; and, finally, she asks for exemplary damages. Defendants answered denying all allegations of fraud. The judgment of the lower court was against Strous and Loomer, for damages, and against plaintiff, maintaining the exchange and the mortgage. Plaintiff appeals.

The act sought to be set aside—of exchange of plaintiff's property for the Schmalinski land—is of date 30th January, 1892, and recites that each party gives her property for the other. The valuation of plaintiff's dwelling is fixed higher than the lands, the difference being adjusted by the stipulation that plaintiff should retain her dwelling for a few months after the date of the act. The testimony shows that plaintiff, desirous of selling her dwelling in Alexandria, employed Strous, one of the defendants (a real-estate agent), to effect the sale. About the same time, Loomer, another defendant, was employed by Schmalinski and wife to sell their lands in the parish south of Red river. Of Loomer's employment by Schmalinski and

wife, plaintiff was ignorant. Strous conceived the scheme of the exchange of the dwelling for the lands. He urged it on plaintiff, and represented that the lands were heavily timbered and salable, lay in a solid body, and were 5,000 or 6,000 acres in extent. Strous enforced his fascinating statement by suggesting the employment of Loomer to examine and report as to the lands. Loomer (if not then) soon after became the partner of Strous, and the commissions on the exchange thereafter effected on plaintiff's dwelling were shared between Loomer and Strous. The plaintiff, entirely ignorant on the subject, stated that she would have to rely on the information given her, and the result was that Loomer proceeded on his mission of examination. His account to plaintiff, on his return, was even more favorable to the land than that of Strous. Loomer's report was, in substance, that the lands were heavily timbered with white oak and other trees of value; lay convenient to the railroad, in a solid body; that the timber could be readily sold at good prices, and, when cleared, the lands were adapted to farming purposes, worth \$10 per acre, and could readily be disposed of. And he and Strous concurred in the assurance that she should get all the lands. Loomer emphasized his account by the statement that the lands were high, and free from overflow. True, the testimony of these representations comes from plaintiff. We have weighed the circumstance of her interest, and of the contradiction her testimony encounters from that of Strous and Loomer. Her narration is clear, consistent, and positive; finds corroboration, we think, in other parts of the record. As to the contradictions of Loomer and Strous, their parts in the transactions connected with the litigation, we think, give little weight to their statements. Our conclusion is that the representations were made as detailed by plaintiff. Our conclusion is, also, that the representations were false, and designedly false. There is some testimony tending to show a speculative value of the lands, based on the hope of a perfect levee system, and other possibilities of the future. On the other hand, there is testimony far more persuasive that, under any conditions, the cost of reclaiming the lands places that result beyond rational possibility. As to the timber, it is put beyond dispute that there is practically no growth on the lands, of the kinds represented to plaintiff. The lands are shown to be low, swampy, and overflowed,—of course, entirely unfit for cultivation, or capable of being fitted for cultivation, except at a cost none could incur. And it is shown they do not lie in a solid body, nor, for the greater portion at least, convenient to the railroad. This testimony, falsifying in all material respects the representations on the faith of which plaintiff was induced to exchange her dwelling for the lands, comes from surveyors and others qualified to speak, and

creates the absolute conviction of the error caused by the false representations under which plaintiff acted.

The judgment of the lower court decrees that Strous and Loomer pay damages, and thus condemns their conduct in the matter, but holds there is no basis to disturb the exchange. We have given the most careful attention to the case exhibited with respect to Schmalinski and wife, and reach a conclusion different from that of the lower court. It is in evidence that, on Loomer's visit of inspection of the lands, he was accompanied by Baker, who gave his testimony as a witness. Baker was asked by Strous to examine the land, and at his instance went with Loomer. On Baker's return he gave Strous the true condition of these lands, and that conformed to the testimony produced by plaintiff. Bad as the lands were reported by Baker, Strous testifies, he "colored" it, and made it, as he expressed it, as "blue" as possible. Thus the false report of the land was given to plaintiff by Loomer to induce her to make the exchange, and the true report, exhibiting the worthless character of the lands, was placed before Schmalinski. Strous practically directed both reports. When Baker's report was put before Schmalinski, it elicited from him the comment that he "did not think the lands were as bad as that." But he was stimulated to no action or forbearance of action with respect to the exchange into which the plaintiff was being led by the false report then before her. But the record shows that in this condition,—the true report before Schmalinski, and the false report before plaintiff,—at Strous' request, Schmalinski made him a gift of 1,000 acres of the land, consummated by the conveyance a day or two after; the conveyance reciting Strous' services in effecting the exchange as the motive for the gift. The general rule, as claimed by counsel for defendants, is that the law requires the parties to the contract of sale to inform themselves as to the property, and does not exact disclosures from one to the other. Story, Eq. Jur. § 200. The principle of law supposes equal opportunities of information, but is never applied to sustain unconscientious advantage. There was here no such equality of position. The full knowledge of the character of the lands, if not possessed before, and at all times, was certainly imparted to Schmalinski by Baker's report. It was given to Schmalinski, and withheld from plaintiff, by the treachery of the agent on whom she implicitly relied for information. If a line of that report had reached her, the lands would have been entirely rejected, as an exchange for her dwelling. With the full knowledge on the subject afforded Schmalinski by Baker's report withheld from plaintiff, to whom it should have been furnished by Strous, and, if furnished, would have protected her against the sacrifice of her property, in our opinion, it is unconscientious to

permit Schmalinski to profit by the exchange. Then, too, he knew he was dealing with Strous as an agent for the plaintiff. The gift to that agent, and the purpose and nature of his communications, were notice, we think, by necessary implication, of the violation of the duty of the agent to his principal. With notice of this treachery of the agent, and with abundant reasons, at least, for Schmalinski to suspect the frauds (shown by the record) practiced on plaintiff by the agent to bring about the exchange, we cannot distinguish the position of Schmalinski from that of one who had actual knowledge of the frauds; and, of course, no one with this knowledge could profit by the exchange. In this view, we think Schmalinski is affected with responsibility for the false representations and artifices of Strous and Loomer which led plaintiff to give the dwelling for the lands.

There is another view: In her conferences with Strous, it was the plaintiff's understanding she was to receive all the Schmalinski lands south of Red river; in all, 5,000 or 6,000 acres. It was afterwards falsely reported to her that there were only 4,000 acres. This was in aid of the gift of the 1,000 acres Strous proposed to secure for himself. A paper was prepared, reciting that Schmalinski bound himself to convey 4,000 acres for the plaintiff's dwelling. Schmalinski signed it, and, as we gather from Strous' testimony, in that condition it was submitted to the plaintiff, and assented to by her. There is some discrepancy in the briefs whether plaintiff ever saw the paper, but the point is not of importance. It is quite certain she acted on the belief in the representations that 4,000 acres was the extent of Schmalinski's ownership. But when Baker's report was laid before Schmalinski, with the menace of the defeat of the exchange if the report became known to plaintiff, "with some persuasion," Strous testifies, Schmalinski was induced to sell 4,800 acres, and "4,000" in the paper was changed to "4,800;" and this change was without plaintiff's knowledge or consent. If the paper had been submitted to plaintiff, and this declaration was after the submission, that circumstance would certainly not put the transaction in a better light. Now, if Schmalinski was willing to part with 4,800 acres, instead of 4,000, for the plaintiff's dwelling, the plaintiff should have been the recipient, not Strous, who had assured her that she should get all the lands. The effect of the transaction was to deprive plaintiff of a large portion of that she had been assured she was to get. It was a fraud on the part of Strous. Was not the transaction of a nature to suggest the fraud to any one? The alteration of a paper affecting another's interest, without her knowledge, is out of the usual course. Strous testifies the altered paper was that signed by Schmalinski, but it appears it was shown to her. Another paper to the same

purport, Strous testifies, was signed by her. Both read that 4,000 acres of the land were to be conveyed for her dwelling, and her assent to either or both was procured on the faith of the false representations that Schmalinski owned only 4,000 acres. Both papers, it is testified, recited the conveyance of the lands was to Strous, but announced they were to be in exchange for plaintiff's dwelling. The relation of plaintiff, as principal, who was to receive the land, and Strous, as her agent, was plain, and known to Schmalinski. Strous again testifies that when the deeds—one to plaintiff, and the other to her agent—were prepared, and before her signature, Schmalinski stated he thought plaintiff was to get all the lands. But Strous answered that it was all agreed with plaintiff, and it made no difference, if Schmalinski got her dwelling. We think Schmalinski's remark in this connection indicated his appreciation that all was not right, and he should have adhered to his thought, and not yielded to Strous' assurance. The result of Schmalinski's acquiescence was to contribute to the fraud of plaintiff's agent, and under circumstances from which the fraud should have been inferred. Then, too, the gift of the lands to Strous, in direct connection with Baker's report of their condition, implied that Strous was not to submit that report to his principal. It was his duty to give plaintiff the information of the true condition of the lands. The gift impliedly exacted the pledge that that duty should not be fulfilled. Strous conformed to the pledge, and Schmalinski got the dwelling. The tendency and effect of the gift was to close the mouth of Strous in respect to the communication duty required he should make to his principal. Schmalinski, in this view, cannot urge that plaintiff has no claim to relief, because she had an agent. The agent was, in effect, controlled by the gift of Schmalinski, and not by duty. In this view, too, we think Schmalinski is not free from responsibility for the success of the false representations under which plaintiff parted with her property.

The grounds we have announced dispose of the case. Involving, in the main, questions of fact, we might have simply announced our conclusions, but that would not have been consistent with the right of the litigant to know the grounds of decision. There are phases of the litigation we have not touched, because not necessary. The case is presented by defendants in this court without reference to any questions of the admissibility of the testimony. We have endeavored to give the requisite attention to all parts of the voluminous record, and to weigh with care the argument of the defense; and, if there are any points of that argument not discussed in the opinion, it is not because they have escaped our attention, but that the case is dominated by the views we have expressed. The controversy, in our opinion, does not at all involve the question of the

value of plaintiff's dwelling. Hence, we have excluded from consideration the testimony and discussions on that point. The issue is whether the lands were of the character represented. The effect of the alleged deficiency and nonwarranty in respect to the property given in exchange is a question not free from difficulty, but not necessary to be considered. There is a question raised whether the deed to Strous of the 1,000 acres is in issue, plaintiff contending that she asked no relief on that ground. We think the issue is substantially made in plaintiff's last supplemental petition, and the general issue was enough in the answer on this, and for that matter, perhaps, on all points. Besides the evidence on that point in the record, we take occasion to say that in our opinion the insertion of the nonwarranty clause affords no reason for any comment with respect to counsel, if, indeed, any unfavorable comment was intended. The law will not hold a party bound when his consent is the result of error bearing on the substance of the contract, caused by fraudulent representations of the other party to the contract; or, if not made directly by the other party, yet when, by his acts and conduct, he has contributed to make effective the false representations. In our opinion, plaintiff, in respect to the wrong of which she complains, and the relief she seeks, is within the principle of law, and the articles of the Revised Civil Code (1847, 1848). 1 Story, Eq. Jur. §§ 189, 191, 192, 195 et seq.; *Tyler v. Black*, 13 How. 232, quoting *Sugdon on Vendors*. As to the mortgage of Ehrstein, in our opinion there is no basis to disturb it. We shall endeavor to secure plaintiff against that mortgage.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court, in so far as it dismissed plaintiff's demands against Elise Schmalinski and husband, be avoided and reversed; that the exchange of plaintiff's property for the lands of said Elise Schmalinski by act of date 30th January, 1892, before Hooe, notary, be, and is hereby, annulled, and the parties to said act are hereby reinstated in the ownership,—the plaintiff of her dwelling, and said Elise Schmalinski of her lands,—as that ownership existed before said act; that plaintiff have and recover from Elise Schmalinski and husband \$200 taxes paid on said lands, with interest from date of payment; that Samuel Schmalinski and wife do surrender to plaintiff within 20 days from the filing of the mandate in the lower court the note made by them, of date the 10th of May, 1892, and secured by mortgage on plaintiff's dwelling, or, in default thereof, that plaintiff do have and recover from said Samuel Schmalinski and wife \$1,000, with interest from 1st January, 1893 (the amount due on said note); that in other respects the judgment of the lower court be affirmed, and defendant pay costs in both courts.

(48 La. Ann. 340)

LESTER v. CONNELLY, Sheriff, et al. (No. 11,429.)¹

(Supreme Court of Louisiana. Feb. 12, 1894.)

NEGOTIABLE INSTRUMENTS — CHARGES ON WIFE'S SEPARATE PROPERTY — RIGHTS OF BONA FIDE HOLDER.

1. When a married woman, separate in property, sells by authentic act her paraphernal property, although the sale is a disguised mortgage for the benefit of the husband, yet, if the notes given for the purchase price fall into the hands of innocent third parties, the vendor's lien and special mortgage securing the notes will be enforced.

2. There is no difference in principle between the holder of notes given for the purchase price of the property and the purchaser of the property, as the reliance of the purchaser in both instances is upon the record. When that discloses an unimpeachable title, he receives the protection of the law as against unknown and latent defects. *Schepp v. Smith*, 35 La. Ann. 6.

3. The mortgage, with all its force and vitality, accompanies the negotiable note which it secures in its transfer to an innocent holder. The secret equities between the original parties cannot affect his title to the sale, or impair its validity, or that of the mortgage.

(Syllabus by the Court.)

Appeal from district court, parish of Terre Bonne; L. P. Caillouet, Judge.

Action by Ada Lester against A. W. Connely, sheriff, and others, for an injunction. There was judgment for plaintiff, and defendants appeal. Reversed.

Andrew H. Wilson and Beattie & Beattie, for appellants. Lucius F. Suthon, for appellee.

McENERY, J. The plaintiff, wife of Felix Bascle, is separate in property from her husband, and authorized to administer her own affairs separate and apart from her husband. Felix Bascle, the husband, was a merchant in the town of Houma, and indebted to Levis Bros., in the city of New Orleans. He was embarrassed, and unable, without security, to obtain further assistance from said firm. In 1891, Mrs. Bascle, duly authorized by her husband, sold her separate property—a house and lot in the town of Houma—to one Leveque, the bookkeeper of said firm. The price and consideration of the sale was \$1,700,—\$200 cash, and the balance of the purchase price was represented by Leveque's three notes, secured by vendor's privilege and special mortgage, payable to his own order, and by him indorsed, each for \$500, at 6, 12, and 18 months. The notes were paraphrased by the notary to identify them with the act of sale. In 1892, before maturity, these three notes were transferred as collateral security to the commercial firm of S. Pfeifer & Co., of the city of New Orleans, by Levis Bros., who received them from Leveque. Pfeifer & Co., after the maturity of the second note, brought suit to enforce the payment of the two that were due against Leveque, the vendee of Mrs. Bascle, who, in February, 1893, confessed judgment in their favor in the sum

¹ Rehearing refused March 12, 1894.

of \$1,000 and interest, with recognition of vendor's privilege and mortgage on the property, as stipulated in the act of sale and mortgage. An execution issued on this judgment, and the property mortgaged in the town of Houma was seized by the sheriff. On the petition of Mrs. Bascle, the vendor of the property to Leveque, an injunction issued, directed to the sheriff and plaintiffs in execution, restraining the sale. The petition for the writ of injunction alleges that Bascle, the husband, was indebted to Levis Bros. in the sum of \$300; that said firm refused to advance to him without security, whereupon her husband, having no security to offer, appealed to his wife to place a mortgage on her property in order to enable him to continue his business; that she refused to mortgage said property, and that the husband, using his marital influence and power over petitioner, compelled her assent to mortgage said property for the purposes stated; that said sale was a sham and pretense, and that Leveque was an interposed party in the interest of Levis Bros., to whom the property was mortgaged solely for the debts of the husband; that she never had possession of the notes given for the purchase price, and that they were delivered immediately by the notary to Levis Bros. She never knew until the seizure what became of the notes. That since said pretended sale she has exercised dominion and control over the property, and has remained in undisputed possession of the same, and that she has paid all the taxes on the property. She alleges that the plaintiffs in execution are not innocent third parties. The prayer is the usual one for judgment in such cases. The defendants in injunction answered, alleging that they were the lawful holders of said notes, acquired in good faith, before maturity, for a valuable consideration. They ask judgment for 20 per cent. on the amount of the judgment enjoined, and 10 per cent. interest on the judgment, and damages for attorney fees incurred in the defense of said injunction. There was judgment for plaintiff, and defendants appealed.

It will be unnecessary to discuss the issues presented by the evidence in the record to show that Mrs. Bascle conducted the business in her own name, and the proceeds of the notes, less the amount due Levis Bros. by the husband, placed to her individual credit, and that goods were furnished her on this amount credited to her. The sale of the property to Leveque, who was an interposed party for Levis Bros., is shown by the evidence to have been in fact a mortgage for the purpose of appropriating the proceeds for an indebtedness due by the husband to this firm, and as security for other advances. As between the parties to such an act and those who should acquire the property or the notes with notice and knowledge of the true character of the transaction, the act of mortgage, disguised as a sale, would undoubtedly

be declared null and void. Civ. Code, arts. 2396, 126, 127, 128; *Parmer v. Mangham*, 81 La. Ann. 348; *Crosier v. Ragan*, 38 La. Ann. 154; and *Bisland v. Provosty*, 14 La. Ann. 169. In order to protect the wife, she is authorized to show the real motive of the contract or transaction, and is not estopped by her declarations in the act. *Vicknair v. Troclair*, 45 La. Ann. 373, 12 South. 486; *McIntosh v. Smith*, 2 La. Ann. 756; *Chaffe v. Oliver*, 33 La. Ann. 1010; *Harang v. Blanc*, 34 La. Ann. 632. In the disguised contract, if it be one the wife, separate in property, had the legal right to enter into, third parties without notice are protected. Justice imperatively demands the maintenance of this doctrine. *Chaffe v. Oliver*, 33 La. Ann. 1010; *Schepp v. Smith*, 35 La. Ann. 1; *Succession of Forstall*, 39 La. Ann. 1052, 3 South. 277; *Bank v. Flathers*, 45 La. Ann. 75, 12 South. 243; *Vicknair v. Troclair*, 45 La. Ann. 373, 12 South. 486. If a party had purchased the property on the apparent validity of the title placed on record by the plaintiff, without knowledge of the real character of the transaction, his title would be protected against the demand of the wife. *Broussard v. Broussard*, 45 La. Ann. —, 13 South. 699. There can be no difference in principle between the holder and owner of the notes given for the purchase price and the purchaser of the property, as the reliance of the purchaser of the notes and of the property is upon the record. "When that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects." *Schepp v. Smith*, 35 La. Ann. 6; *Broussard v. Broussard*, 45 La. Ann. —, 13 South. 699. In *Broussard v. Broussard*, referred to, we said that: "Whatever the secret equities between a vendor and vendee, and whatever their rights between themselves, the former, who has placed upon the public records a title valid on its face, cannot urge such equities against a bona fide purchaser for value from the vendee, who acted on the faith of such recorded title. This principle applies to married women who, in the exercise of powers conferred by law, have executed apparently valid sales of their paraphernal property." The law authorizes the wife to sell her paraphernal property, and to dispose of the proceeds as she may deem fit. Rev. Civ. Code, art. 2390; *Courtney v. Davidson*, 6 La. Ann. 456; *Morrow v. Goudchaux*, 41 La. Ann. 716, 6 South. 563. The defendants acquired the notes in suit, paraphed by the notary to identify them with the act of sale, retaining the vendor's privilege and special mortgage to secure the same. The mortgage, with all its force and vitality, accompanies the note in its transfer to an innocent holder. *Carpenter v. Allen*, 16 La. Ann. 435; *Schepp v. Smith*, 35 La. Ann. 1; *Bank v. Flathers*, 45 La. Ann. 75, 12 South. 243. The paraph required the holder to look to the registry of the act with which the notes were identified, which has for its object the pro-

tection of third parties. This registry of the act of sale executed by Mrs. Bascle informed the defendants that she, a married woman, separate in property from her husband, with his authorization had sold to one Leveque her paraphernal property, part for cash and the balance on terms of credit, evidenced by the notes in his possession and ownership. There was nothing in the act to put them upon inquiry, or which remotely suggested that the sale was in fact a mortgage executed for the purpose of raising money for the husband's benefit. There was no duty imposed upon them to inquire into what disposition she made of the proceeds of the sale.

The facts mainly relied upon by plaintiff to show that the defendants were not innocent holders of the notes are that the defendants knew that Leveque owned no visible property, and would not, without collateral security, have been credited by defendants; and the continued possession of the property by the vendor, Mrs. Bascle. Leveque owned no visible property, and may not have had on this account credit in commercial circles. But he was a man of business, a bookkeeper in the employ of Levis Bros.; and it is not at all improbable that he may have had sufficient means to purchase the property on the terms and conditions in the act of sale. The fact, therefore, that Leveque was not the owner of visible property by itself is not sufficient to charge the defendants with the knowledge that he was an interposed party for the benefit of Levis Bros., and that the real transaction was intended to be a mortgage, and not a bona fide sale. But a party may be interposed for convenience, and the sale a valid one. There may be, in such a case, a real price and consideration paid by the actual vendee. The defendants may have known that Leveque was an interposed vendee, and that Levis Bros. were the real purchasers, but this would not, in our opinion, be sufficient to charge them with the secret intentions of the parties to the original act of sale. It was sufficient for the protection of the defendants that they found on record a sale apparently valid on its face, sufficient to induce third parties to purchase. *Schepp v. Smith*, 35 La. Ann. 1; *Bank v. Flathers*, 45 La. Ann. 75, 12 South. 243. If the defendants had notice beyond this, actual or constructive, it must be shown, in order to prevent recovery. The delivery of the property accompanied the public act of sale. *Fleckner v. Grieve*, 4 Mart. (La.) 694; *Laurans v. Garner*, 10 Rob. (La.) 425; *Ellis v. Prevost*, 13 La. 235; *Flynn v. Moore*, 4 La. Ann. 400; *Peterkin v. Martin*, 80 La. Ann. 894; *Rev. Civ. Code*, art. 2479. The continued possession of the vendor, Mrs. Bascle, cannot avail her in her demand to have the sale annulled. The sale, on this account, can only be attacked when third persons have acquired an interest in the property, or the rights of creditors on the

same are asserted. In such an event, when there is reason to presume that the sale is simulated, its reality must be shown by the parties. *Rev. Civ. Code*, art. 2480. The exception to this rule is when the wife attempts to show the real character of the transaction entered into by which she binds herself for her husband; as, in the instant case, between her and the original parties to the act of sale, she would be permitted to prove that she remained in possession of the property to show that the sale was a disguised mortgage. This she has shown, but has failed to prove that the defendants had any knowledge of the transaction. They are innocent third parties, and as to them the public act of sale, placed upon record by the plaintiff, must be taken according to its recitals. As to these parties, no question of simulation is at issue between them and plaintiff. The evidence shows that, whatever may have been the intentions of Levis Bros. and Mrs. Bascle as to the sale of the property, and whatever disposition may have been made of the proceeds of the sale, the defendants are the legal holders of the notes in good faith, and without notice of the equities between the parties to the act of sale.

The threats and marital influence alleged to have been exerted by plaintiff's husband are not proved. Had they been proved, the fact would not assist the plaintiff, as the defendants are innocent holders of the notes. *Blanchard v. Castille*, 19 La. 362.

From the facts and circumstances of this case, we are not disposed to assess general damages. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that it is now ordered that plaintiff's demand be rejected, and the injunction dissolved, at plaintiff's cost. It is further ordered and decreed that the defendants do have and recover judgment against the plaintiff and the sureties on the injunction bond in solido, for 10 per cent. interest per annum on the amount of the judgment enjoined, and special damages for attorney's fees in the sum of \$100.

(46 La. Ann. 126)

Succession of MASSEY. (No. 11,305.)
(Supreme Court of Louisiana. Jan. 15, 1894.)
ADMINISTRATION—POWER OF EXECUTORS TO SELL
REALTY—VALIDITY OF SALE.

1. When a testator directs in his will that his immovable property be sold by his executor, an order of sale rendered thereon for the sale of the property is valid.

2. If the executor dies pending the proceedings for the sale, his death does not have the effect of annulling the order or arresting the sale.

3. It is the law that an executor's authority is confined to the execution of the will, and that he can only sell property (movables first and thereafter immovables) in default of funds to pay debts and legacies. But *Rev. Civ. Code*, art. 1669, makes an exception when the executor is directed to sell immovable property by the will.

4. The rights of the widow in community

and the heirs of age are fixed at the testator's death, and these rights are personal to them. If they make no objection to the sale of the property directed by the will, the adjudicatee has no cause of complaint. They waive their personal rights by making no opposition to the execution of the will, and the order of sale by the court is a complete protection of the adjudicatee's title.

5. The adjudication by the auctioneer of the property to the purchaser is a complete title. No other is necessary and essential to vest title in the adjudicatee. The auctioneer who made the sale can make the deed and receive the price if no opposition is made by the executor, or in his absence.

6. The fact that there is no one to receive the price cannot annul the adjudication. The purchaser can retain the price until some one is authorized to demand it, or he can relieve himself of responsibility by depositing same in court.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

In the succession of William Massey, W. C. H. Robinson, auctioneer, and others obtained the rule of W. H. Mathews & Bro. to show cause why they should not comply with the terms of their bid on property at a judicial sale. On the hearing, the rule was made absolute, and they appeal. Affirmed.

Browne & Choate, for appellants. Guy M. Hornor, for appellees.

McENERY, J. William Massey died in the city of Philadelphia in 1891. Joseph P. Hornor, of the city of New Orleans, was appointed, by the last will and testament of the deceased, executor in Louisiana. The testator owned considerable immovable property in the city of New Orleans. In the will he directed the Louisiana executor "to sell all the property of the deceased within the state of Louisiana under the orders of the court of probate and advice of my Pennsylvania executors, and after payment of all my debts, if any, to remit the proceeds to the executors of my estate in Pennsylvania, my domicile." Joseph P. Hornor, the Louisiana executor, presented to the proper court, having jurisdiction, a petition in which he alleged that the deceased, by last will, dated 26th April, 1881, directed him to sell the property of the deceased in this state under the orders of court and the advice of the Pennsylvania executors, and to remit the proceeds to the executors in Pennsylvania, and that he was advised to sell the real estate at public auction. The order was granted as prayed for, and an order issued to W. C. H. Robinson, an auctioneer, directing him to make the sale, after legal delays and advertisement, and upon the terms and conditions as prayed for by the executor. The sale was advertised to take place on 1st February, 1893. Before the day of sale arrived, the Louisiana executor, Hornor, died. The auctioneer proceeded with the advertisement and sale, and on the day of sale adjudicated a certain piece of real estate, situated in the city of New Orleans, in the square bounded by

Magazine, Lafayette, Common, and Girod streets, to the commercial firm of W. H. Mathews & Bro., for the price of \$21,000. The auctioneer made a tender of title to said firm of an act of sale signed by him, and made a demand on them for the price of the adjudication. They refused to comply with their bid. A rule was then taken by the auctioneer and the heirs of deceased on Mathews & Bro., the adjudicatees, to show cause why they should not accept the title tendered, and pay the purchase price. The defendant in rule answered by attacking the validity of the proceedings provoked by the executor upon the following grounds: (1) Because the said property was sold without authority in law or in fact, and the proceedings looking to the sale of said property are wholly unwarranted in law, and they are null and void on their face; (2) because the district court was without authority or power to issue the order of sale herein for the sale of said property; (3) because there is no one at present qualified to receive the purchase price herein, and grant a valid discharge therefor, and make to these respondents a formal and valid title to said property; (4) because the said proceedings are in effect partition proceedings, and the proper parties, the widow and heirs, have not been brought into court, and they are not bound thereby; (5) because the said proceedings are otherwise defective, illegal, and not binding on the heirs of the deceased. The rule was made absolute, and W. H. Mathews & Bro. were ordered to accept title, and pay the price of the adjudication. They appealed from the judgment.

The first and second grounds are based on the well-established principle that the executor was without power to enlarge the duties imposed upon him by the laws of this state, and that he could only sell enough property to pay debts and legacies, and that the record shows that the estate owed no debts and there were no legacies to be paid; and he relies upon articles 1659, 1660, 1668, Rev. Civ. Code, and *Percy v. Provan*, 15 La. 69, and *Succession of Dumestre*, 40 La. Ann. 571, 4 South. 328. Article 1660 says: "But if the executor testamentary be merely appointed testamentary executor without any other power his functions are confined to see to the execution of the legacies contained in the will, and to cause the inventory and other conservatory acts of the property of the succession to be made." In default of funds to discharge debts and legacies of sums of money, he can sell, on the order of court, the movables, and, if they are insufficient, the immovables, to a sufficient amount to satisfy said debts and legacies. Article 1668. Article 1669 says: "Except in the cases provided for in the preceding article [1668] the executor cannot cause the immovables to be sold unless he is authorized by the will to do so." The executor is bound to see that the will is faithfully executed. Rev. Civ. Code, art. 1672. Article 1669 authorizes the immov-

ables to be sold if so directed by the will. The testator, in the will, expressly directed that the property in Louisiana should be sold, and the proceeds remitted to the executors in Pennsylvania. The sale of the immovables in Louisiana was to be made on the advice of the executors in Pennsylvania. This disposition of the will evidently intended that the executors in Pennsylvania should be the judges of the proper time for the sale. They directed it, and the condition became absolute, and it then became the duty of the Louisiana executor to apply to the proper court for the requisite order to sell. The right of the widow in community on the property, her ownership of one-half and usufruct on the other, could not be controlled by the dispositions in the will; and the same may be said of the rights of the heirs on the property, which were fixed at the testator's death. Succession of Smith, 9 La. Ann. 107. The widow and the heirs assert no rights on the property,—we are not informed by the record that they have done so. At any rate, they must assert them before the final execution of the testament. In the instant case, in the rule, they demand the execution of the will. The matter is personal to them, and, if they waive their rights by not opposing the execution of the will, it does not concern the adjudicatee of the property. There are no minor heirs' rights at issue. The testator ordered the sale of his property, the proceeds to be remitted to the executors of his domicile. The will is executed, the property sold, and proceeds remitted to the executors at the testator's domicile. Now, in what manner, after the sale of the property, can the heirs or widow attack the sale made of the property by a court of competent jurisdiction? They have acquiesced in it by making no opposition to the execution of the will. The fact that the Code authorizes the testamentary executor to sell immovable property, directed by the will to do so, is a protection to the adjudicatee, in the absence of any proceedings by the heirs or widow in community to prevent the sale. The authority of the executor to sell was derived from the will. The will was probated and ordered executed. The order of the court ordering the sale of the property is a protection to the adjudicatee. There is nothing in the record behind the order to put the adjudicatee upon inquiry. In the absence of any opposition to the final execution of the will, the order to sell stands alone a complete and perfect shield for the purchaser under the order.

On the third ground alleged by defendants in rule—that there is no one at present qualified to receive the purchase price, and grant a valid discharge therefor, and make to defendants a valid title to said property—it is sufficient to say that the death of the executor before the sale could not have the effect of revoking the order of court. The property

was directly under the administration of the court, under the order, and it could compel the final execution of the order. The court had appointed the auctioneer to make the sale, and the announcement or advertisement of the same had been made to take place on a certain day. There was no reason why the death of the executor should arrest the execution of the order. Having provoked the order as required by the will, his active participation was no longer necessary for its final execution. The adjudication of the property to the defendants was in itself a perfect title. There was no necessity for any other. Rev. Civ. Code, arts. 2607, 2608, 2623; *Lane v. Cameron*, 36 La. Ann. 773; *Dabadie v. Poydras*, 3 La. Ann. 153; *Heirs of Nesom v. Weis*, 34 La. Ann. 1009; *Washburn v. Green*, 13 La. Ann. 332; *Desobry v. Carmena*, 9 La. Ann. 180; *Babin v. Winchester*, 7 La. 468; *Faulk v. Pinnell*, 6 Rob. (La.) 26; *Lafton v. Dolron*, 12 La. Ann. 164; Code Pr. art. 690; Interdiction of Onorato (recently decided) 46 La. Ann. 73, 14 South. 299. There being no one to whom he could pay, the price could not defeat the sale. The purchaser could retain it until demanded by proper party, or he could have relieved himself of responsibility by depositing same in court. The auctioneer, Robinson, had the undoubted right to make a deed to the property, and to receive the price, as he had been authorized by the court to make the sale. In *Covas v. Bertoulin*, 45 La. Ann. 160, 11 South. 874, we decided that, where the auctioneer who made the sale died, the court could appoint another auctioneer to make the deed. It is self-evident, then, that the auctioneer who is living has the right to sign the act of sale.

On the fourth ground—that the proceedings were, in effect, partition proceedings, and the widow and heirs were not parties, and the act therefore null and void—it is evident that the sale was not made to effect a partition between coproprietors, but to reduce to cash the testator's property in Louisiana, under the provisions of the will. The sale may be a preliminary step to a final partition in Pennsylvania among the heirs of the deceased. This may have been the reason for the disposition in the will for the sale of the immovable property in Louisiana. But these are subsequent matters that do not concern the defendants. *Dees v. Tildon*, 2 La. Ann. 412; *Kohn v. Marsh*, 3 Rob. (La.) 48. Judgment affirmed.

PARLANGE, J., takes no part in the decision of this case.

(46 La. Ann. 367)

MAJOR v. HER CREDITORS. (No. 11,450.) (Supreme Court of Louisiana. March 12, 1894.)

INSOLVENCY—EMOTION OF SYNDIC—RIGHTS OF MINORS.

1. In legal contemplation there is no debt of the tutor to the minor until the end of the

tutorship and settlement of the tutor's account. Hence, at a meeting of creditors of the tutor to elect a syndic, his vote cannot be received, based on the supposed debt to the minor, the tutorship still subsisting, and there having been no settlement of accounts, and the law exacting that the debt on which the creditor votes at such meeting be fixed and certain. *Rev. St. § 1796; Civ. Code, art. 3086; Tourne v. His Creditors, 6 La. 462; Terry v. Creditors, 38 La. Ann. 15; Lesseps v. His Creditors, 7 La. Ann. 624.*

2. Nor, in another view, can the tutor vote at such meeting on a supposed debt due by himself individually to himself as tutor. He cannot, as tutor, act against or sue himself individually. If the interest of the minors is at all concerned at the meeting of the creditors of the tutor, it is for the under-tutor to act for the minors. *Civ. Code, art. 275; McHugh v. Stewart, 12 La. Ann. 361; Gibbs v. Lum, 29 La. Ann. 531.*

3. It is contrary to the spirit of our law for the protection of minors that the tutor seeking a discharge from his debts should subject the minors to the operation of the insolvent laws, so as to affect their right against him,—least of all to cancel their mortgage against him,—under the sections of our insolvent laws directing the erasure of mortgages. Hence the tutor cannot, in our view, bring the minors before the meeting of his creditors by assuming to vote on the debt supposed to be due the minors by himself as their tutor. *Civ. Code, art. 3314; Association v. Hall, 33 La. Ann. 49; Gibbs v. Lum, 29 La. Ann. 531; Linn v. Dee, 31 La. Ann. 217; McHugh v. Stewart, 12 La. Ann. 361.*

(Syllabus by the Court.)

Appeal from district court, parish of Pointe Coupée; E. B. Talbot, Judge.

To the appointment of Joseph D. Major as syndic of Emma S. Major, an insolvent, John R. Picton and others filed an opposition. The opposition was dismissed, and opponents appeal. Reversed.

O. O. & A. Provosty, for appellants. L. B. Claiborne and M. Tacon Hewes, for appellee.

MILLER, J. This is an appeal by creditors of the insolvent and by the party claiming to have been elected syndic from the judgment of the lower court, maintaining the appointment of syndic made by the court, on the ground there had been no election. At the meeting of the creditors, John R. Picton, one of the appellants, and Joseph D. Major were candidates for syndic. Among the votes cast and counted by the notary for Major was that of the insolvent, voting on an asserted debt claimed to be owing by herself as tutrix of her minor children to herself as tutrix. The vote counted produced the result stated by the notary; a majority in amount voting for Major, and a majority in number for Picton. The meeting of creditors was closed on the 9th December, the procès verbal of their deliberations filed in court on the 10th, and on that day the court appointed a syndic on the basis of no election stated by the notary. Within the 10 days from the filing in court of this procès verbal, Picton opposed the appointment of syndic by the court, and of certain votes counted for Major, and insisted that, these votes excluded, he (Picton) had been elected

syndic. This opposition was dismissed, the appointment of the syndic by the court maintained, and from that judgment the appeal is by Picton and the creditors who voted for him.

The discussion in this court presents but two propositions for decision: Had the lower court the right to appoint the syndic before the expiration of the 10 days allowed for oppositions? Second. Should not the vote of the tutrix for Major have been excluded, and Picton decreed elected. The argument in this court concedes that, if the vote of the tutrix is excluded, Picton was elected. We take the case on the basis of that concession. Within the 10 days allowed for oppositions to the proceedings before the notary no appointment of syndic should be made by the court, for such appointment could not stand if the votes on which it depended were subsequently set aside on the creditors' oppositions. *Rev. St. § 1802.* If rightfully made,—i. e. on votes entitled to be cast,—it would not be set aside on appeal. This appeal, however, brings before the court the question of the legality of the vote cast by the tutrix. The decision of that question controls the case. It is exacted by the law that the debt of the creditor on which he votes for syndic or on other questions submitted to the creditors' meeting must be liquidated. The amount of the debts represented by the votes cast is one of the elements that determines the election of the syndic. To the end of ascertaining that amount, each creditor is required to "certify on oath" his respective claim. The obligation that may become a debt—i. e. dependent on future conditions—is not a debt on which the creditor can vote. Consistently with the theory of the law requiring certainty as to the debt, it is enacted that the wife in community shall not be allowed to vote unless her right has been fixed by a partition or judgment for a separation of goods. So the vote based on notes of the insolvent given to his children to represent their interest in an unsettled community between their deceased mother and their father, the insolvent, were rejected because the supposed debts were not deemed liquidated. *Rev. St. §§ 1796, 1799; Terry v. Creditors, 38 La. Ann. 17; Lesseps v. His Creditors, 7 La. Ann. 624.* In view of our law and jurisprudence on this subject, it cannot be maintained, in our opinion, that, pending the tutorship, especially when there has been no liquidation of the accounts of the tutor, there is any fixed debt by the tutor to the minors. The special mortgage in this case, given on April, 1892, or, indeed, at any time, would not liquidate the debt of the tutrix. The mortgage is to secure the ultimate rights of the minor as they may exist at the end of the tutorship. How, then, can it be held to fix the debt of the tutrix at the incipency or at any stage of the tutorship? Until the tutorship ends, no suit can be brought to enforce the minors' rights. The law considers

that until that end of the tutorship there is no debt due by the tutor. The only debt of the tutor incident to the relation he holds to his ward is that which may exist when he ceases to be tutor. We therefore hold there was no debt, in any legal acceptation, on which the tutrix could predicate the vote cast by her for syndic. *Gibbs v. Lum*, 29 La. Ann. 531; *Linn v. Dee*, 31 La. Ann. 217; *McHugh v. Stewart*, 12 La. Ann. 361; *Lesseps v. His Creditors*, 7 La. Ann. 624; *Succession of Edwards*, 32 La. Ann. 459.

The view already expressed, that the tutrix has no debt on which she can vote, is enough to dispose of this case. There is, however, another aspect of the case. If the tutrix can appear in these insolvent proceedings, it must be on the theory that she is to be deemed a creditor, in her capacity of tutrix, of herself as the insolvent. She certainly is not competent to sue herself. If any proceeding in this matter could be deemed requisite to protect the interest of the minors, surely the tutrix could not act for them. *McHugh v. Stewart*, 12 La. Ann. 361; *Gibbs v. Lum*, 29 La. Ann. 531. Again, creditors who appear in insolvent proceedings are subjected to the control vested by law in the syndic. He is to sell the property, raise mortgages, and pay the debts of the creditors with the proceeds realized. The tutrix has no power to enforce the debt supposed to be due by her as tutrix, nor can she by any act displace the minors' mortgage, under our law to endure to the end of her tutorship. The nature of her relation to the minors precludes her, in our opinion, from appearing at the meeting of creditors. The minors are supposed to be fully protected by the special mortgage given by her. See *Association v. Hall*, 33 La. Ann. 49. She can, at the meeting of her creditors, convened under the insolvent laws on her application, perform no functions, or exercise no right, with respect to the debt she may ultimately owe her wards, least of all disturb the mortgage to secure their rights resting on her property. In our view, her vote as tutrix at that meeting was illegal. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be reversed; that the appointment of Joseph D. Major as syndic of the creditors of Emma S. Major be amended and annulled; and that John R. Picton be, and he is hereby, decreed to be duly elected syndic of said creditors, with the right of exercising the duties of said office on giving bond as required by law; and that appellee pay costs.

(46 La. Ann. 145)

STATE ex rel. GELPI et al. v. BOARD OF ASSESSORS et al. (No. 11,415.)

(Supreme Court of Louisiana. Jan. 15, 1894.)

TAXATION—IMPORTED GOODS.

1. Imported goods, in the importer's possession, are not part of the property in the state subject to taxation.

2. While they remain in the original package, the importer owes no tax upon them.

3. An article imported continues to be a part of the foreign commerce of the country while in the hands of the importer for sale in the original package.

4. The authority to import carries with it the right to sell the article in the original package.

5. When it has passed into the hands of a purchaser, it is no longer an import, and is subject to taxation like any other property.

6. The goods were sold by the importers in the original packages.

7. They cannot be taxed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action, on the relation of Paul Gelpi & Bro., against the board of assessors and others to restrain the collection of certain taxes. Relators had judgment, and defendants appeal. Affirmed.

E. A. O'Sullivan, City Atty., and George W. Flynn, Asst. City Atty., for appellants. Harry H. Hall, for appellees.

BREAUX, J. The admitted facts are that the relators conduct a commercial partnership as importers of foreign goods in New Orleans; that they (the goods) are foreign imports; that at the date of the assessment they had in stock \$15,000 worth of imported goods, of which \$1,000 were in broken packages, and \$14,000 in original packages; that at no time during the year did the quantity or value of imported goods in broken packages exceed \$1,000; that during the course of the year they sold the entire \$14,000 in the original packages imported, and they are in their store, subject to such sales as can be made during the year. It is also admitted that the import or impost taxes have been paid. Application was made to the board of assessors for the cancellation of the \$14,000 assessed upon goods in original packages; also, to the committee on revision for the taxes for the year 1893. The relators claim that the assessment is illegal; that the duty on the goods imposed by the act of congress had been paid to the United States; that the tax assessed was in effect an additional import duty, which could not be constitutionally imposed by state law. The respondent the city of New Orleans defends on the ground that the relators had, by their disposition of the property, incorporated it in the mass of the property of the state; that by their act the importers have mixed the property with the other values in the state subject to assessment.

That a state law including original packages as property to be taxed would be repugnant to the prohibition of the constitution upon the states not to lay any imposts or duties on imports is conceded by respondent. (1) The respondent argues that it is not essential to break every package in the stock of merchandise, in order to commingle them with the other property of the importer; (2) that by the admission that the goods are in

relators' store, subject to sale, they have become taxable property.

Commencing with the case of *Brown v. Maryland*, 12 Wheat. 447, the supreme court of the United States, in a number of decisions, has invariably held that imported goods from foreign countries are not subject to taxation under state laws until the packages are broken, or they have been sold by the importer. Relative to broken packages: When the imported goods are broken up, they become subject to taxation as part of the bulk of the property in the state. 1 *Desty, Tax'n*, p. 234. Relative to sales: At all times between the arrival of the goods imported and the sale by the importer, if the packages are not broken from the original cases, they are not subject to state taxation. *Low v. Austin*, 13 Wall. 34. With reference to imports, the United States supreme court, in another case, holds: "We have held property in one stage of its ownership [prior to its sale] not to be taxable," and in a succeeding stage "to be taxable,"—after the sale by the importer in original packages. *Murray v. Charleston*, 96 U. S. 446. "Breaking packages," as applied to imported goods, has a defined meaning. The package consists of a number of things bound together, convenient for handling and conveyance. A "package" means a bundle put up for transportation or commercial handling. It is a thing in form, to become as such an article of merchandise, or transportation or delivery from hand to hand. *U. S. v. Goldback*, 1 Hughes, 529, Fed. Cas. No. 15,222. The breaking or destroying the entirety of the package is a clear definition which does not admit of comment.

Applying these principles to the case at bar, it is obvious that the packages were not broken, and that the importers had not sold the goods. The evidence shows that at no time during the year the quantity or value of the imported goods in broken packages exceeded \$1,000, and that during the year the relators sell the entire \$14,000 remaining in the original packages in which they are imported, and that they are in their store subject to such sales as can be made during the year. Any argument that there was a breaking of the packages or a mixing of part of the goods claimed as exempt from taxation is not sustained by the evidence. The sale during the year of the goods valued at \$14,000 is made in the original. The fact that these goods are for sale in the store does not change their ownership nor necessarily have the effect of mingling them with other goods that are not in packages. The immunity from payment of the taxes follows the goods, without reference to the place in which they are stored. That they are offered for sale in unbroken packages in the importer's store is not, in effect, the breaking of the packages, or such a disposition of the goods as causes the immunity from the tax to end. The writs were made peremp-

tory by the judgment of the district court. We affirm the judgment.

PARLANGE, J., takes no part.

(46 La. Ann. 147)

STATE v. STONE. (No. 11,316.)

(Supreme Court of Louisiana. Jan. 15, 1894.)

ADULTERATION OF MILK—CRIMINAL PROSECUTION—VALIDITY OF CITY ORDINANCE.

1. The defendant was found guilty of selling adulterated milk. The defendant, having handed two samples of milk, less than a pint in each, without the least objection, is not in a position before the court to question the validity of that part of an ordinance which provides that dairymen shall furnish, under the penalty of fine and imprisonment, gratuitously, samples of milk whenever required so to do by the health officer, to be subjected to analysis.

2. There should be some objection made in order that the vendor of milk may not appear to give unqualified assent to furnishing the milk asked.

3. While defendant's waiver precludes him from defending on the ground that the milk for analysis was unlawfully obtained, the fine imposed enables him to question the validity of the remainder of the ordinance.

4. Under the police power and the statutes delegating authority to the municipality, the city council may protect health by prohibiting the adulteration of milk, and may adopt ordinances to that end.

5. Such ordinances are not open to the objection that they transcend the limits of municipal authority; the purpose being the protection of public health.

6. To secure such a purpose, persons and property are subjected to many restraints and burdens. Those who directly feel the restraints and burdens are presumed to be rewarded by the common benefit secured. The ordinances were designed to insure the purity of an article of food upon which many families are dependent. It is of universal consumption. The police regulations upon the subject are designed to prevent fraud and protect health. Under the police power and the delegated authority the ordinance of the council relating to the necessity of selling pure milk is legal, and the fine was legally imposed.

7. These ordinances, without proof to the contrary, are not unreasonable. The standard adopted to test the purity of the milk cannot operate to the exclusion of all other evidence upon the subject. Upon proof of the unreasonableness of the standard, that part of the ordinance relating to standard of purity of milk would be illegal, and amenable to the charge of unreasonableness. There is no such proof of record. (Syllabus by the Court.)

Appeal from first recorder's court of New Orleans; E. S. Whitaker, Judge.

On the complaint of the Louisiana board of health, John Stone was convicted of selling adulterated milk, and appeals. Affirmed.

James C. Walker, for appellant. Frank McGloin, for appellee.

BREAUX, J. The defendant appeals from a sentence of the first recorder's court condemning him to pay a fine of \$25, and in default of payment to suffer imprisonment for 30 days on the charge of selling adulterated milk in violation of an ordinance of the city. His ground of appeal is that the ordinance provides for the conviction of

dairymen by means of evidence forbidden by the constitutions of the state and the United States, by ordaining that they shall furnish, under the penalty of fine and imprisonment, gratuitously, samples of milk whenever required so to do by the health officers, to be subjected to analysis. The defendant, on the trial, objected to the introduction of proof as to the quality of the samples of milk. The defendant delivered to the inspector two samples, one from each can of the milk he had for sale. Each sample consisted of a small quantity, less than a pint, which the inspector handed to the chemist of the board of health. After the analysis the inspector made an affidavit against the defendant, charging him with having violated City Ordinance 6596, relating to adulterated milk. As a witness on the trial the chemist testified that the milk was below the standard. With reference to the analysis he testified that it was accurate, and explained the method followed in testing the milk; that he had examined a large number of samples of natural milk, and that in no instance had he found them less than the standard adopted, except where the cows were diseased, or just before or after parturition. The constitutionality of the ordinance is questioned. The facts, as disclosed by the record, do not prove that the defendant was compelled to be a witness against himself, and furnish samples of milk. While, in order to retain a right in opposition to any demand in execution of a law, on the ground of its illegality, there is no necessity to resort to downright resistance or to a display of combativeness; there should be sufficient objection manifested to render it certain that assent was not intended. The facts upon this point are in evidence, and have been considered. They prove compliance, and, in consequence, exclude certain constitutional objections that would necessitate a decision if the defendant had been forced to give up the samples. Moreover: "Where power is expressly given to municipal authorities to license and regulate trades and callings generally, or certain specified trades and callings, or where power to enact licenses is implied, it will be found that such authorities have very commonly prohibited certain employments which affect closely the public health or safety, except the persons engaged therein take out licenses to prosecute such employments. This restriction is usually applied to the business or employment of architects, bakers, dealers in old rags, or in meats and provisions, or in milk, or in spirituous liquors, or in dangerous articles," and other trades and occupations. Parker & W. Pub. Health, p. 298. License itself is one of the means of regulation. It has the effect of lessening the number that would, without it, engage in the trade or occupation licensed, and thereby, to a corresponding extent, decreases competition. By the license the trade or occupation is brought more directly within the scope of the police power. This being a fact of which it must be pre-

sumed the defendant was aware when called upon for samples, instead of objecting, he delivered them to the inspector, and continued selling the milk he had for sale. He cannot be heard to question the regularity or legality of the execution of the ordinance, to the execution of which he consented. The acquiescence in the execution of the ordinance does not have the effect of defeating the plea of the illegality of the ordinance itself as violative of the constitution, and *ultra vires*. The consent to a test does not make legal that which may be illegal in the ordinance under which the proceedings were instituted and the fine imposed. The waiver of a citation and of other informalities under which a defendant may be brought in court, and proof offered against him, is not a waiver of illegalities of the law under which he is prosecuted and condemned. A similar rule applies to the case at bar.

The authority *vel non* of the municipality to pass the ordinance in question under the city charter, and the implied power of the municipality under the charter, are remaining issues for our determination. Under the charter the council has the power, and it is made their duty, to pass such ordinances, and to see to their faithful execution, as may be proper and necessary to prevent the sale of adulterated food, and to punish those guilty of adulterating food and drinks. The authority to punish the violators of ordinances drawn under sections 7 and 8 of the charter is delegated by Act No. 41 of 1890. *State v. Bringler*, 42 La. Ann. 1095, 8 South. 298; *State v. Bonell*, 42 La. Ann. 1110, 8 South. 298. The ordinance, under this authority, adopts a standard by which the adulteration of milk shall be determined, and ordains that any person found guilty of selling milk below the standard shall be subject to a fine of not more than \$25 for each offense, and, in default of payment, to imprisonment for a period not exceeding 30 days, thus conforming with the requirement of the statute delegating authority to the municipality. The statute and the ordinance were properly directed to fixing a legal standard to which all milk is subjected, to fixing penalties for violation of the ordinance, and establishes the duties of the chemists by whom the analysis is made. These details are appropriately within legislative control. They do not transcend the limits of legislative authority. They belong to the class of police regulations designed to protect health and prolong life. The intention throughout was to prevent the sale of adulterated milk. The provisions fixing a standard are valid, as they merely control and regulate the method of ascertaining the quality. The design being to prevent the sale of adulterated milk, and to regulate an employment that must be regulated, it was not *ultra vires* on the part of the council to fix a standard of quality of the milk. The exercise of trades and occupations is subject to reasonable conditions essential to health.

If the power be not express, under the implied power the council would have the authority to adopt measures to maintain a standard of purity of that article of food to the extent of preventing evil and injurious consequences to the public or to individuals. The question was decided in *State v. Fourcade*, 45 La. Ann. 717, 13 South. 187. Judgment affirmed, at appellant's cost.

(46 La. Ann. 151)

REINACH v. DUPLANTIER. (No. 11,258.)
(Supreme Court of Louisiana. Jan. 15, 1894.)

REAL ACTION—TAX TITLE—VALIDITY OF.

1. The property claimed was forfeited to the state in 1877, in compliance with Act No. 93, enacted that year. In 1885 it was adjudicated to the state, under the provisions of Act No. 96 of 1882, for the state taxes of 1882 and 1883. It was also adjudicated to the state of Louisiana for the state taxes of 1880 and 1881. The plaintiff sued to be placed in possession as owner. The defendant filed no appearance in the suit prior to the confirmation of the default. Before the judgment was signed she moved for a new trial on the ground that the property could not be conveyed by the state under Act No. 80 of 1888. Although the property was forfeited to the state in 1877, taxes were assessed upon it for 1880, inclusive to 1884, for which it was sold. To obtain payment of taxes for these years the property could be sold under the law of 1888.

2. Moreover, the defendant invokes the forfeiture to the state of a date preceding 1880, and the fact that the state became the owner under that forfeiture. The owner, prior to the forfeiture, is without interest to have annulled a conveyance made by the state after she was no longer the owner. The state had become the owner by the forfeiture.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by Solomon Reinach against A. A. Duplantier to try title to land, and for possession. Plaintiff had judgment, and defendant appeals. Affirmed.

Lazarus, Moore & Lemle and J. N. Luce, for appellant. Benjamin Ory, for appellee.

BREAUX, J. The action is petitory. In his petition the plaintiff alleges that the state of Louisiana had acquired the property by forfeiture under Act No. 96 of 1877 for state taxes of 1877 and 1878. Moreover, that the state had acquired the same property by adjudications for state taxes for the years 1880, 1881, 1882, and 1883, made in the years 1884 and 1885; that for the years 1880 and 1881 the property was assessed in the name of Joseph A. Peniston, and for the years 1882 and 1883 in the name of the defendant; that the latter inherited from the former, and was placed in possession of the property on December 31, 1881. The service of the citation and petition was personal. In due time a default was entered against the defendant. About six months elapsed between the default and the date of the confirmation of the default. After judgment had been rendered on the confirmation of plaintiff's default, be-

fore the judgment had been signed, the defendant moved the court for a new trial, on the ground that the judgment was contrary to law and evidence, and that it was not competent for the state to make a sale of the property described in plaintiff's petition, consisting of town lots, under the act of 1888. The defendant argues that, the land having been forfeited to the state, as alleged in plaintiff's petition, it should have been sold under Act No. 107 of 1880 or Act No. 82 of 1884, and that the auditor was without authority to convey title under Act No. 80 of 1888; that that act provides for the sale of lands that had been sold to the state for the taxes of 1880 and subsequent years; that the property, having been forfeited to the state for the taxes of 1877 and 1878, was improperly assessed in the name of the defendant for the years 1880 to 1884, inclusive, and that a sale based upon that assessment is illegal; that lands belonging to the state are exempt from taxation; that the land, by the forfeiture for the taxes of 1877 and 1878, as alleged in plaintiff's petition, became the property of the state, and was not subject to taxation.

The defendant cites the case of *Bradford v. Lafargue*, 30 La. Ann. 432, in support of the proposition that by the transfer to the state all taxes existing on the property at the time were extinguished by confusion, and that, subsequent to the transfer, the property is exempt from taxation. Applying that decision to her case, she urges that after the forfeiture of the property to the state for the taxes of 1877 and 1878 the state became the owner, and all taxes subsequent were extinguished by confusion, and that it was improperly assessed while it remained the property of the state. In the last deed, dated in 1892,—that under which the plaintiff owns as vendor,—the auditor of the state declares that, in pursuance of section 8 of an act approved July 12, 1888 (No. 80 of 1888), he conveys the property described to plaintiff. That it is the property which was adjudicated to the state for the unpaid taxes of the years 1880 and 1881 in the name of J. A. Peniston, and in 1882 and 1883 in the name of A. A. Duplantier (the defendant), on the 20th December, 1884, by James D. Houston, tax collector, for unpaid taxes due the state of Louisiana, and that it had been duly advertised and offered for sale by I. W. Patton, tax collector, in accordance with the provisions of Act No. 80 of 1888; that the sale was made for the price of \$102 cash. Copies of the deeds referred to in this last act were admitted in evidence. The forfeiture to the state under Act No. 96 of 1877 vested full title in the state of all the right and interest of the party assessed in the property, subject only to a right of redemption. There being no informality in the forfeiture, it being alleged that the property was forfeited, and the defendant having conceded *ex necessitate rei* for the purpose of

her defense on the rule for a new trial that the property was forfeited as alleged, it absolutely and unqualifiedly became the property of the state from the day the time to redeem had elapsed. The state acquired the immediate dominion. Property is the absolute right of the owner to enjoy and dispose of a thing. The defendant is without interest to question the legality of the title conveyed under Act No. 80 of 1888. A similar question was considered in *Morrison v. Larkin*, 26 La. Ann. 699. This court held that the former owner (who contended that the tax collector could not sell his land, it having been forfeited to the state) could not assume that position without putting himself out of court, because, if his lands were forfeited to the state, the only remaining right was the right of redemption. The same may be said as applying to the case at bar. The former owner invokes the fact that the property involved was forfeited to the state. In *Breaux v. Negrotto*, 43 La. Ann. 432, 9 South. 502, the court is as emphatic: "The divestiture of title was complete, and it is immaterial to the owner prior to the divestiture in what manner the state disposes of her property." In *Martinez v. Tax Collector*, 42 La. Ann. 677, 7 South. 796, we said: "No reasons are urged and can be urged why the state, being the owner of the property, could not sell the same, and fix the price, and impose such conditions in the sale as she deemed fit and proper." The case of *Morrison v. Larkin*, 26 La. Ann. 699, was decided under revenue statutes since repealed. At the time sales could be made upon payment to the collector of the amount of the state and parish taxes due on the property, and no provision was made to collect taxes upon property accruing after it had been adjudicated to the state. In *State v. Recorder of Mortgages*, 45 La. Ann. 566, 12 South. 880, it is stated: "It likewise appears to be clear that it was the definite purpose of the legislature to make the property purchased by the state liable to subsequent taxation, state, parish, and municipal, as will appear from the following, viz.: 'The price bid and paid for said property shall be in full and final payment and satisfaction of all state taxes, together with all costs—and the purchaser shall take said property subject to all subsequent taxes.'" The sale was made to the plaintiff for a price including the taxes assessed on the property after it had been adjudicated to the state. In two cases of recent date it was decided that, in order to become the owner, the purchaser must pay all the taxes, including those assessed after the property had been adjudicated to the state. *Breaux v. Negrotto*, 43 La. Ann. 432, 9 South. 502; *Martinez v. Tax Collector*, 42 La. Ann. 677, 7 South. 796; *Morrison v. Larkin*, 26 La. Ann. 699. They are taxes due on the property, which must be paid in order that the purchaser may have a complete title. The law relating to a confusion of right extinguishing obligations,

when the qualities of debtor and creditor are united in the same person, does not apply. It was competent for the legislature to enact a statute excluding the state from the operation of the law regarding confusion and authorizing the collection of a tax upon her own property. The statute No. 80 of 1888 provides for the sale of property bid in and adjudicated to the state for taxes for the year 1880 and subsequent years. The taxes for which the property was sold were assessed within the years provided by that act. The forfeiture to the state in 1877 does not affect the right to taxes for years subsequent to 1880 on property adjudicated to the state. The defendant has no interest enabling her to have a nullity of a title pronounced. The judgment appealed from is affirmed, at appellant's costs.

(46 La. Ann. 436)

FLOWERS v. HUGHES et al. (No. 11,383.)¹
(Supreme Court of Louisiana. Feb. 12, 1894.)

APPEAL—WHEN LIES—ACQUIESCENCE IN JUDGMENT.

1. The receipt by the appellant of a portion of the amount decreed to him by the judgment is acquiescence in the judgment and defeats the appeal. Code Pr. art. 567; *Campbell v. Orillion*, 3 La. Ann. 115; *Cobb v. Hynes*, 4 La. Ann. 150; *Fleuhart v. Golding*, 7 La. Ann. 233; *Succession of De Egana*, 18 La. Ann. 64; *Stinson v. O'Neal*, 32 La. Ann. 947.

2. Nor is this acquiescence at all affected because the appellant, receiving part of the amount of the judgment, undertakes to reserve his appeal. The reservation cannot avoid the effect the law attaches to the acquiescence in the judgment. *Succession of De Egana*, 18 La. Ann. 64.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Louisiana E. Flowers against William Hughes and others for partition. From the judgment rendered, defendant William Hughes appealed. Heard on motion to dismiss appeal. Motion granted.

Alcée J. Villeré and George L. Bright, for appellant. Rice & Montgomery and J. P. Blair, for appellees.

MILLER, J. On motion to dismiss. The motion to dismiss is on two grounds: That the transcript is imperfect, and that the defendant in the lower court, the appellant here, has acquiesced in the judgment from which he appeals.

The suit was for a partition between the plaintiff and defendant, and other heirs of John Hughes. The defendant in his answer urged that, in the partition, the last community should be charged with certain amounts of the separate estate of his father received by, and which inured to, the benefit of that community; and the answer also contained other demands pertinent to the settlement of accounts between the heirs. The partition

¹ Rehearing refused.

and sale of the property were decreed, and the usual reference to the notary for the completion of the partition was made. The partition act awarded to the defendant \$2,920.74, and, on motion of one of the parties, the partition was homologated, against the objection of the defendant, whose demands, urged in his answer, were disallowed. From the judgment homologating the partition the defendant took this suspensive appeal. Pending his appeal on his motion, he obtained an order to receive \$500 of the amount awarded to him by the judgment, and accordingly that amount was paid to him. This payment is the acquiescence in the judgment, the basis of the motion to dismiss.

It is the text of the Code that the appellant cannot maintain his appeal from the judgment acquiesced in by him. Code Pr. art. 567. To receive the amount of the judgment, in whole or in part, is in its natural significance, as well as under our jurisprudence, an acquiescence in the judgment. To receive part is as significant as to receive the whole. If the defendant could receive part of the amount decreed to him, and still preserve his appeal, he might just as well take the full amount. If the judgment was satisfied by the defendant receiving the full amount, it certainly could not be urged he could still maintain the appeal from a judgment that, satisfied, had ceased to exist. Payment in part of the judgment, as an acquiescence in that judgment, is not to be distinguished from full payment. Any payment received by defendant under the judgment is fatal to his appeal. See *Farham v. Orillion*, 3 La. Ann. 115; *Cobb v. Hynes*, 4 La. Ann. 150; *Fluhart v. Golding*, 7 La. Ann. 233; *Succession of De Egana*, 18 La. Ann. 64; *Stinson v. O'Neal*, 32 La. Ann. 947.

The defendant contends he can maintain his appeal because he claims more than the judgment gives him, and his acquiescence is only to the extent of the amount decreed to him, but does not extend to the part or amount he claims, and which the judgment disallows. But it is only through the judgment he can appeal to claim the greater amount, and, if he acquiesces in that judgment, the basis for his appeal disappears. It is often the experience that the plaintiff asserting a money demand recovers less than he claims. But, of course, no one supposes he could collect the judgment and still maintain his appeal because he claimed a greater amount than that decreed to him. Such a pretension was advanced in one of the cases cited in this opinion, where the appeal was devolutive. It was contended in that case that the plaintiff, taking only the devolutive appeal, could collect his judgment and still prosecute his appeal for the greater amount he claimed. The court discarded this pretension, and held that acquiescence in the judgment by payment ended the appeal,

though plaintiff claimed more than the judgment gave him. See *Campbell v. Orillion*, 3 La. Ann. 115. The defendant cites the case from 3 Rob. (La.) 253 (*Milliken v. Rowley*). There the judgment was in favor of the plaintiff for the partition of the land, and against him in favor of defendant for the improvements. The plaintiff took steps to execute the judgment in his favor for the partition, but appealed from the money judgment against him for improvements; that is, he took the appeal from the judgment against him on the money demand. The court held in that case, on motion to dismiss, that acquiescence in the decree for partition was not acquiescence in the decree against plaintiff for money. There was no act of plaintiff in that case of acquiescence in the money decree. The other case cited by defendant (*Mitchell v. Lay*, 3 La. Ann. 593) is that of an injunction against the seizure of property. The injunction was on motion dissolved as to part of the property, and that part plaintiff proceeded to seize and sell. By a subsequent judgment the injunction was maintained as to the residue of the property seized, and from that judgment plaintiff appealed. The court, on a motion to dismiss, held that executing the judgment dissolving the injunction as to part of the property was not an acquiescence in the judgment maintaining the injunction as to the residue. There were two judgments. The court observed the judgment in that case was "not indivisible." There was manifestly in that case no acquiescence in the judgment appealed from, because the appellant had executed another judgment. Here there is one indivisible judgment in favor of defendant for a sum of money. He takes part of the sum decreed to him. That must be deemed an acquiescence in the judgment. The circumstance that in taking it he undertakes to reserve his right to appeal is of no consequence. The protest itself evinces his appreciation of the significance of the act. The protest is unavailing to avoid that consequence the law attaches to acquiescence in the judgment.

It is a reluctant duty to dismiss appeals thus precluding the relief sought by the litigant in the court of last resort. In this case the court conceives there is no alternative. It is therefore ordered, adjudged, and decreed that this appeal be dismissed, at appellant's costs.

(46 La. Ann. 449.)

MAYOR, ETC., OF ALEXANDRIA v.
WHITE. (No. 11,454.)

(Supreme Court of Louisiana. March 12, 1894.)

CONSTITUTIONAL LAW—OCCUPATION TAX—MUNICIPAL POWER.

1. Municipal corporations are restricted by their charters with respect to the taxes the corporations may impose on property or occupations. See *Burroughs, Tax'n*, p. 371, c. 19; *Mayor v. Roth*, 29 La. Ann. 261.

2. The legislature may by general act, i. e. applicable to all such corporations, enlarge the taxing power; that is, without amending their charters, this enlargement of the taxing power may be effected by general legislation. 1 Dill. Mun. Corp. c. 5, p. 169. Revenue Acts, 1886 and 1890.

On Rehearing.

Legislative provisions conferring the taxing power on cities, towns, and parishes are within the scope of the title of the act "to levy, collect and enforce payment of an annual license tax upon persons, associations or business firms and corporations pursuing any trade, profession," etc. Acts 1890, No. 150; Const. art. 29; Municipality No. 3 v. Michoud, 6 La. Ann. 606; Succession of Lanzetti, 9 La. Ann. 333.

(Syllabus by the Court.)

Appeal from justice's court, parish of Rapides; A. B. Rachal, Judge.

Action by the mayor and council of Alexandria against H. H. White to recover a license fee. There was judgment for plaintiff, and defendant appeals. Affirmed.

H. H. White and J. F. Ariail, for appellant. John C. Ryan, for appellee.

MILLER, J. This is an appeal, under article 81 of the constitution, from the judgment of the justice's court of the Alexandria ward, parish of Rapides, in favor of the town of Alexandria against the defendant for the amount of his license tax as an attorney at law. The defense is there is no authority to exact the tax.

The charter of the town, granted in 1868, conferred no power to impose taxes on occupations. Deriving their existence from their charters, municipal corporations exert the taxing power only to the extent authorized by the legislature. 2 Dill. Mun. Corp. §§ 740, 763; Mayor v. Roth, 29 La. Ann. 261; Board v. Migues, 32 La. Ann. 923. The legislature, however, in the revenue acts of 1886 and 1890, has manifested its appreciation that all parochial and municipal corporations should possess the power to impose license taxes. These acts declare that all municipal and parochial corporations shall have the right to impose a fair and equitable license tax on any business, occupation, or profession herein specified, provided that licenses shall be graded. See Act No. 101 of 1886, § 13; Act No. 150 of 1890, § 14. These acts provide for license taxes on attorneys. In pursuance of this authority, the plaintiff by ordinance imposed such licenses, and under that ordinance the defendant is sued.

In our opinion, it was competent for the legislature by a general statute to enlarge the taxing powers of parochial and municipal corporations. 1 Dill. Mun. Corp. p. 169, c. 5. If in the legislative wisdom such increase of the corporate powers was beneficial, it is not easy to appreciate any objection to a general law, i. e. applicable to all municipal or parochial corporations, declaratory of the legislative purpose. The defendant contends, on the contrary, that the charter of Alexandria should have been amended under Act No. 110

of 1890, providing for amendments to charters of towns or cities, and it is urged it was only by such amendment the power to tax occupations could have been conferred on plaintiff. While, under this act of 1890, the town might have obtained the necessary amendment conferring the power to exact licenses, still the competency of the legislature by general act to deal with the subject is, in our view, undoubted. Again, the defendant urges that the charter of Alexandria, being special legislation, is not to be deemed affected by the provisions applicable to towns generally contained in the revenue acts of 1886 and 1890. But the express purpose of the provisions of the revenue acts under consideration was to supplement with the right to tax occupations the powers of all parochial and municipal corporations. The charter of Alexandria, not conferring any taxing power in respect to occupations, was clearly within the scope of the provisions in the revenue acts. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, at the costs of the appellant.

On Rehearing.

(March 26, 1894.)

The defendant, in his application for a rehearing in this case, directs our attention to his defense that the power to tax occupations or professions, conferred on municipal and parochial corporations by the acts of the legislature of 1886 and 1890, is not embraced in the titles of the acts. We had not overlooked the point, but did not appreciate it was pressed. The titles are: "To levy, enforce, and collect a license tax," etc. The act was intended to embrace the state and the political corporations, cities, towns, and parishes, each exerting within its sphere the taxing power. In the body of the act the power is conferred on parochial and municipal corporations to levy license taxes. We think these provisions were fairly within the scope of the title, to be construed, as expressed by this court, according to the understanding of reasonable men. Const. art. 29; Municipality No. 3 v. Michoud, 6 La. Ann. 605; Succession of Lanzetti, 9 La. Ann. 329; Act No. 101 of 1886, § 13; Act No. 150 of 1890, § 14. It is therefore ordered that the application for the rehearing be refused.

(46 La. Ann. 315)

E. O. STANARD MILLING CO. v. FLOW-
ER. (No. 11,458.)

(Supreme Court of Louisiana. March 12, 1894.)

AGENCY—RATIFICATION—GAMBLING CONTRACT.

1. The ratification of the act of an agent cannot be divided, and applied to one part of the act and excluded from the other. It is entire or nothing.

2. An agreement, signed by an ostensible purchaser of flour, couched in the following language: "Bought of the E. O. Stanard Milling Co., 3,000 barrels of Eagle steam flour at 3.85-100, f. o. b. St. Louis, for shipment, at

my option, during month of March, 1893. It is further agreed and understood that if I do not want to receive the flour in March, settlement may be made as follows, viz.: E. O. Stanard Milling Co. paying me any difference that may be an advance in value, or my paying E. O. Stanard Milling Co. the difference between the purchase price and the market price at the time of settlement, provided the value then is less than the purchase price. Settling prices to be based on St. Louis Merchants' Exchange quotations on extra fancy flour at date of settlement."—*held* to be void, as coming within the provisions of article 2983 of the Revised Civil Code, relative to gaming.

(Syllabus by the Court.)

Appeal from district court, parish of Rapides; Adolph V. Coco, Judge.

Action on a contract by the E. O. Stanard Milling Company against William P. Flower. Defendant had judgment, and plaintiff appeals. Affirmed.

Robert P. Hunter, for appellant. John C. Ryan and J. R. Thornton, for appellee.

NICHOLLS, C. J. Plaintiff, a Missouri corporation, seeks a judgment against the defendant for \$2,250, with legal interest from April 1, 1893, under an agreement evidenced by the following instrument: "St. Louis, Mo., U. S. A., 10/21, 1892. Agreement. Bought of E. O. Stanard Milling Co., 3,000 barrels of Eagle steam flour, at \$3.85, f. o. b. St. Louis, for shipment, at my option, during month of March, 1893. It is further agreed and understood that if I do not want to receive the flour in March, settlement may be made as follows: E. O. Stanard Milling Co. paying me any difference there may be if an advance in value, or my paying E. O. Stanard Milling Co. the difference between the purchase price and the market price at the time of settlement, provided that the value then is less than the purchase price. Settling prices to be based on St. Louis Merchants' Exchange quotations on extra fancy flour at date of settlement. [Signed] W. P. Flower, per J. G. White." Plaintiffs allege that they have at all times been ready and willing to comply, and have complied, with all their obligations under the terms and stipulations of the said agreement; that they manufacture about 2,500 barrels of flour daily, and were ready and willing, during the month of March, 1893, to ship, f. o. b. on the cars at St. Louis, the 3,000 barrels of flour bought by said William P. Flower, had he so ordered, in accordance with his option as specified in said agreement, which he utterly and entirely failed to do, through no fault or neglect of theirs; that not only did he not order the shipment of the flour purchased, but he has failed and refused to comply with the stipulations of the second clause in said agreement by settling the difference between the \$3.85 per barrel fixed in the agreement and the price per barrel which said grade of Eagle steam flour was selling for during the month of March, 1893, at St. Louis, to wit, \$3.10 per barrel, as would be shown by reference to the quota-

tions of the St. Louis Merchants' Exchange for extra fancy flour, which is the standard fixed by the said agreement, notwithstanding amicable demand was made upon him so to do, but, on the contrary, when he was requested to settle the said differences in accordance with the terms of the agreement and the usages and commercial customs relating thereto, he refused to settle said differences, and announced his intention not to pay the same, thereby voluntarily placing himself in default, and relieving and dispensing the plaintiffs with the duty or necessity of giving him any notices or making any further demands upon him; and they expressly deny that under the terms of said agreement they were called upon at any time to give Flower any demand or notices whatever. Plaintiffs aver that the sum claimed is the amount of the difference between the purchase price and the market price of said 3,000 barrels of flour at the time specified in the agreement, and that this difference represents the actual loss of profits that they would have made on the said 3,000 barrels of flour if the said Flower had complied with his contract and agreement, and ordered the said 3,000 barrels of flour shipped, at any time during the month of March, 1893; and he justly owes them the said amount. Defendant pleaded first the general issue. Further answering, he declares that neither himself nor White, who signed the writing or agreement sued on, are merchants in flour, or any other article of merchandise, either by the wholesale or retail. That Moses Bloom, who is, and has long been, a resident of the parish of Rapides, still is, and has been for the last 15 years, the agent for the plaintiffs, transacting and managing their business in Rapides and other neighboring parishes in the state. That he is well and favorably known in commercial circles and in business as a man of experience, honesty, and integrity, and enjoys the confidence of all who know him. That a few days before the writing sued on respondent heard that flour was very low in price, cheaper than it had been for many years, with every probability of its advancing a few months later on; and that the plaintiffs' agent, Moses Bloom, was selling what was and is known as speculating, wagering, or future contracts for them. That he saw the agent, who confirmed this report, and thereupon ordered 3,000 barrels of Eagle steam flour, March futures, on a basis of \$3.85 per barrel for that month. That it was distinctly agreed and understood that neither the said flour so ordered, nor any part of it, was contemplated or intended by either party for real or actual delivery in the month of March, 1893, or at any other time, and the agreement was to be what is known as a speculating, wagering, future contract. That it was further understood that the margin on the said flour was 15 cents per barrel, or \$450 on the whole 3,000 barrels; and that, if this brand and quality of flour should further de-

cline as much as 15 cents per barrel, respondent would be notified, and called upon by plaintiffs for an additional margin of 15 cents per barrel; and that he would then have the option of keeping the margin good on that basis, otherwise he would lose any and all margins put up, and the whole transaction was to be deemed null and void from that moment by all parties without further notice or delays. That not only at the time of giving the order, but at the time of signing the writing or agreement sued on, it was the distinct understanding and expressed intention of all parties that it was a speculating, wagering, and future contract, and not an actual or real agreement for sale, purchase, and delivery of any flour in March, 1893, or any other time. That the whole matter was from beginning to end negotiated, and the writing or agreement sued on signed, at Alexandria, La., with the said Moses Bloom, who stated at the time of signing that it was well and perfectly understood that it was not a real contract for delivery or sale and purchase of actual flour, because it was a notorious fact that that large quantity of flour would overstock the whole parish of Rapides. That it never was the intention of any party that the agreement sued on was to be considered a purchase, sale, transfer, or delivery of any flour at any time, but a mere and simple wager on its future price or value in March, 1893. That, if the said writing is susceptible of any other construction or interpretation on its face than that of a speculating, future, wagering agreement as to the future price of Eagle steam flour at the St. Louis Merchants' Exchange in March, 1893, then he shows and avers that the same was signed, and the whole transaction from beginning to end was made, through error and mistake on the part of himself, the said White, and the said Moses Bloom. That, during his absence, and without his knowledge, the writing or agreement sued on was signed at Alexandria, La., and forwarded to the plaintiffs by the said Moses Bloom. That on his return to Alexandria, on or about the 31st of October, 1892, he was for the first time informed that the agreement had been signed, and at the same time was notified by the Rapides Bank that the plaintiffs had drawn two sight drafts on him, each for \$450 and exchange thereon, and payment thereon was demanded. That one of the said drafts was drawn and dated October 24, 1892, and the other October 27, 1892. That he forthwith, on the 31st October, 1892, notified the plaintiffs that he refused to honor the said drafts, and that he declined to consummate and execute the agreement by putting up the first or any subsequent margin, and to consider the whole transaction at an end, and off. Respondent specially denied that any demand was made on him for the amount sued for, or that any notice or statement was sent him, or any notice given him to pay for and receive the said flour, or that plaintiff was

ready and willing to deliver any flour at any time before the filing of the suit; thus showing that they knew and understood the agreement sued on to be nothing more than a speculating, wagering agreement as to the price and value of Eagle steam flour at the St. Louis Merchants' Exchange in March, 1893. On the trial of the case the court rendered judgment rejecting plaintiffs' demand, and they have appealed.

There can be no doubt that the contract as made between Bloom and Flower was what is known as a "future contract." In his testimony the former admits that fact. He said: "I am an old resident of this town and parish. This whole transaction was negotiated through me, here in Alexandria. When this flour was ordered, it was understood that it was to be future flour. There was to be no actual delivery in March, or at any other time. It was understood that it was a future contract,—that no delivery was to be made. The understanding with Mr. Flower was that he was to put up a margin of fifteen cents per barrel, and keep his margin good if flour declined. I can't remember whether I told Mr. Flower at the time he gave the order he would be closed out; but it is the custom, so far as I know. Mr. Flower was not present when this contract was signed. I remember, when Mr. White signed the agreement, that he said to me, 'Now, Mr. Bloom, this is a future, and not a real, contract;' and I replied: 'This was not for actual delivery; that 3,000 barrels of flour at one time here would overstock the market; and that, if that large quantity of flour were in this town at one time, you couldn't sell it for 25 cents per barrel.' It was not the intention of any of the parties that this should be actual flour. By 'any of the parties' I mean myself, J. G. White, or W. P. Flower. About the same time of this transaction I made a similar contract for the delivery of flour in March. I sold about 13,000 barrels under similar contracts." Plaintiffs concede that the evidence establishes that defendant did not contemplate the actual purchase of 3,000 barrels of flour, but "submit that it does not establish any subunderstanding on the part of the plaintiffs." They urge that Bloom was not authorized to make this particular contract; that the writing evidencing the agreement does not show on its face any illegality; that knowledge of the actual facts of the case was not brought home to them. We understand it to be intimated that, even though plaintiffs' agent (acting as such) may have made an illegal contract, the contract could none the less be enforced if the principals themselves were not aware of its character, for it is claimed that their right to recourse would not be affected unless they were a party to the understanding which made it so. Bloom, in the transaction, unquestionably acted for and on behalf of the plaintiffs in making this agree-

ment. The plaintiffs sue upon it. If they affirm it at all, they must do so in its entirety as made. They cannot affirm a part and repudiate a part. *Elam v. Carruth*, 2 La. Ann. 275.

Without entering into details of the testimony in the case, it suffices to say that we are satisfied that the plaintiffs had full knowledge from the beginning of the exact terms of this agreement. Referring to the writing on which this suit is based, plaintiffs claim that "It is nowhere stipulated in it that the E. O. Stanard Milling Company is to have the option of not making an actual delivery of the flour; that its obligation to deliver the flour, when called for in the month of March, 1893, f. o. b. on the cars at St. Louis, is absolute and unequivocal. It is only the defendant who is granted the right of not calling for the actual flour, and the privilege of requiring a settlement by an adjustment of the differences in price. With a view of testing the character of the agreement entered into between the parties, let us assume that on the 31st March, 1893, the price of flour, instead of being \$3.85 per barrel, the price mentioned in the agreement as the purchase price, had advanced to \$4.85; that on that day, the defendant having notified the plaintiffs that he would not accept delivery of the flour, they had paid into his hands the sum of \$3,000,—and then ask, by what right and under what title would the defendant have received the money, and by reason of what cause (from a legal standpoint) would the plaintiffs have paid it? Would it have been paid to defendant by way of damages? Damages are given as the result and consequence of breach of contract, but in the case assumed there would have been no breach of contract, for not only would there not be a breach of contract as a contract of sale, but the plaintiffs would have been unable, under the contract (no matter how greatly might have been their desire or interest to do so), to free themselves from their obligations as vendors by the performance of the legal obligation of the delivery of the flour, imposed upon them as such vendors by the law. In spite of themselves, they would have been forced under the contract (if legal) to have paid the defendant a sum of money. If the money would not have been paid by way of result or consequence of a breach of contract, then it would have been paid by way of direct affirmative performance of an original contract. If that contract had been one of sale, the performance would have consisted of the delivery of the 3,000 barrels of flour; but, instead of this, we find that the position of parties to a contract of sale would have been reversed, the vendors paying over instead of receiving money; and, not only this, but the amount so paid differing greatly from that stipulated as the price of the

flour. Reasoning backward from result to cause, we find that this original contract was not one for the sale of flour. Taking this suit as it is, what is its character? Is it a suit for the specific performance of a contract of sale? If it was, then the demand would be for the purchase price stipulated in the agreement, and plaintiffs would have alleged, and would seek to prove, a tender; but the demand is not for the purchase, and the necessity of the tender is absolutely denied. Is it a suit against the defendant for damages? Clearly not, for, if the defendant (had the plaintiffs made a tender) had declined to receive delivery, his refusal would have been simply the exercise by him of the legal right so to do, expressly reserved and stipulated in the contract, and damages do not flow from the exercise of a legal right. The suit is for the specific performance of a contract, but the contract sought to be enforced is not a contract of sale. We are of the opinion that the agreement was purely and simply that which Bloom declares in his testimony. All parties clearly understood it to be a wagering, speculating, future contract, in which an actual delivery of the flour was not contemplated under any contingency. The agreement bears on its face that the parties were not contracting on the basis of the after-execution by either of the legal obligations springing from a contract of sale, but expressly ab initio upon the fact of the nonexecution of such obligations. *New Orleans v. Wardens of St. Louis Church*, 11 La. Ann. 244. It will be noticed that under no contingency were the plaintiffs to have the right of delivery,—a right which they certainly would have had had the contract been one of sale. In holding that the agreement falls under the provisions of article 2983, Rev. Civ. Code, which declares "the law grants no action for the payment for what has been won at gaming or by a bet except for games tending to promote skill in the use of arms such as the exercise of the gun, and foot, horse and chariot racing," and was therefore not enforceable. We are of opinion the district court reached a correct conclusion, and the judgment appealed from is therefore affirmed.

(46 La. Ann. 387)

VANOSDEL v. HYCE. (No. 11,464.)

(Supreme Court of Louisiana. March 12, 1894.)

EQUITY—CANCELLATION OF DEED—CAPACITY OF GRANTOR—EVIDENCE.

1. It is not established that the person interdicted in 1893, whose curator sues to set aside a deed of sale, was non compos mentis in 1879, at the date of the sale. Nor is it established that he was at the time, because of the weakness of his mind, unable to give his consent, intelligently, as a vendor of his property.

2. Generally, an executed contract, fairly made, with one who was apparently of sound mind, and not known to be otherwise, and of which he had received the benefit, cannot be

avoided by his legal representative more than 14 years after the date of the contract.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; George W. Buckner, Judge.

Action by Michael Vanosdel, curator, against John A. Hyce, to cancel a deed. There was judgment for defendant, and plaintiff appeals. Affirmed.

H. N. Sherbourne and T. A. Moore, for appellant. Kernan & Laycock and J. W. & G. W. Burgess, for appellee.

BREAUX, J. In 1893 suit was brought against Enoch Vanosdel, and his interdiction decreed. The plaintiff was appointed his curator. This suit was brought by the curator to annul and set aside a deed of sale dated the 22d day of January, 1879, signed by Enoch Vanosdel, as vendor of a tract of land containing 160 acres, to the defendant. The vendor reserved the right to purchase back the property until the 1st of January, 1880, by returning to the purchaser the amount paid by him on the property, and retaining the promissory note representing a portion of the purchase price. He remained in possession after the sale, which was intended as a security for advances to be made by the vendee. On the 27th day of November, 1879, Enoch Vanosdel acknowledged in a notarial deed, signed also by his wife, that he had received the full amount of the purchase price, and renounced the right of redemption stipulated in the deed of the 22d January, 1879. This land was acquired by Enoch Vanosdel from G. W. Martin in an exchange dated 17th January, 1879. Two of the deeds were passed before John McGrath, recorder of the parish of East Baton Rouge. From the 1st of June, 1879, until the latter part of October, 1879, Enoch was afflicted with mental alienation, and was a patient during that time at the insane asylum at Jackson, undergoing medical treatment. The purchaser, prior to the signing of the confirming deed of November, 1879, paid \$100 to Enoch and \$100 to his wife, making, with other items paid, the sum of \$2,300, according to Hyce's account. The act of sale was for \$1,500. The witnesses testify that it was about all the place was worth. With reference to his mental condition, G. A. Bozeman, a farmer residing near this vendor (Enoch) in 1879, and who subsequently was employed in the sheriff's and assessor's office, and had opportunities to judge as to whether he was insane, testifies that he knew him intimately, and regarded him as a man of sound mind, in the early part of 1879. The sheriff of the parish and a number of other witnesses testify that they knew him, and never noticed that he was deranged, prior to the date he was sent to the insane asylum; that after leaving the asylum, in 1879, he appeared sane; that he voted intelligently, and sought to support himself and family, consisting of wife and children. The notary before

whom the acts were passed testifies that there was nothing in the conduct of the vendor, when he passed these acts of sale, to indicate that he was in the least deranged. Dr. T. S. Jones testifies that he has known Enoch Vanosdel over 40 years; that he was a stupid boy, but that he cannot state that he was an imbecile. Other witnesses testify that he was always weak-minded, and refer to certain of his acts as showing insanity. The testimony, however, does not sustain the contention of the plaintiff that, at the time of these transactions, Enoch was incapable of transacting business, or of making contracts, for the want of sufficient intelligence and sense to manage his affairs, and that, in his weak mental condition, he fell an easy prey to the wiles and machinations of the defendant, Hyce. More than 20 witnesses, who knew him well, resided in the same parish (many of them his neighbors), who met him frequently, conversed with him, and knew of his different business transactions, testify that they did not know of any acts of his indicating insanity, and that they had never heard that he was insane at the time the deeds were passed. The transactions, at the time, were not referred to or spoken of in the community by any one, in so far as the evidence discloses, as the acts of imposition and fraud by an unscrupulous neighbor,—the defendant merchant. The brother, who became the interdict's curator, and the plaintiff in this suit, had a business transaction about the same time with the defendant. He also obtained advances from the defendant, and deeded to him the same number of acres of land, worth about the same amount, to secure the advances. It does not appear that the terms and conditions differed materially from those complained of in this suit. Not long subsequent to that date the plaintiff himself had business dealings with his brother. While unimportant in amount, they do not have a tendency to establish that he was known as a person of insane mind. One of the witnesses testified that she had told the defendant that Enoch was a "man of very little sense," that "he was idiotic," and that he had never transacted any business. She is the only witness who testified as to any notice to the defendant. She is not corroborated by the weight of the testimony, particularly in so far as relates to business transactions, for it is well established that he did transact business. The defendant denies that he was ever notified, or received any warning, not to deal with him. More than 14 years had elapsed. The transactions remained unquestioned all those years, without even adverse comments. We do not feel authorized to disturb these executed contracts.

In reference to the advances made by the defendant on the property placed in his name as security: A receipt in notarial form was executed after they had been furnished. The mules that were part of the property thus advanced are sold by several witnesses

not to have been worth the amount charged. The record discloses that they were not sold directly by the defendant, as appears from the following: "W. H. Wright, sworn, says: Q. Did you let Mr. Enoch Vanosdel have some mules during the first part of the year '79? If so, please state how many, at what price, and who paid you for them. A. I sold some mules to Mr. Vanosdel in the early part of '79. I sold him, I think, four mules. I ain't sure. Mr. Vanosdel, as I recollect, came here to Baton Rouge. He wanted to buy some mules, and he looked at the stock. He told me he would buy them, and he would make arrangements with Mr. Hyce to pay for them. I went up to Mr. Hyce's place, and he (Mr. Vanosdel) was at Rolling Fork, and he (Mr. Hyce) was not present at the time. I left the mules and horses there. I sold them to him, but I cannot tell you the price of them. I have forgotten. I cannot tell the price. Q. Mr. Hyce paid you for them? A. Yes, sir; I think it was about two weeks afterwards he paid me. Q. Was it a fair price you charged Vanosdel? A. I had a talk with Mr. Hyce, and he told me any kind of a deal that I made with this man would be all right. He told me that he did not want to make any money on it himself. He said, 'If you sell any stock to my tenants, I don't want to make any money on it.' Q. You made the trade with Enoch Vanosdel? A. He bargained with me for the stock. I left them there, and Mr. Hyce paid me for them afterwards. Q. In dealing with Enoch Vanosdel, did he strike you as a man who would be able to take care of his side of a trade? A. I did not see anything wrong with him, any more than any other man." Relative to the remainder of the account, the testimony does not show an advantage improperly taken. The witnesses for plaintiff state that advances were made of such provisions as he and his laborers needed. There were also certain debts paid. The mere impression of certain witnesses that there were overcharges would not justify the conclusion that the amount advanced did not amount to at least \$1,500,—the price and value of the property in controversy.

In *Chevalier v. Whatley*, 12 La. Ann. 651 (a well-considered case), the court held that contracts with weak-minded persons will be closely scrutinized, and those who deal with them are held to a strict standard of good faith. The facts of that case make manifest the correctness of the conclusion regarding them. The object of the suit was to annul two acts of sale executed, one on the 28th December, 1847, the other on the 26th February, 1848. The vendor died in 1853, and the suits were brought immediately after his death. The professed consideration of the sales was not paid at all. The consideration of the other sale consisted of property which continued, as before, and as they always intended it should continue, to

belong to the vendee. The vendor was an excessively weak-minded person, most easily duped and deceived. The defendants were the relatives, and he was living with them. Their influence, as relatives and protectors, over his mental incapacity, was obvious. The court concluded that advantage had been improperly taken of the weak-minded vendor by his relatives, the vendees. In the matter at bar the time which elapsed between the date of sale and that of suit is much greater. The sale was not without consideration, and it was not notorious that the vendor was weak-minded, nor is the fraud charged obvious. In the case of *Holland v. Miller*, 12 La. Ann. 624, the fraud was not established. The court says: "Contracts would rest on a very weak foundation, if those of the most solemn character could be avoided on allegations of insanity, when the proof thereof is contradictory. It would be necessary for contracting parties, before the execution of the contract, to inquire into their mental soundness." These utterances apply to the case at bar. In *Baumgarden v. Langles*, 35 La. Ann. 441, on the 31st December, 1877, Baumgarden sold to Langles. Suit to annul the sale was brought on the 30th December, 1878. One of the grounds was fraud, in that defendant, being well aware of Baumgarden's mental weakness, took advantage thereof, and by threats, improper influences, and false and fraudulent representations, induced the vendor to sign the deed of sale. The proof was not clearly established. The court affirmed the judgment of the district court rejecting the demands. The law treats with special regard those unfortunate beings deprived of understanding by some providential dispensation. It also treats with tenderness those whom mental weakness renders incapable of managing their affairs. But neither applies in the case at bar, for the evidence does not establish that the sadly afflicted man who was interdicted in 1893 was insane in January, 1879, nor does it establish that he was at the last-mentioned date notoriously weak-minded, and incapable of giving consent to a contract for advances to enable him to cultivate his place. The judgment appealed from is affirmed, at appellant's costs.

(46 La. Ann. 393)

VICKSBURG BANK v. McDOWELL. (No. 11,471.)

(Supreme Court of Louisiana. March 12, 1894.)

ATTORNEY AND CLIENT—PRESUMPTION AS TO AUTHORITY—EVIDENCE.

1. The substance of our jurisprudence on the subject is that a certain degree of sanctity attaches to the act of an attorney at law, as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption, and put the opposite party to the proof of his authority.

2. But this rule is not exclusive of all others, and such an oath is not a condition prece-

dent to the administration of any proof on the part of the party who denies the authority of the attorney. It is permissible for such party to go on the stand, and testify on the subject. (Syllabus by the Court.)

Appeal from district court, parish of Madison; Field F. Montgomery, Judge.

Action by the Vicksburg Bank, subrogee of W. K. Bender, to revive a judgment against John R. McDowell. There was decree for defendant, and plaintiff appeals. Affirmed.

A. L. Slack, for appellant. E. D. Farrar and W. M. Murphy, for appellee.

WATKINS, J. This is an action to revive the judgment rendered in the case of *W. K. Bender v. J. R. McDowell* on the 11th of June, 1888, of which the subrogee subsequently became owner, to which the defense tendered in the answer is that no valid judgment had originally been rendered against him, as he had never been cited. The answer specially denies that he ever employed or authorized any attorney to represent him in said proceeding, either to make an appearance, to accept service, or in any manner to represent him. In the record appears a written acceptance of service of the suit in which judgment is sought to be revived, and citation waived, by Spencer and Lucas, as attorneys for the defendant; and on this acceptance and waiver a judgment by default was entered, which was made final on the day the judgment was signed. When the defendant was offered as a witness in his own behalf, the plaintiff objected to his evidence on the ground that he could not be heard to testify as to want of citation, or that the counsel who represented him were unauthorized to represent him, because he had not made oath to the truthfulness of the averments of his answer. This objection was overruled in the court below, and the plaintiff's counsel retained a bill of exceptions. As this is the controlling question in the case, and is presented at the threshold of investigation, it must be disposed of preliminarily. We note the concession stated in the brief of defendant's counsel, and its qualification, which is as follows: "Plaintiff's second objection was that defendant had not denied under oath the authority of counsel who pretended to represent him; and counsel relies confidently on the case of *Dockham v. Potter*, 27 La. Ann. 74, and the authorities there cited. That case, and the authorities cited, simply decide that the party alleging want of authority in an attorney who appears in court must prove the fact of want of authorization. It is, of course, clearly settled in our jurisprudence that when an attorney so appears, being a sworn officer of the court, the presumption is that he is authorized to represent his principal; and so strong is the presumption that the court will not listen to a party who denies the authority, unless the denial is supported by an

affidavit. But in the case relied on the state of facts existing were very different from the facts of this case. In *Dockham v. Potter*, plaintiff sued to annul a judgment rendered against her, on the grounds of want of citation, alleging want of authority in the attorney who appeared for her. She not only did not support her allegations by affidavit, but did not offer one word of testimony to disprove the authority. The court very properly held that her bare allegation would not outweigh the presumption of authority in the attorney. And in every case cited in that opinion it will be found that, where a party has not been permitted to overthrow the presumption of authority in his attorney, it was where the party simply relied on his naked denial of authority without attempting to show the fact by sworn testimony." The proposition of the plaintiff is that when, in an action to annul a judgment, the defendant sets up as a defense its absolute nullity because it was not founded on citation, and in support of that contention alleges in his answer that the attorney who accepted service was not authorized, he is obliged to support that averment by his oath as to its truthfulness, as a condition precedent to making any proof of such want of authority on the part of the said attorney. The leading case on the question is *Dockham v. Potter*, 27 La. Ann. 74; and, as plaintiff's counsel has reproduced in his brief pertinent extracts therefrom, we will quote them in their entirety, as the best mode of presenting the view entertained by the court. They are as follows, to wit: "His authority to consent to the judgment * * * has not been denied under oath by the plaintiff, and, until thus denied, the defendant was not required to prove it. He (the attorney) was a sworn officer, bound by his oath as well as by the principles of integrity and honor, which ought to characterize the profession of which he was a member, to act correctly in its pursuits. Thus situated, it is not to be presumed that he acted in the present case without authority. On the contrary, every presumption is in favor of his having pursued a proper course of conduct, unless the contrary should be suggested by the opposing party on affidavit. * * * *Hayes v. Cuny*, 9 Mart. (La.) 88. And this has been the uniform doctrine of this court since that decision; citing *Johnson v. Brandt*, 10 Mart. (La.) 639; *Dangerfield v. Thruston*, 8 Mart. (N. S.) 233; *Bonney v. Landry*, 4 Rob. (La.) 23; *Fisher v. Moore*, 12 Rob. (La.) 95-97; *Conrey v. Brenham*, 1 La. Ann. 398; *Campbell v. Arceneaux*, 3 La. Ann. 558; *Barnes v. Profilet*, 5 La. Ann. 118; *Jeannet v. Ricker*, 10 La. Ann. 67; *Succession of Massieu*, 24 La. Ann. 238. The court further said: "That an attorney at law * * * is presumed to have authority to do so was expressly decided in the case of *Dangerfield v. Thruston*, 8 Mart. (N. S.) 235, and nothing to the contrary has

ever been held by this court. If the plaintiff desired this court to notice the suggestion that the attorney at law * * * had no authority to do so from herself and husband, she should have alleged the fact under oath, which she has not done." As additional authority, I refer to Succession of Patrick, 20 La. Ann. 204. In an almost uniform manner of expression, the same precept has been announced in many preceding cases. In Barnes v. Proflet, 5 La. Ann. 117, it was said that "the attorney's authority must be presumed until disproved;" citing Hayes v. Cuny, 9 Mart. (La.) 88; Dangerfield's Ex'rs v. Thruston, 8 Mart. (N. S.) 234; Conrey v. Brenham, 1 La. Ann. 398. In Campbell v. Arceneaux, 3 La. Ann. 558, it was said that "it is obvious that we cannot permit a party to impugn the authority of the attorney upon a mere suggestion, etc. * * * Such a course is repugnant to all sound rules of law, and to the authority which courts are bound to accord to their officers. In Succession of Massieu, 24 La. Ann. 237, it was said that, "aside from the proof in the record, the authority of the attorney will not be presumed;" citing Hayes v. Cuny, 9 Mart. (La.) 88; Johnson v. Brandt, 10 Mart. (La.) 639; Fisher v. Moore, 12 Rob. (La.) 95; Campbell v. Arceneaux, 3 La. Ann. 558; Barnes v. Proflet, 5 La. Ann. 118; Jeannet v. Ricker, 10 La. Ann. 66. In Succession of Patrick, 20 La. Ann. 204, it was said that "we presume that the counsel was authorized to represent his clients, the contrary not being supported by oath." Taken all in all, the conclusion is that a certain degree of sanctity attaches to the act of an attorney at law, as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption and put the opposite party to the proof. We find no case which goes to the extent of holding that the making of such an affidavit is a condition precedent to the administration of any proof under his plea. We think it was competent for the defendant to be heard. The district judge seems to have entertained a correct view of the law, and properly overruled the objection of plaintiff's counsel, and admitted the evidence of the defendant as witness on the subject.

On the merits of the case, there seems little doubt of the sufficiency of the defendant's evidence to justify the judgment rendered in his favor. His statement under oath as witness is positive to the effect that he had no knowledge of the existence of the suit until seven or eight years after its date, and only then became aware of it by accident; that he never employed the attorneys who acted as his counsel in the case, and accepted service of the petition in his name; that he never had any conversation with them about it. Counsel for plaintiff has, ex industria, collated quite a number of collateral facts and

historical circumstances indicative of the employment of the said counsel. He also cites the circumstance of both members of said law firm being dead, thus rendering it impossible for the defendant's testimony to be contradicted by them; insisting upon the vigorous enforcement of the rule so often applied in such cases,—that such testimony is the weakest of all evidence, and entitled to little or no credit. Accepting this view, and giving that rule due weight, we do not feel at liberty, for that reason, to disregard the plain and emphatic statement of the defendant, however persuasive and cogent the argument against it may be. His evidence is terse and unequivocal, and in no manner contradicted. We see no reason for altering the decree of the court a qua. Judgment affirmed.

(46 La. Ann. 469)

SIMONDS v. McMICHAEL, Sheriff, et al.
(No. 11,463.)

(Supreme Court of Louisiana. March 12, 1894.)

MORTGAGE—FORECLOSURE—ATTORNEY'S FEES.

While the stipulation in an act of mortgage that, in the event suit becomes necessary for its enforcement, the mortgagor is to pay attorney's fees, and only on the happening of that condition are such fees due, yet it is the duty of the mortgagee to make a timely legal tender of the principal and interest of the debt in order to prevent the institution of suit, and save himself the payment of attorney's fees.

(Syllabus by the Court.)

Appeal from district court, parish of Tangipahoa; Robert R. Reid, Judge.

Action by Walter A. Simonds against P. P. McMichael, sheriff, and Albert Baldwin for an injunction. There was judgment for plaintiff, and defendant Baldwin appeals. Modified and affirmed.

Stephen D. Ellis, James Legendre, and Guy M. Hornor, for appellant. Joseph A. Reid, for appellee.

WATKINS, J. This is an injunction suit against an executory proceeding in the enforcement of a special mortgage on property of which the plaintiff alleges himself to have been in the actual and undisputed possession, under duly recorded titles, at the date of, and antecedent to, the seizure of the creditor.

The grounds on which his injunction is predicated are: (1) That he had not been judicially notified, prior to the issuance of the writ of seizure and sale, to pay the debt of the original mortgagor; (2) that no copy of the petition for and order of seizure and sale was served on him anterior to the seizure, notwithstanding he had specially assumed to pay this mortgage indebtedness as a part of the purchase price; (3) that the original mortgagors have been discharged from the payment of said indebtedness, and are not necessary or real parties to the executory proceedings, and he has not been made a party to the same; (4) That the

plaintiff in executory proceedings made demand by letter of him for the payment of the mortgage note, and he directed its presentation at the counter of a certain bank in the city of New Orleans, La., for the payment of the principal and interest, and the offer was declined because he had not directed and requested the payment of 10 per cent. attorney's fees; he disclaiming that any attorney's fees were at the time due, the recital of the act of mortgage being that 10 per cent. attorney's fees were only due in the event of the suit becoming necessary. He avers his readiness and willingness to pay the capital and interest of the note at any time. Setting out a state of circumstances indicating that the suit was vexatious, he claims \$200 attorney's fees and \$500 for wanton injury inflicted by the seizure of his property; and his prayer is for a judgment for said amounts, and the perpetuation of his injunction. The answer of the seizing creditor is a general denial, coupled with the special averment that he has sustained damages to the extent of \$250 in attorney's fees, occasioned by his wrongful injunction. His prayer is for the dissolution of the plaintiff's injunction, with \$250 for attorney's fees, and 20 per cent. statutory damages. On the trial there was judgment in favor of the plaintiff, perpetuating the injunction as to the 10 per cent damages claimed in the executory proceedings; but same was dissolved, in all other respects, the cost of suit being put on the seizing creditor as defendant. It is from that judgment that the defendant has appealed.

In this court the plaintiff and appellee has made no appearance, has filed no answer; consequently, the controversy is limited to the claim of the appellant. In brief and argument the appellant's counsel make the points (1) that no cause is assigned for an injunction conformable to Code Pr. art. 739, and for that reason the injunction must be dissolved; and (2) that he is, under the law, entitled to the attorney's fees stipulated in the act of mortgage; also to the \$100 special damages for attorney's fees, and 20 per cent. statutory damages.

1. On the first point, appellant places reliance on the provisions of Code Pr. art. 739, as interpreted by this court in *Dupre v. Anderson*, 45 La. Ann. —, 18 South. 743. True it is, they sustain his view, but it was his duty to have excepted preliminarily on that ground; for, had he done so, the plaintiff's injunction would have been dissolved. But the defendant, having elected to join issue with the plaintiff by answer, is necessarily restricted to those issues.

2. On the second proposition, the evidence shows that the plaintiff had sufficient money to his credit in the Bank of Commerce of New Orleans to cover the principal and interest of the note, as well as the attorney's fees stipulated in the act of mortgage; but it fails to show a legal tender to the mort-

gagee of the amount of the capital and interest of the mortgage debt sued on, notwithstanding he had, antecedent to suit, expressed a willingness to pay that amount, though the attorney of the mortgagee declined to accept same in full discharge, insisting on the payment of the 10 per cent. that is stipulated in the act of mortgage as attorney's fees. That stipulation is as follows, to wit: "In case it shall become necessary to institute legal proceedings for the recovery of the amount of said notes, or any part thereof, the said purchasers do hereby bind themselves to pay the fees of the attorney who may be employed for the purpose, which are fixed at 10 per cent. on the amount which may be sued for." On this presentation of fact, we are clearly of the opinion that plaintiff has become liable for the amount of attorney's fees stipulated in the contract. At the same time we think it clear that he was not liable or responsible for those fees previous to the institution of legal proceedings, and that he could have discharged himself from the payment by making a reasonable legal tender in conformity to the provisions of article 407, Code Pr. *Zimmermann v. Langles*, 36 La. Ann. 65; *Mullan v. Creditors*, 39 La. Ann. 397, 2 South. 45; *Levy v. Beasley*, 41 La. Ann. 832, 6 South. 630; *Succession of Duhe*, 41 La. Ann. 209, 6 South. 502. Notwithstanding the plaintiff's expressed willingness to pay the debt and interest, leaving as the only matter in controversy between the parties at the time the claim of the mortgagee's attorney for his fees, yet he met the mortgagee's executory proceedings with an injunction based on various other grounds, that were ruled against him on the trial, and he has apparently acquiesced in the judgment.

3. Though proof was adduced in support of defendants' claim for attorney's fees, as damages sustained in this suit in consequence of procuring the dissolution of the plaintiff's injunction pro tanto, yet it is limited to \$100, and for this amount judgment was pronounced in his favor in the lower court. This court has repeatedly held that damages will not be allowed on the dissolution of an injunction, except in cases when executions to enforce moneyed judgments are enjoined. *Green v. Reagan*, 32 La. Ann. 974; *Morris v. Bienvenu*, 30 La. Ann. 878; *Verges v. Gonzales*, 33 La. Ann. 410; *Boyer v. Joffrion*, 40 La. Ann. 657, 4 South. 872. It has also been repeatedly held that, when a writ of seizure and sale is arrested by injunction which is afterwards dissolved, the seizing creditor cannot obtain his damages by the judgment dissolving the injunction, but must bring an action on the bond. An order of seizure and sale is not a moneyed judgment in the sense of article 304 of the Code of Practice. *Dejean v. Hebert*, 31 La. Ann. 729; *Thompson v. Lemelle*, 32 La. Ann. 932; *Burgess v. Gordy*, Id. 1296; *Hodgson v. Roth*,

33 La. Ann. 941. In terms the Code declares that, in case the injunction is dissolved, the plaintiff shall be condemned "in the same judgment * * * to pay to the defendant interest at the rate of ten per cent. per annum on the amount of the judgment." Article 304. Hence we cannot award the defendant the 20 per cent. he demands, this injunction being directed against an order of seizure and sale, but we are powerless to so alter or amend the judgment in respect to the plaintiff, who has not appealed and has not joined issue with the defendant in his appeal. *Laloin v. Wiltz*, 31 La. Ann. 436; *White v. Baptist Church*, Id. 521; *Succession of Forstall*, 32 La. Ann. 97. The judgment appealed from must be so amended as to award the seizing creditor 10 per cent. on the amount of the mortgage debt that is sought to be enforced, as attorney's fees.

It is therefore ordered and decreed that the judgment appealed from be so amended as to allow the defendant, as seizing creditor, the sum of 10 per cent. on the amount of the principal and interest of the mortgage debt, as attorney's fees; and that, as thus amended, same is affirmed at the cost of the plaintiff and appellee in both courts.

Rehearing refused.

(46 La. Ann. 452)

MURRAY et al. v. Succession of SPENCER et al. (No. 11,237.)

(Supreme Court of Louisiana. Feb. 12, 1894.)

PLEADING—WAIVER OF OBJECTIONS TO—CONTEST OF WILL—ESTOPPEL.

1. An exception of prematurity is not waived nor merged in the answer by a consent to have the same referred to be tried with the merits, particularly where the answer filed is under reservation of the exception.

2. Robert H. Short died leaving two wills, both of which were probated. By the first, or Christy, will, plaintiffs, as his heirs at law, were entirely cut off. By the second, or Zengel, will, they were also cut off, save for a small special legacy. In proceedings in the civil district court these parties prayed that both wills be set aside, that Short be decreed to have died intestate, and that they be recognized as his legal heirs; assigning as grounds that the notaries who drew up the wills had not complied with legal forms and requirements. On trial the Zengel will was set aside, but the Christy will was upheld. They then instituted suit against the notary who had drawn up the Zengel will for damages, claiming that through his negligence and want of care he had caused that will to be a nullity, carrying with it, as a result, the loss of their legacy. Held that, having adopted the errors of the notary, and sought to utilize the same for their benefit to get into position as heirs, they should not be permitted, because unsuccessful in their ultimate object, to turn back upon the notary for damages.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas O. W. Ellis, Judge.

Action by Arthur H. Murray and others against the succession of John Spencer and

others. Defendants had judgment, and plaintiffs appeal. Reversed in part.

F. Rivers Richardson and Frank E. Rainold, for appellants. Henry P. Dart, for appellees. Henry C. Miller, for executor of Robert Short, appellee and amicus curiae. Charles S. Rice, amicus curiae.

NICHOLLS, C. J. Plaintiffs represent that Fred Zengel is a notary public for the parish of Orleans, and was such on the 29th December, 1888, at which time he received the last will and testament of Robert H. Short, who formerly resided in New Orleans, and died on the 11th of August, 1890, in which said will the said deceased gave and bequeathed to Mrs. Virginia T. Murray, widow of Joel T. Murray, or her heirs in case he survived her, the sum of \$3,000; that on the 22d of May, 1890, and before the death of Robert H. Short, Mrs. Virginia T. Murray died, leaving as her heirs Arthur H. Murray, Mrs. Juliette Murray Jones, and the issue of a predeceased daughter, Mrs. Mary W. Murray, to wit, the minors Arthur Murray Dargan, Cornelia Alice Dargan, and Bertie Lucy McDonald, all of whom are plaintiffs herein, and are the parties described as the heirs of Mrs. Virginia T. Murray in the said testament, and would be hence entitled to the said legacy; that the said will was duly probated on the petition of Philip S. Simms, named as one of the testamentary executors in the will, on the 13th August, 1890; that thereafter Mrs. Margaret Short Moran, a legatee of R. H. Short, filed a suit to annul the will on the ground that the said notary had failed to clothe the will with the formalities required by law, and especially because, after a greater portion of the said will had been dictated by the testator to the notary, and having been read over to the testator, and the testator having changed certain dispositions, and added a modification or an amendment to the will, bequeathing the residue of his estate, after discharging the legacies therein named, to all the legatees named therein, share and share alike, the notary failed to clothe said amendment or modification with any of the requirements of law, and by reason of the said fatal defects the said will was a nullity; that the plaintiffs were cited, among others, as defendants in said suit, and after due proceedings said will was annulled and avoided solely by reason of the fatal defects of form appearing on the face thereof, due wholly to the fault and want of care on the part of the notary, which judgment is now final; that, when the notary executed the said will, William R. Richardson and John Spencer, now deceased, were the sureties of the said notary on his notarial bond, in which bond the said Fred Zengel, notary, bound himself as principal in the sum of \$5,000, and each of the sureties in the sum of \$2,500; that by reason of the fault, negli-

gence, imprudence, want of skill, and inattention to his business, and the deplorable omissions in failing to clothe the will with the requirements of law which the said Robert H. Short had a right to expect by reason of the said Zengel's reputation as a competent notary, the will was a nullity, and so declared by judgment of court, and petitioners were damaged in the full sum of their so lost legacy; that John Spencer, one of the sureties, has died, and his succession is represented by the said Fred Zengel and John Lynch as executors; that under the law the said notary is liable for said damage and injury; that the surviving surety, Richardson, is liable in solido with him up to the sum of \$2,500, and that the succession of Spencer is liable in solido up to the sum of \$2,500. They pray for judgment against Zengel for \$3,000, and for judgment for the sum of \$2,500 against Richardson, and for a like amount against the succession of Spencer, with legal interest from date of judgment. Defendants excepted (1) that the demand was premature; and (2) that the same set forth no cause of action. Plaintiffs then filed a supplemental petition, in which, reiterating their averments as first made, they further allege that the succession of Short is perfectly solvent, and, had the will of the deceased, executed before the said notary, not been annulled by decree of court, they would have received the full amount as stipulated in the said will that they should be entitled to; that even had the court failed to annul the will for the reason more particularly set forth in the petition, still the said will was an absolute nullity because the notary had failed to clothe it with the formalities required by law, in that it was not written by the notary as dictated by the testator, which said fact the notary has himself testified to in the contest of said wills of the deceased, in which he was examined as a witness, all of which was due wholly to the fact of the negligence and want of skill of the said notary, as was more fully set forth in the original petition. By consent of counsel the exceptions were referred to be tried with the merits. Defendants, under reservation of their exceptions, answered, pleading, first, the general issue. Further answering, the defendant Zengel said that it is true he made the will complained of, but that he took down and wrote the will exactly as it was dictated by the testator, and that he did not fail or omit to comply with all the formalities of law; and he specially denied that the will in question was invalid, or that the same has ever been held to be invalid by any court, or in any case, except in a consent proceeding; and he specially denied that the plaintiffs have suffered any loss whatever as the result of the making of the will; and, in the event that there should be an error in the confection of said will, then he pleaded the same was an error of judgment, and not want of skill or negligence in the confection

of the will. Judgment was rendered in the district court in favor of the defendants, and plaintiffs have appealed.

Robert H. Short died in the city of New Orleans on the 11th August, leaving no descendant or ascendants, but certain collateral relations, who, in the absence of testamentary dispositions by him, would have been his legal heirs. These parties were (1) the plaintiffs, who are the children of Virginia Thomas Short, a predeceased sister, who was the widow of Joel Murray; (2) a half-sister, Juliette Brown, widow of R. S. Simms; (3) the descendants of William H. Brown, a predeceased half-brother; (4) the representatives of Richard Brown, a predeceased half-brother; (5) the representatives of John Short, a predeceased half-brother. Robert H. Short had, however, executed two wills by notarial acts,—one before George W. Christy, notary, on the 19th day of April, 1888; the other on the 29th December, 1888, before Frederick Zengel, notary. In each will his entire estate was disposed of. In that of 19th April, 1888, known as the "Christy Will," he bequeathed, after payment of special legacies therein named, "the residue of his property" to the Christian or Campbellite Church at Hopkinsville, Ky., and to the Baptist Church at the same place. In the second will, known as the "Zengel Will," he at first bequeathed, after the special legacies therein made, "the remainder of his estate" to his nephew Phillip Short Simms, but, before signing his name, "declared to the notary, in presence of the witnesses, that he amended and modified his will, as before written, by bequeathing the remainder and residue of his estate, after the discharge of the legacies therein made, in equal shares and interests to all of the thereinbefore named legatees, to be possessed by them, share and share alike." Both of the wills were probated by the civil district court. The deceased left considerable property, real and personal, in Louisiana, and real estate in Tennessee, Alabama, and Kentucky. Mrs. Margaret Short Moran, wife of William J. Moran, who was a legatee in the Christy will for \$4,000 and in the Zengel will for \$2,000, instituted an action, to which all parties holding adverse interests were made defendants, asking the annulment of the Zengel will, and the recognition and enforcement of that executed before,—Christy. The plaintiffs and appellants herein filed an answer in that case, in which they say: "For answer to the petition of Mrs. Margaret Short Moran to annul the writing purporting to be the will of Robert Short, dated December, 1888, they admit that said public act passed before Fred Zengel, notary, is null and void and of no effect, because (1) all of its dispositive provisions were not dictated by Robert Short to the notary in the presence of the witnesses; nor (2) were all of the provisions written by the notary as dictated in the presence of Robert Short,

and in the presence of three witnesses; nor (3) were all the dispositive provisions read aloud to Robert Short by the notary in the presence of three witnesses, observing all these formalities without interruption, and without turning aside to other acts; and these respondents admit that the said act of 19th April, 1888, is null and void, and pray that it be so decreed; and they deny all the other allegations of the petition of the said Margaret Short Moran; and they aver that the said Robert Short died intestate. * * * Now, these respondents show that the writing of 29th December, 1888, purporting to be the last will and testament of Robert Short, is null and void and of no effect, not only for the fatal defects of form already alleged, but also because he was not of sound and disposing mind and memory at the time of the execution of the said instrument, and was insane at that time, and was under the control of the will of another. They further allege that the writing purporting to be the last will and testament of Robert Short, passed before George W. Christy, is null and of no effect, and should be so decreed, and the demand for its execution rejected." The answer, after enumerating a number of objections in the preparation of the first will, closes by alleging that, at the time of the making of the same, Robert Short was not of sound and disposing mind and memory; that he was insane, and incapable of making a will. It then proceeds as follows: "And these appearers, assuming the attitude of plaintiffs in reconvention against Mrs. Margaret Short Moran, pray that her demand for the establishment of the will of 19th April, 1888, be rejected, and said act be declared null and void and of no effect, and that it be decreed that Robert Short died intestate, and that your petitioners [naming each of the present plaintiffs] be recognized as his heirs." They prayed for citation to the attorney for absent heirs, the various legatees, the executor of the will of April 19, 1888, and the executor of the will of 29th December, 1888, and that petitioners have judgment in conformity to their allegations, and rejecting both wills. Some of the parties cited submitted the issues raised in the pleadings of the plaintiff Mrs. Moran, and of the reconventional demand to the decision of the court. Others filed general or special denials, or made special admissions, as their different interests dictated. The district court, upon these issues, adjudged the Zengel will null, but upheld that executed before Christy, dismissing the reconventional demand. In his reasons for judgment the district judge disposed summarily of the Zengel will by the statement that "the will of December 29, 1888, is conceded by all parties to be of no effect." The succession of Robert H. Short has not been closed; it is still under administration in the district court. The rights of parties have not yet been definitely ascertained and fixed.

In the present proceeding the district court upheld the validity of the Zengel will, which it had before pronounced of no effect; the judge in his judgment stating, as he did in his testimony taken in the case, that the first judgment was substantially, in his opinion, a correct decree; that, acting upon that hypothesis, he had not given the will the consideration and thought which he would have done had it been contested in the first, as it was in the last, case; that, had the matter been presented to him originally as it was afterwards, he would have sustained, and not rejected, the will.

The first position contended for by the plaintiffs and appellants is that the exception of prematurity filed by the defendants is not before us, it having been abandoned by the consent reference to the merits. The second is that "prematurity vel non of the action is not dependent upon whether the succession of Short has ever been, or ever will be, administered." The exception was not waived. The record entry states "that by consent of counsel the exceptions are referred, to be tried with the merits," and the answer filed was "under benefit and reservation of the exceptions." A consent that they shall be "tried" with the merits does not, under such circumstances, merge them into the answer. Were appellants' contention on their first point true they would have still to maintain the correctness of the second, which is "that their right of action arose when Mrs. Moran brought suit to annul the Zengel will, and had the probate set aside; that whether or not plaintiffs have established the amount of their loss was another question; that the act which occasioned them loss and gave them a cause of action was the fault of the notary in failing to make a valid will." We do not think that the act of a notary in failing to comply with the formal requirements of the law in the preparation of a will, carrying with it, as a result, the rejection of the will, gives rise necessarily, per se, to an action against the notary by a party named as a legatee in the rejected will. The setting aside of the instrument would in many instances inure to the benefit, instead of to the injury, of the legatee. The case at bar is itself an instance of the truth of this statement. The plaintiffs here, as heirs at law of the deceased, would receive a large portion of his estate if he should be held to have died intestate, while the upholding of the will would take from the heirs the entire succession, leaving them special legatees for a trifling amount. But for the fact of the existence of the prior will of April 19, 1888, plaintiffs' obvious interests were that the Zengel will should be declared null; and, even with the Christy will standing between them and their position as legal heirs, they deemed the Zengel will an obstacle in the way of those interests, and sought by affirmative action to get rid of it. Plaintiffs' conduct indicated a

rejection of the legacy made to them in the Zengel will. The attack upon that instrument was part of a general plan to get into position as legal heirs of Robert Short through a repudiation of, and setting aside of, both wills. We think that, where a will has failed of probate by reason of the fault of a notary in the drawing of the instrument, a person who predicates an action upon that fact must also allege and prove injury. Injury must concur with error, and the extent of the injury would be the measure of the plaintiffs' rights. It matters little, practically, in this case, whether we deal with the question of prematurity from the standpoint of an exception taken to the action, or that of a failure by the plaintiff to allege and prove a condition of affairs giving rise to the action, and entitling them to a judgment. There is no claim or pretension in plaintiffs' petition that the succession of Robert H. Short has been settled, and the rights of parties finally ascertained and fixed. It is true that plaintiffs, in one allegation, aver as a conclusion that they have been damaged to the extent of the legacy; but there is no fact stated save the fact itself of the setting aside of the will, and a declaration that the succession of Short is solvent, on which such a conclusion could be based. The solvency of the succession is anything but certain. We do not feel warranted in the present situation of the Short estate, and under the pleadings, in examining into and adjudicating piecemeal upon the issues raised in this litigation. It will be time enough to do so as a whole when we will have to deal with facts, and not conjectures. What we say here has reference to the claim set up on behalf of the minors.

We have enough before us to pass finally upon the claims of Arthur H. Murray, advanced individually by him, and those of Mrs. Juliette Murray, wife of Philip S. Jones. We are of the opinion that those parties, by seeking to avail themselves of the alleged errors of the notary against the other legatees under the Zengel will, and as part of a general plan to get into position as heirs of Robert H. Short, should not, though their efforts proved futile by reason of the prior will, be permitted to subsequently turn back upon the notary whose errors they had deemed beneficial, and had sought to utilize in their own behalf as instruments of attack. Plaintiffs cite us to the principle announced in the decisions quoted in the American & English Encyclopaedia of Law (vol. 7, note 2, verbo "Estoppel"), to the effect that parties are not bound by allegations unsuccessfully pleaded. We do not think that principle applicable to this case. It may be that when parties attack a will for fraud, for insanity, or on other grounds, and fail in their attack from resistance made, they can still claim the benefit of any provision in their favor to be found in the will, as estoppel would meet estoppel; but we do not think

the doctrine goes to the extent contended for here. We think it perfectly clear that it was the desire, the interest, and the intention of the major heirs to free themselves from the effect of both wills. To that end, in furtherance of that object, they approved and adopted, and by so doing condoned, the errors (if such there were) of the notary. They cannot, as we have just said, be allowed to repudiate now, as wrongful and injurious, that which they had previously availed themselves of, and advanced and relied upon, and sought to utilize as a basis for acquiring beneficial rights. In examining the record we notice that, while Mrs. Juliette Murray, wife of Philip S. Jones, was by the Zengel will made a legatee for \$500, she is by the Christy will a legatee for \$1,000. For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed, in so far as it concerns Arthur H. Murray individually, and Mrs. Juliette Murray Jones, wife of Philip Jones. It is further ordered, adjudged, and decreed that, as concerns the minors Arthur Murray Dargan, Cornelia Alice Dargan, and Bertie Lucy McDonald, the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that there be judgment against the said minors on their demand, as a case of nonsuit.

MILLER, J., recused.

Rehearing refused March 26, 1894.

(71 Miss. 153)

BOARD OF SUP'RS OF MONTGOMERY
COUNTY v. STATE ex rel. JOHNSTON,
Attorney General.

(Supreme Court of Mississippi. Dec. 11, 1893.)

FENCES—ON COUNTY LINE—ADOPTION OF STOCK
LAW.

1. Ann. Code 1892, § 2061, requiring the supervisors of counties affected by establishment of a stock law in one of them to jointly build and repair fences on the county line, is constitutional.

2. In mandamus to supervisors of a county where the crops are fenced to build half a fence dividing it from a no-fence county (Ann. Code 1892, § 2061), or defray half the cost, respondents cannot plead the invalidity of the other county's no-fence election.

3. Nor can they plead that the other county has already built half the fence.

Appeal from circuit court, Montgomery county; C. H. Campbell, Judge.

Mandamus on relation of F. Johnston, attorney general, to the board of supervisors of Montgomery county. Writ granted. Respondents appeal. Affirmed.

This is a petition for a writ of mandamus exhibited by the state on relation of the attorney general to compel Montgomery county to build one-half of county-line fence between it and Carroll county, or to pay one-half the expenses of building same. The petition sets

out that the Carroll county board of supervisors had ordered an election under chapter 47 of the Code of 1892 to determine whether the people of said county should adopt the stock law, and that an election was duly and legally held in accordance with said order, and, a majority of the votes being cast for a full stock law, the board of supervisors of Carroll county declared that the stock law or no-fence law should be of full force and effect in Carroll county; and that Montgomery county had declined to adopt the stock law. The petition avers that, because of the establishment of the stock law in Carroll county and the refusal to adopt it in Montgomery county, it became the duty and obligation of the board of supervisors of Montgomery county to unite with the board of supervisors of Carroll county in jointly building and keeping in repair the dividing county-line fence between the two counties; and that the said board of supervisors of Montgomery county had refused to unite with the board of supervisors of Carroll county in building said fence, or in defraying any of the expenses thereof. It prays that a writ of mandamus may issue compelling defendants to build one-half of said dividing-line fence, or to jointly with Carroll county defray one-half the expenses of building same. Respondents demurred to this petition, raising the question as to the constitutionality of the law, and denying the right of the relator to the particular relief sought, and also the right to alternative relief. This demurrer was overruled. Respondents then pleaded, setting up the invalidity of the election in Carroll county, and that Carroll county had already built one-half of the fence. A demurrer was sustained to this plea, and a peremptory writ issued, directing Montgomery county to build one-half the fence, or to join Carroll in defraying half the expenses of building said fence. From this judgment respondents appealed.

Sweatman, Trotter & Knox, for appellants.
Southworth & Stevens, for appellee.

CAMPBELL, C. J. The demurrer to the several pleas was properly sustained, and, as the defendants declined to plead over, judgment was rightly given for the plaintiff. The decision of the board of supervisors of Carroll county was unassailable by the defendants in the manner attempted, and nothing remained for the board of supervisors to do except to join Carroll in building and keeping in repair the required fence, which is a necessity to the people of Montgomery county, and which its board of supervisors should make haste to do in their interest. We find no

¹Ann. Code 1892, § 2061: "The board of supervisors of counties affected by the establishment of a stock law in one of them, shall jointly build and keep in repair fences on or near the county line to prevent stock straying from one county in which the stock law is not in force, into the other in which it is in force."

fault with the form of the judgment. It conforms to the law, and no difficulty will be found in executing it. Affirmed.

(71 Miss. 51)

FIRST NAT. BANK OF MERIDIAN et al.
v. PHILLIPS.

(Supreme Court of Mississippi. Oct. 30, 1893.)

EQUITY—SUIT TO DISCOVER PARTY LIABLE.

A bill making several parties defendant, and alleging information and belief whereby some one of defendants is thought to be liable for the conversion of complainant's cotton, or the putting beyond his reach of warehouse receipts therefor, and asking for a discovery by defendants as to the matters, cannot be maintained, as complainant must ascertain against whom he has a cause of action, and sue them alone.

Appeal from chancery court, Lauderdale county; W. T. Houston, Chancellor.

Suit by J. R. Phillips against the First National Bank of Meridian and others. A demurrer to the bill was overruled, and defendants appeal. Reversed.

Appellee, J. R. Phillips, filed this bill against the First National Bank of Meridian, the Planters' Warehouse Company, Innman & Co., M. T. Murfree, and C. C. King. It alleges that complainant was the owner of certain cotton, which he delivered to Litchenstein & Metzger, merchants in Meridian, Miss., who were, as he supposed, to store it for him in their warehouse; that said firm failed in business, and all their property was attached by creditors; that complainant thereupon came to Meridian to ascertain what had become of his cotton, and was told by a member of the said firm that they had placed it in a warehouse of the Planters' Warehouse Company, and that they had sold it or authorized its removal; that defendants King and Murfree had control of said warehouse, and, when requested by complainant to point out his cotton, or inform him what had become of it, promised to furnish, from the books of the warehouse, data showing the disposition of the cotton, but failed to do so; that complainant had searched the warehouse diligently in the effort to find his cotton, but without success. The bill further alleges that complainant is informed and believes that, immediately after the failure of Litchenstein & Metzger, his cotton was converted, either by the First National Bank or by Innman & Co., and shipped out of the state; that the books of said Innman & Co. would show the marks and weights of the cotton, and its disposition and whereabouts, but that these sources of information are withheld; that Litchenstein & Metzger, as complainant is informed and believes, got receipts from said warehouse company for the cotton, which receipts complainant has been unable to obtain, they telling him that they had delivered them to the First National Bank, which had parted with the receipts, but to whom complainant does not know. As a conclusion from the foregoing averments, complainant

avers that either the bank or Innman & Co. or the warehouse company converted the cotton, or placed it beyond his reach, and likewise placed beyond his reach the receipts. The bill prays for the discovery by the defendants, under oath, as to all that they may know about the disposition of the cotton, and as to the matters set forth in the bill. The defendants joined in a demurrer to the bill, the main grounds of which are that the bill is uncertain and indefinite, and fails to show which of the defendants are liable for the cotton, and fails to show against which of the defendants a decree is sought. The demurrer was overruled, and an appeal granted to settle the merits of the cause.

Hamm, Witherspoon & Witherspoon, for appellants. Miller & Baskin, for appellee.

CAMPBELL, C. J. We do not know of any precedent or principle which will maintain this bill. Doubtless, Mr. Phillips has a cause of action against somebody, but he must ascertain against whom he may have a decree, and bring his suit against him or them. He has no right to bring before the court a number of persons not shown to be liable to him, or in any way interested in the matter of the suit, in the effort to find among them some who are liable to him. No one should be made a party defendant against whom no relief is prayed or grantable. It is not allowable to bring a bill against many with a view to having them exonerate themselves from the charge made, in the hope of finally fastening it upon some who fail to show that they are not chargeable. This bill is of that character, and the demurrer should have been sustained. The complainant must show by his bill his right to a decree against those made defendants, and this is not done by this bill. Reversed, demurrer sustained, and bill dismissed without prejudice.

(71 Miss. 576)

FANT et al. v. DUNBAR et al.

(Supreme Court of Mississippi. Nov. 6, 1893.)
GUARDIAN AND WARD — INVESTMENTS IN REALTY
— ELECTION.

Where a guardian's loan of his wards' money was disallowed and charged to him, and was afterwards paid him by conveyance of realty, on which he received the rents and paid the taxes and insurance, it being certain what part of the purchase price was the wards' money and what the guardian's, the wards may elect to charge their money with interest on the lot, or take an interest therein proportionate to the amount of their money that went into it, and to that end are entitled to accounts stated both ways.

Appeal from chancery court, Noxubee county; T. B. Graham, Chancellor.

Bill by James Dunbar, administrator, and others, against Mrs. A. E. Fant and others. From the order of reference to a master, Mrs. A. E. Fant and A. C. Fant appeal. Reversed.

In 1871, Dr. J. C. Fant was appointed guardian of I. W., Ida, and S. P. Fant. The only property he received as such guardian was \$3,660.25 in money, being the proceeds of an insurance policy on their father's life. He loaned the money to Buck & Beauchamp, a firm of merchants in Mobile, Ala., and took their note, due December 23, 1872, for \$4,026.27, being the principal and interest to that date. In his report in March, 1872, he sets out the receipt of the money, and reports the loan. The inventory was approved, but the loan of the money was not. In his first annual account, Dr. Fant charged himself with the money as on hand, with interest, and asked credit for several items of expenditure. This account was approved. Buck & Beauchamp not being able to meet their note at maturity, J. J. Beauchamp, one of the members of the firm, executed to Dr. Fant, in his own name, a deed to a storehouse and lot in the town of Macon, Miss. This deed was executed and delivered with the understanding that it was to be a mortgage, with possession in Beauchamp until January 1, 1874. If Buck & Beauchamp paid the note on that date, then the deed was to be surrendered and canceled; if they failed to pay, then the deed was to become absolute, and the property turned over to Dr. Fant in payment of the loan. In his second annual account the guardian reported the fact to the court that Buck & Beauchamp had failed to pay anything on their loan, and that he had taken the house and lot in payment. The court refused to accept the transaction in behalf of the wards, and the guardian accounted as though the money was in his hands as cash. He continued to account in that way until 1885, when I. W. Fant came of age, when he filed his final account as to his guardianship, showing a balance due of \$1,051.90. No action was ever had on the final account. Dr. Fant took possession of the storehouse on the 1st day of January, 1874. From that time to the time of his death, in 1889, he paid taxes, insurance, and repairs, and received the rents and profits, of the house. In 1878 the house was burned down, and he built it as before, using for that purpose the full amount of an insurance policy on the house and \$1,000 which he borrowed from Mrs. M. A. McIntosh; and to secure Mrs. McIntosh he executed a trust deed to her on the storehouse. Mrs. McIntosh died in 1882, leaving all her property to Lola McIntosh, a minor, and W. H. Bogle was appointed her guardian, and took possession of the Fant note and trust deed as such. May 14, 1888, Dr. J. C. Fant executed a renewal note and trust deed to Lola McIntosh, the note reciting that it was in renewal of the original note to Mrs. McIntosh and the amount of interest in arrears. This note and trust deed was afterwards transferred to A. C. Fant for value. Dr. Fant died in 1889, leaving all his property to Mrs. A. E. Fant, and Mrs. Fant took possession of

the storehouse, and has remained in possession ever since, receiving the rents and profits, and paying taxes, insurance, and other expenses. March 15, 1890, Iley W. Fant filed his original bill in the chancery court of Noxubee county against Lola McIntosh and Mrs. A. E. Fant, setting up the circumstances and details of the purchase of the storehouse and lot and the fact of the McIntosh loan and trust deed. The bill prayed the court to declare a resulting trust in favor of complainant to the extent of one-third interest in the house and lot, and that the McIntosh deed of trust be declared inferior to his rights and interest, and for an accounting of the rents and profits. Mrs. Fant and Lola McIntosh answered the bill, setting up the fact of the refusal of the court to recognize or ratify the action of the guardian in the matter of the Buck & Beauchamp loan, alleging that I. W. Fant had been paid in full, and that Mrs. McIntosh was a bona fide purchaser for value without notice. November, 1892, complainant filed an amended bill, alleging, among other things, that the trust deed to secure the McIntosh loan had never been renewed, and that the indebtedness was barred by the statute of limitation. Mrs. Fant and A. C. Fant answered, denying the allegation that the trust deed had not been renewed. S. P. Fant, in the mean time, had filed his petition, setting up the facts in regard to the guardianship and the purchase of the house and lot, the McIntosh loan, etc., as alleged in I. W. Fant's bill, claiming the right to elect whether to claim an accounting from his guardian for his money or to claim an interest in the house and lot, and elected to claim an interest in the house and lot. He denied the fact that the McIntosh loan had been applied to the building of the house in 1879, and alleged that the debt had become barred by limitation, and the trust deed had never been renewed. Mrs. Fant and A. C. Fant answered this bill, and the two cases were tried together by agreement. Pending these proceedings, I. W. Fant died, and the cause was revived in the name of James Dunbar, administrator. The chancellor rendered his decree in both cases, in which he makes the following findings: "(1) That the guardian, soon after November 3, 1871, received \$3,660.25 belonging to his three wards; that he kept it loaned out at 10 per cent. interest until January, 1874; that he then accepted the house and lot in controversy in lieu of principal and interest due on the loan; that the deed conveying the house and lot was made to Dr. J. C. Fant in his individual right, but that the consideration was the money of his wards; that the guardian received the rents of the building up to the year 1887, when it was burned; that he built another house on the same lot, and received the rents on it to the time of his death; that he paid all taxes, insurance, and repairs,

and received the rents and insurance paid on it; that he borrowed from Mrs. McIntosh, in September, 1880, \$1,000, and gave a deed of trust on the house and lot to secure its payment; that, at the time he borrowed the \$1,000, the legal and equitable title to the property, so far as Mrs. McIntosh knew, was in Dr. J. C. Fant, and that Mrs. McIntosh was a bona fide incumbrancer for value without notice, as against complainants; that Mrs. McIntosh died, leaving the note to Lola McIntosh; that prior to May 14, 1888, the note to Mrs. McIntosh became barred by the statute of limitation; that on May 14, 1888, Dr. J. C. Fant executed a new note for the amount due, and executed a deed of trust to secure the new note; that Lola McIntosh (the holder of the new note and trust deed) did not occupy the position of a bona fide holder for value against complainants; and that the new note was only binding on the estate of Dr. J. C. Fant. (2) That the estates of Iley W. Fant (he having died pending the litigation) and S. P. Fant are each entitled to one-third interest in the house and lot and the rents and insurance on the house." The two causes were referred to a master to state an account between Dr. J. C. Fant and the complainants in accordance with the findings of the decree. The decree directs the master, in stating the account, to begin with the year 1874, and to make annual rests, and directs him to charge interest upon annual balances at the rate of 10 per cent. per annum when in favor of complainants, and at 6 per cent. when in favor of Dr. Fant. It directs the master to charge I. W. Fant with one-third of the \$1,000 borrowed from Mrs. McIntosh, but to make no charges as to said sum against S. P. Fant. From this decree, Mrs. A. E. Fant and A. C. Fant appealed.

A. C. Bogle, for appellants. Rives & Rives, for appellees.

COOPER, J. On the evidence it is entirely certain what part of the purchase price of the lot described in the pleading and evidence was the money of his wards, and what part was the money of Dr. Fant, the guardian. Under these circumstances, his wards had the right, at their election, to charge their money, with interest, upon the lot, or to take an interest therein proportionate to the amount of their money that went into it, as compared to the purchase price. They have not the right to elect to take the entire interest in the property, for that would be to appropriate, not their own, but the property of the guardian. Before making their election, the wards are entitled to have accounts stated in both aspects, and, being thus advised, to elect that which is the more beneficial to them. Decree reversed, and cause remanded.

(71 Miss. 351)

WADDELL v. LATHAM et al.

(Supreme Court of Mississippi. Jan. 8, 1894.)

DREDS—RESCISSION—EVIDENCE—ACTION FOR PRICE.

1. One A. executed to defendant a warranty deed of land, receiving his note in consideration therefor, but retained the deed. Defendant took possession of and improved the land, and, afterwards discovering a defect in the title, the deed was handed him for investigation. Thereafter, A. became insolvent, and defendant recorded the deed. *Held* that, though no delivery of the deed was intended, A. could treat it as such, and that, in an action to sell the land to pay the note, the burden was on defendant to show an invalid title.

2. The fact that the title is imperfect in written muniments will not entitle him to rescind where it is supported by possession sufficient in time and in character to cure all defects.

Appeal from chancery court, Coahoma county; W. R. Trigg, Chancellor.

Bill by Latham, Alexander & Co. against B. B. Waddell on a note, and to have the bond for which it was given in payment sold to satisfy the decree thereon. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

In 1886 Thomas H. Allen, a resident of Memphis, Tenn., and who was reported at that time to be wealthy, and perfectly solvent, owned a plantation in Coahoma county, Miss., known as the "Butler Place." In June, 1886, B. B. Waddell, who was then in the employ of Allen, and who had been sent by Mr. Allen to look after this place, wrote to Mr. Allen, offering to buy the place; offering him \$4,000, payable in five years, provided Mr. Allen would lend him \$1,000 to improve it. This was accepted by Allen, and he executed a warranty deed to Waddell for said place, reciting in the deed a cash consideration of \$4,000; and Waddell executed his promissory note to Allen for \$4,000, payable in five years,—interest payable annually. The deed was not recorded, but was left with Allen. Waddell took possession of the place, and began cultivating and improving it. Upon investigation, Waddell found that Allen's title to the place was defective, and so wrote him. Mr. Allen, at this time, was solvent. In the mean time the deed had been handed to Waddell for the purpose of investigating the title to the land. Afterwards, Allen became insolvent, and made an assignment of all his property for the benefit of his creditors. Waddell, on learning this, immediately filed the deed for record in Coahoma county, Miss. In November, 1890, Allen filed his bill in the chancery court of Coahoma county against Waddell, on said note, asking a decree against Waddell for the amount of the note, with interest, and that the land comprising said Butler place be sold to satisfy said decree. Waddell filed his answer to said bill, and made his answer a cross bill, in which he sets up the fact that Allen had warranted the title to the land sold him, and at that time Allen was solvent, and that

it was the intention, in selling said land to him, that he should have such title as he could procure a loan upon the land with, and that the title to all the land was very defective, and that to part of the land, which was right in the center of the place, Allen had no title whatever, and that said Allen was now insolvent, and his warranty in said deed was worthless; and asked the court that said Allen be first required to make and tender him a deed conveying a perfect title to said land, before being entitled to a decree for the purchase money thereof and a sale of the land. The cross bill also alleged that it was the intention to convey all of said Butler place, and that said deed did not include a part of said place, and that this land should be included in any decree the court might render. T. H. Allen answered this cross bill, denying most of the material allegations thereof. Waddell claimed that, under his general prayer for relief, he was entitled to a rescission of his contract of purchase, on the ground of the failure of Allen's title, and his insolvency, defeating the purpose for which the deed was given. In the mean time one of Allen's creditors had filed an attachment against him, garnished Waddell, and seized the land in question. In November, 1892, Latham, Alexander & Co., a New York firm, filed their petition in said cause, which was then before the chancellor, in vacation, under advisement, in which they set up that on June 20, 1892, Thomas Allen had transferred said land note of B. B. Waddell to them, and that they were then the owners and holders of said note, and asked to be permitted to file an amended and supplemental bill in said cause, setting up their rights in the premise. An order was made by the chancellor, remanding the cause to rules, with leave for petitioners to file their supplemental bill, and to substitute themselves as complainants. In their amended bill they set up substantially what Allen did in his bill, with the additional fact that the note had been transferred to them by Thomas H. Allen. They asked that a decree be rendered in their favor against Waddell, and decreeing the land to be sold to satisfy same. Waddell, in his answer, denies that Allen was owner in fee simple of the lands comprising the Butler place, at the time they were sold to him. He denies that Latham, Alexander & Co. were then the equitable owners of said note, or that it had been assigned to them, and denies their right to come into court to have a decree to sell said land to pay said note, and then makes his answer a cross bill, and alleges that Thomas H. Allen is insolvent, and was at the time he filed his original bill, and that nothing can be made out of him by execution at law. He sets out the conditions which induced him to buy the place, and that at the time Allen made him a warranty deed he was perfectly solvent, and his warranty good, and that the title to said land was not good, and especially as to a

part of it, which runs through the center of said place, and that without said part he would not have purchased the place. He further states that he has improved the place, making it now quite a valuable place, and that owing to the purpose for which he purchased the place having failed, by reason of the defective title of the land, and that his vendor is now hopelessly insolvent, and his warranty worthless, he asks the court to rescind his contract of purchase of the land, for the aforesaid reason, and to order an account taken, charging him with reasonable rents, and crediting him with improvements, taxes, etc. He further sets up the fact that he has been garnished by one of Allen's creditors, and asks that the court consolidate this cause with that cause, as far as is necessary to protect him in both cases. Latham, Alexander & Co., in their answer, admit the insolvency of Thomas H. Allen, and that he has no paper title to part of said land. They ask for a decree against Waddell, and for the sale of the land. Trial was had upon this amended bill, answer, and cross bill, and answer to the cross bill. On the hearing the court below decreed that Latham, Alexander & Co. were then the owners of said note, that it had not been paid, and decreeing that Waddell pay the same in some short time, and, in default thereof, that a special commissioner be appointed to sell all the land which was included in said deed, also that part of the Butler place which had never been in said deed, to pay said note. From this decree, B. B. Waddell appealed.

St. John Waddell, for appellant. D. A. Scott, for appellees.

COOPER, J. It is far too late for the appellant to set up the claim that he is the purchaser of the lands under an executory, and not an executed, contract. Doubtless, that was the attitude it was intended for him to occupy; and, when the deed was intrusted to him, it was not intended to be delivered by the grantor. But the appellant put it to record; refused to restore the status quo, upon the ground that to do so would be an admission that the grantor had justly lost confidence in him; occupied and leased the land for many years; and finally, by his sworn answer and cross bill, unequivocally asserted that the delivery of the deed was absolute and unconditional. Though what was done was not intended by the grantor as a delivery of the deed, he had the right to treat it as a delivery, by reason of the conduct of appellant, and to exhibit his bill to foreclose the lien for the purchase price. It suits the appellant now to occupy the inconsistent attitude of a purchaser under an executory contract, for the reason that, if he can occupy this relation, it will devolve upon complainant the burden of proving a good title to the lands sold, before he can call on appellant to consummate the contract, and pay the purchase price. But, since appel-

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lant cannot now be treated otherwise than as a vendee in the undisturbed and undisputed possession of the land, it devolves on him to show clearly the defect of title relied on by him. The grantor being confessedly insolvent, a court of equity will refuse to compel the grantee to pay the purchase price, although he has not been evicted, if it is made to appear that the title is invalid. *Johnson v. Jones*, 13 Smedes & M. 580; *Kilpatrick v. Dye*, 4 Smedes & M. 289; *McDonald v. Green*, 9 Smedes & M. 138; *Walles v. Cooper*, 24 Miss. 208; *Gartman v. Jones*, Id. 234; *Miller v. Lamar*, 43 Miss. 383. But the defendant must clearly show the defect of title, and that, if sued, he cannot maintain his possession. *Moss v. Davidson*, 1 Smedes & M. 112; *Green v. McDonald*, 13 Smedes & M. 445; *Ayres v. Mitchell*, 3 Smedes & M. 683; *McDonald v. Green*, 9 Smedes & M. 138. The appellant failed to show the invalidity of the title of the grantor. At most, he has shown a title imperfect in written muniments, but supported by possession certainly sufficient in time, and probably in character, to cure all defects. Counsel is mistaken in stating that the pleadings admit that, by accident, a part of the land intended to be conveyed was omitted from the deed, and that, without correcting this error, the court has decreed a sale, not only of the land described in the deed, but of that omitted. The final decree directs the grantor to convey this land within 20 days from the date of the decree, and, in default thereof, that the clerk of the court, acting as commissioner, shall make the conveyance. We find no error in the decree, and it is affirmed.

(71 Miss. 1009)

WHITNEY v. HANOVER NAT. BANK et al.
(two cases. Nos. 7,459, 7,749).

SAME v. BANK OF GREENVILLE et al.
(No. 7,460.)

(Supreme Court of Mississippi. April 9, 1894.)

BANKS—RECEIVERS—APPOINTMENT—JURISDICTION
—COLLATERAL ATTACK—EQUITY—PARTIES.

1. One cannot be made a defendant to a bill in equity on his own application, against the objection of the complainant.

2. In the absence of statutory authority, the appointment of a receiver for a bank on its ex parte application is void, and therefore can be assailed collaterally.

3. Under Const. 1890, § 147, providing that no judgment or decree shall be reversed or annulled on the ground of want of jurisdiction, in that there was a mistake as to whether the cause was of equity or common-law jurisdiction, the appointment by a chancery court of a receiver for the property of a bank, where the bank has abandoned it, at the suit of a general creditor, cannot be attacked on the ground that the creditor should first have obtained a judgment at law.

Appeal from chancery court, Washington county; W. R. Trigg, Chancellor.

Proceedings between George Q. Whitney and the Hanover National Bank and others relative to the funds of the Bank of Green-

ville. From three adverse decrees, Whitney appeals. Affirmed.

Nugent & McWillie and S. H. King, for appellant. Yerger & Percy, for appellees.

CAMPBELL, C. J. These three cases were argued and submitted together, and will be so considered. Their history is this: The Bank of Greenville was found to be insolvent, and came to a stop, on the 22d day of December, 1891, when the directors, headed by the president, applied, by petition to the chancellor, to take charge of the assets of the bank, by appointing a receiver to collect and manage its affairs. The chancellor appointed the president of the bank receiver, and, on his application, enjoined all persons from proceeding by suit against it. The receiver appointed entered upon his duties as designated, and continued until he resigned, on the 6th of July, 1892. On the 11th July, 1892, the Hanover National Bank and other creditors of the Bank of Greenville exhibited their bill, in the chancery court in which the receiver had been appointed, against the Bank of Greenville, and averred the foregoing facts, and that since the 22d December, 1891, the officers and directors of the bank had ceased to manage it, and that its affairs had been managed wholly by Pollock, as receiver, who had collected a large sum of money due said bank, and that the appointment of another receiver was necessary for the preservation of the assets of the bank and the protection of the rights of its creditors; with other specific allegations, designed to show the necessity for the immediate appointment of a receiver. Upon due notice to the defendant a receiver was appointed in this proceeding on the 18th July, 1892, and the former receiver was directed to deliver to him all the assets of the bank in his hands. On July 23, 1892, George Q. Whitney and others, creditors of the Bank of Greenville, united in a bill against the bank and G. D. Thomas, who had qualified and was acting as receiver by virtue of his appointment on July 18th, and against other defendants, in said chancery court. This bill set forth the suspension of the bank on the 22d December, 1891, and the appointment by the chancellor of Pollock as receiver on the application of the president and directors of the bank, and that Pollock took exclusive control of all the assets of the bank, and acted as receiver, but that defendant Thomas, at the time of exhibiting said bill, claimed to be receiver of said bank by virtue of an appointment by the chancellor of said court; that the application to the chancellor on December 22, 1891, and all the proceedings had, including the procurement of the appointment of Thomas as receiver, were devices to hinder, delay, and defraud creditors, and "invalid and void." Discovery was sought by the bill as to all the assets of the bank, of whatever kind,

and a lien upon them prayed to be established from the date of filing the bill, and their appropriation to the demands of the complainants. The Bank of Greenville interposed a plea to this bill of the proceeding by the Hanover National Bank et al. v. Bank of Greenville, and the appointment in that case of Thomas as receiver, and that he had qualified as such, and was in possession of the assets of the bank under that appointment, and relied on this plea as a bar to the bill filed 23d July, 1892. The plea was set down for hearing upon its sufficiency, and was sustained, and the bill dismissed. From that decree an appeal was taken, and case No. 7,460 on the docket of this court is that appeal.

On October 4, 1892, George Q. Whitney petitioned the chancery court of Washington county, in which these cases were pending, and which had been consolidated, setting forth that he was a creditor to a large amount of the Bank of Greenville, and had recovered judgment for a large sum against it in the court of the United States at Vicksburg, Miss., July 28, 1892, which had been duly enrolled, and, he claimed, was a paramount lien on all the assets of said bank, notwithstanding all the various proceedings in the said chancery court, which are set forth with detailed particularity, and denounced as void, and no obstacle in law to the application of the assets of the bank to the claim of the petitioner, who prayed to be allowed to be made a party defendant to said cause. At the same time he presented a petition and bond for removal of said cause, in which he prayed to be made a defendant, to the United States court at Vicksburg. The complainants in the cause in which Whitney sought to intervene as a defendant opposed his application, and it was denied by the court, and from this he appealed, and that appeal is contained in No. 7,459 on the docket of this court.

Defeated in his effort to be made a defendant as stated, Whitney made an abortive effort to have the United States court at Vicksburg take charge of his suit, and enforce his claim to be paid out of the assets of the Bank of Greenville in preference to other creditors; but with that we have no concern, and state the fact historically only, being in the record before us. On February 6, 1893, Whitney, who had been baffled in all his efforts to obtain payment as a creditor entitled to precedence out of the assets of the Bank of Greenville, exhibited an original bill in the chancery court of Washington county against the complainants in the bill of the Hanover National Bank and others against the Bank of Greenville, exhibited July 11, 1892, and the Bank of Greenville and W. A. Pollock, receiver, and G. D. Thomas, receiver. In this bill is narrated with detail the history of the dealing by and with the bank from the time of its suspension and taking refuge from creditors in the

chancery court to the filing of this bill, which also relates the persistent, but ineffectual, efforts of the complainant, in state and federal courts, to secure recognition of his right, as claimed, to be first paid out of the assets of the Bank of Greenville. It assails the action of the chancery court of Washington county as void for want of jurisdiction over the subject-matter dealt with, and seeks to vacate all orders that stand in his way, and the payment of his as a preferred claim out of the effects of the bank. The bill seeks injunction, which was obtained. This bill was answered, and most of its allegations admitted, but the claim made by it to the right of the complainant to priority of payment out of the assets of the bank was denied. A motion was made to dissolve the injunction, and some affidavits were taken, and some facts were agreed on for the hearing of the motion to dissolve, and it was agreed that the case should be heard on the motion to dissolve, and for final decree on such hearing. The respondents gave notice of a claim for damages to be allowed on dissolution of the injunction to amount of \$2,500 for attorney's fees in defense of the suit. The case was heard in accordance with the agreement, and a decree was made dissolving the injunction, dismissing the bill, and awarding damages against the complainant in the sum of \$2,000 as attorney's fees, the decree reciting that the court had heard testimony in open court as to the attorney's fees, and taxed the costs against the complainant, who appealed, and this is No. 7,749 of the docket of this court.

From this complete but succinct history of this litigation, as disclosed in voluminous form in the three cases before us, it is apparent that the only question presented for decision by the appeal in No. 7,459 is as to the propriety of the action of the court in refusing to permit Whitney to intervene as a defendant in the case of Hanover National Bank et al. v. Bank of Greenville, against the objection of the complainants, who protested earnestly against it. The court did right in this refusal. "No such practice is known in equity as making a person a defendant to a suit upon his own application over the objection of the complainant." 1 Danell, Ch. Pl. & Pr. 287, note 2, and cases cited; *Stretch v. Stretch*, 2 Tenn. Ch. 140,—where the subject is fully treated, and the action of the court in the case before us is fully vindicated on principle and authority.

The question presented by cases 7,460 and 7,749 is whether the chancery court of Washington county was so wanting in jurisdiction of the case of Hanover National Bank and others exhibited against the Bank of Greenville, July 11, 1892, as to render its action in the case void, and liable to be assailed collaterally, and treated as a nullity, whenever and however called in question; for, if it be conceded that the action of the court was erroneous, unless it was void, the fact that it had assumed jurisdiction, and taken control

of the assets of the Bank of Greenville, and appointed a receiver in the case, was an answer to the original bill exhibited by Whitney and others on the 23d July, 1892, and likewise to Whitney's bill of February 6, 1893. We regard the action of the chancellor on the 22d December, 1891, appointing a receiver on the ex parte application of the directors of the bank, and his subsequent action in pursuance of that appointment, as utterly void, and of no legal effect. It could be assailed collaterally, and disregarded with impunity, by anybody. The proposition that an insolvent debtor can take refuge in a chancellor's decree on his or its own application, and obtain protection against pursuing creditors, who may be enjoined from pursuing their ordinary remedies, is without foundation. We cannot account for the mistake fallen into in the proceeding of December 22, 1891, and all that was done under it, except by supposing that what is provided for by statute in other states was considered admissible in the absence of statute in this state. The suit of Hanover Bank et al. v. Bank of Greenville, instituted July 11, 1892, is evidence of the fact that it was considered necessary to strengthen the grasp of the chancery court on the assets of the bank, and that it was a timely proceeding for the purpose of the complainants in that suit, for it results from what we have said that all that went before was of no legal validity; and, but for that suit, there would have been no barrier to his proper proceeding by any creditor, the injunction issued to the contrary notwithstanding. But, if the court was not wholly without jurisdiction in that suit, it was inadmissible to inject into it other suits, as sought to be done by the bill of July 23, 1892, and that of February 6, 1893.

The question, then, is as to the case of Hanover Bank et al. v. Bank of Greenville, begun by original bill July 11, 1892. Was the action of the court as to that case void? It is to be observed that the bill in that case is not one to secure any priority or advantage to the complainant in it, to the injury of other creditors, but it is for all creditors of the Bank of Greenville, as shown by its prayer for the appointment of a receiver to preserve and collect the assets, and distribute the money among all the creditors, according to their rights as ascertained. There was no time when Whitney could not join in this suit as a complainant, or assert his right of priority as claimed, if he had chosen to do so; but his persistent effort was to obtain priority over other creditors and secure full payment, if the assets were sufficient; and he was unwilling to make common cause with all creditors, but, asserting the voidness of all the proceedings in the chancery court as to these matters, he sought, as he had a right to do, to obtain precedence as a creditor by getting judgment against the bank, and enforcing it. He got judgment, and, if that entitled him to be paid out of the bank's

assets in the hands of the receiver, he might have propounded his claim of priority in the chancery court, and demanded its recognition and payment by an order therefor, but he maintained his attitude of asserting the nullity of all the proceedings in this matter of the chancery court, and attacked them as void; and the maintenance of his bill of February 6, 1893, depends on maintaining the legal proposition on which it rests. His learned counsel has been not only persistent, but consistent, in the many methods employed to obtain for his client an advantage over other creditors. It remains to be stated whether or not he shall succeed in securing the reward of his industry in behalf of his client. By his bill of February 6, 1893, he has pursued the proper course to obtain an adjudication of the question on which the claim made by his client depends. This bill attacks the validity of the proceedings in the chancery court in the case of *Hanover Bank et al. v. Bank of Greenville*, on the ground that it is not the province of a court of chancery to dissolve a corporation, or interfere with the exercise of its franchise, or displace its officers, or appoint a receiver, or otherwise exercise jurisdiction over it, at the instance of creditors who have no judgment against it. In this case there was no interference by the court with the bank or its franchise, and the performance of the ordinary functions of its officers. There was no attempt to dissolve or restrain the corporation. Its directors had voluntarily surrendered its assets to the keeping of the chancellor, and ceased to perform their duties as to them. The chancellor had accepted the trust, and designated a receiver to take charge of these assets, and care for them, and had enjoined all creditors of the bank from suing it, and had proceeded in the administration of the trust he had accepted, as if there had been a creditors' bill; and, although this fell little short of being a mere farce, saved from it only by the seriousness of the performance with judicial gravity, in good faith, it was, nevertheless, the condition in which the complaining creditors found the affairs of their debtor on the 11th July, 1892, when they instituted their suit representing the deplorable conditions existing, and prayed the interference of the chancery court to take charge of the assets of their debtor, the bank, thus abandoned by it, and surrendered to the chancellor, who, though without authority to receive them, had yet taken control of them as if he did have the right to receive them, and had been dealing with them accordingly. The bill urged the necessity for the immediate appointment of a receiver for the preservation of the assets of the bank, which had suspended, and ceased to care for them since December 22, 1891. It is true that none of the complainants was a judgment creditor of the bank, and none had a specific lien on the assets of the bank. Yet these assets con-

stituted a trust fund, in a general sense, for the payment of the creditors of the bank, and, having been abandoned by the managers of that corporation, and transferred to the chancellor, who was dealing with them as of right, when he had no more legal authority over them than a private individual, who might have found them, if it may be said that, under these circumstances, it was erroneous for the chancellor to entertain the suit of general creditors of the bank, and appoint a receiver, it certainly cannot be maintained that this proceeding was wholly unauthorized and void, so as to be subject to collateral attack for want of jurisdiction to entertain the suit. *Vanfleet, Collat. Attack*, § 100; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781; *Graham v. Railroad Co.*, 102 U. S. 148; *Goodman v. Winter*, 64 Ala. 410; *Barbour v. Bank*, 45 Ohio St. 133, 12 N. E. 5; *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293.

Many other books might be referred to in support of the proposition asserted, but, if the doctrine announced did not prevail elsewhere, there can be no doubt as to the law here since the constitution of 1890. By section 160 of that instrument, "in all cases where said court [chancery] heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted, or the legal title established by a suit at law." This is in harmony with the scheme of the constitution reversing the former relations of the courts, in which the circuit court possessed general jurisdiction, and was the repository of the power to administer legal remedies, and the chancery court had jurisdiction of certain designated matters, and where there was not a full, adequate, and complete remedy at law. Now the circuit court has original jurisdiction "in all matters, civil and criminal, in this state, not vested by this constitution in some other court." Section 156. A residuary grant is thus made to the circuit court. This manifests the policy of enlarging the domain of chancery, and limiting that of the court of law. What may be the effect of the provisions mentioned in widening the scope of the courts of chancery cannot be determined now, and is not necessary to be decided; but that they will be influential in considering the class of cases in which chancery courts may entertain jurisdiction is undeniable. When we look to section 147 of the constitution, all doubt as to the proper resolution of the question presented by this case vanishes. Because of that section, error is not predicable of "any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction." "No judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of

want of jurisdiction to render said judgment or decree; from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction," is the mandate of the fundamental law, and sweeps away all distinction between equity and common-law jurisdiction, after it has been entertained, in a civil cause in the chancery or circuit courts. It may be an action of crim. con., or for libel or slander, or trespass, or any other civil cause in the chancery court, or an equity matter in a court of law; if entertained there, error is not predicable, and the decree or judgment shall not be annulled for want of jurisdiction. The chancellor or circuit judge conclusively and finally settles the question of jurisdiction, as between equity or common-law jurisdiction, of the particular case; for it would be the height of absurdity to hold that, while error may not be affirmed of it, such judgment or decree is void. The reason we do not apply the provisions of the constitution mentioned to the matter of December 22, 1891, and uphold it, and what followed, is that it was not a cause. There was no suit or action, and no parties plaintiff and defendant, but a mere *ex parte* surrender by the bank to the chancellor of its affairs, for which there is no authority in law; and therefore the constitution does not apply, but relates to a civil cause, as properly understood, and not to all that a chancellor or judge may do. The case of *Hanover National Bank et al. v. Bank of Greenville* is a suit regularly begun by bill against a defendant, and regularly proceeded with to a final decree; and, while we will not be understood to hold that there was even error in the action of the chancellor,—which question is not before us for decision,—we are sure his action cannot be held void or annulled, and that disposes of cases Nos. 7,749 and 7,460.

The decree allowing \$2,000 for damages in the way of attorney's fees is complained of, but, as the evidence on which the chancellor decided this sum to be reasonable was not put in the record, and is not before us, we cannot disturb the decree for this. The result is that the decree in each of the three cases hereinbefore mentioned must be affirmed.

(71 Miss. 444)

ALCORN v. STATE.

(Supreme Court of Mississippi. Jan. 1, 1894.)

PRIVILEGE TAX—STORES.

A plantation store, kept by the planter, to furnish his tenants with necessary supplies, as required by his contracts with them, the goods being sold at the usual credit prices, for a profit, and a staff of clerks employed, is a "store" subject to privilege tax.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

James Alcorn, convicted of conducting a

store without having paid privilege tax, appeals. Affirmed.

E. Mayes and Glover & Sawyer, for appellant. Frank Johnston, Atty Gen., for the State.

WOODS, J. The appellant was indicted for conducting a store in which the stock exceeded \$2,000, but never exceeded \$3,500, without first having paid the privilege tax for so doing. From the agreed statement of facts upon which the case was tried by the court below, a jury having been waived, it appears that the appellant is the owner of a large plantation, on which he has about 500 tenants; that on this plantation he has a store and a corps of clerks working in said store, said clerks being necessary to carry on the business. By the contract between the defendant and his said tenants it was the duty of the former to furnish the latter with all necessary goods, provisions, etc. In this store were kept all things necessary to furnishing the said cotton plantation, and the goods, provisions, etc., were sold to the tenants for a profit, and at the customary credit prices charged by merchants generally; but no goods were sold from the store to persons who were not tenants of the defendant. The privilege tax imposed by our law in cases of this character is not upon mercantile firms, or upon individuals engaged in the selling of merchandise, but upon stores. That the establishment on the plantation was a store seems hardly open to controversy. It is called a "store" in terms by the agreed statement of facts, and the recitals in that statement perfectly demonstrate that it is a "store" in the common and proper acceptation of that word. Business to the amount of thousands of dollars is there annually conducted. Goods are sold at credit prices for customary profits, as with merchants generally; and a corps of clerks is employed to transact this large, and presumably profitable, mercantile venture. That alone which distinguishes it from other stores is the fact that the proprietor, for reasons known and satisfactory to himself, sells only to a selected class of customers; but every owner of a store has the right to and does select his own customers. The judgment of the court below was correct, and is affirmed.

(71 Miss. 508)

HOPSON et al. v. LOUISVILLE, N. O. & T. RY. CO.

(Supreme Court of Mississippi. Jan. 1, 1894.)

EMINENT DOMAIN—MEASURE OF DAMAGES.

The measure of compensation to be awarded owners of land in a proceeding to acquire the right to continue a railroad thereon is not affected by their recovery of damages in trespass for unlawfully building and operating such road thereon.

Appeal from chancery court, Coahoma county; W. R. Trigg, Chancellor.

Action by the Louisville, New Orleans & Texas Railway Company against J. B. Hopson and another to condemn the defendants' land for a railroad. From a judgment for plaintiff, defendants appeal. Reversed.

Cook & Anderson, for appellants. Mayes & Harris, for appellee.

CAMPBELL, C. J. The jury was not properly instructed. The measure of the "due compensation" to be awarded the owners of the land was not in any way affected by their recovery in the action of trespass for unlawfully entering upon the land, and building and operating the railway. That action was for wrongful acts. This "proceeding is to confer, in a lawful way, the right to" continue the railway on the land. After the recovery in the action for damages, the railway company had no right to continue on the land. It had been recovered against for being unlawfully there, and for its unauthorized acts, but did not thereby secure any right. It still had the right to acquire a right of way, and thereafter enjoy it unmolested by the owners of the land; and that is what this proceeding is for, in which the owners are entitled to compensation, as if their former action had never been instituted. The two proceedings are distinct and different things, and to this effect are our decisions, which clearly draw the distinction. Reversed and remanded for further proceedings in accordance with this opinion.

(71 Miss. 833)

WEISE v. RUTLAND.

(Supreme Court of Mississippi. March 19, 1894.)

LIENS ON CROPS—FARM OVERSEER.

Code 1880, § 1360, giving every employé, laborer, cropper, part owner, or other person who may aid by his labor to make, gather, or prepare for sale any crop, a lien for his wages or interest on the interest of the person who contracts with him, applies in favor of the overseer of a farm where the crop has been grown.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Action by S. A. Rutland against L. D. Weise to enforce a lien on a crop. Judgment for plaintiff. Defendant appeals. Affirmed.

Jayne & Watson, for appellant. J. H. Wynn, for appellee.

COOPER, J. The appellee, who was an overseer or manager of the farm upon which the crop in controversy was grown, was entitled to the lien thereon, asserted by him, and allowed by the court below. By section 1360 of the Code of 1880 it was declared, *inter alia*, that "every employé, laborer, cropper, part owner or other person who may aid, by his labor, to make, gather, or prepare for sale or market, any crop, shall have a lien on the interest of the person who con-

tracts with him for such labor, for his wages or share or interest in such crop, whatever may be the kind of wages or the nature of such interest; and such liens shall be paramount to all liens or incumbrances or rights of any kind created by or against the person so contracting for such assistance, except the lien of the lessor of the land on which the crop is made, for rent and supplies furnished, as provided in the act in relation to landlord and tenant." In *Hester v. Allen*, 52 Miss. 162, it was held that an overseer did not have a lien upon the crops grown under his supervision, under the provisions of the acts of 1872 and 1873, providing for the lien of laborers upon agricultural products. But there is a wide difference between the provisions of the acts of 1872 and 1873 and those of the Code. By the act of 1872 it was declared "that there shall be a first lien in law upon all the agricultural products raised in the state, to secure payment of any wages due for labor done in the raising, handling, saving or transportation of such agricultural products, and the person or persons to whom such wages shall be due shall have the security of such lien," etc. Acts 1872, p. 131. By the act of 1873 the provisions of the act of 1872 were extended "to all cases in which any person may be working for, or otherwise interested in a share or part of the crop," etc. Acts 1873, p. 79. In delivering the opinion of the court, Chalmers, J., said: "Manifestly the services here described are not embraced and protected by the statutes under which the proceeding was instituted. These statutes are only intended to grant liens upon the crops, and to provide means for the enforcement thereof, for those classes enumerated therein, to wit, the employer and employé, the landlord and tenant, the cropper on shares," etc. But the statutes did not, as the learned judge stated, embrace by enumeration employés, and, though the decision was correct upon the statutes as they really existed, it is by no means clear that the same conclusion would have been reached if the lien provided for by them had also been given to any employé engaged in making the crop. It is to be noted that section 1360 of the Code of 1880 conferred the lien upon "every employé, laborer, cropper, part owner, or other person who may aid by his labor to make, gather, or prepare for market or sale any crop," thus extending the liens provided for by the acts of 1872 and 1873, by the most comprehensive language, to persons to whom the former laws did not apply. If the legislative purpose was to give the lien only to laborers, croppers on shares, and others who bestowed manual labor directly to the cultivation, gathering, and preparing the crops for market or sale, the material and obvious changes made in the Code would have been unnecessary. The inference is that the altered language was chosen for the purpose of conferring the lien upon persons

occupying different relations to the crops than those sustained by others to whom former statutes applied, and it is difficult to conceive of a class which would more naturally or justly fall within the scope of the added language than that to which the appellee belongs. The judgment is affirmed.

(71 Miss. 509)

ARMISTEAD v. CHATTERS.

(Supreme Court of Mississippi. Jan. 1, 1894.)

MASTER AND SERVANT—HIRING SERVANTS OF ANOTHER—MEASURE OF DAMAGES.

1. Under Code 1892, § 1068, making liable, in double damages, any person who "knowingly employs" a laborer under contract with another for a specified time, before the expiration of the contract, without the employer's consent, the fact that the laborer breaks the contract, and ceases to work thereunder, before he is employed by such person, does not render the latter any the less liable for damages.

2. In such case the measure of damages recoverable is double the damages sustained because of the breach of contract by the laborer, and is not limited to double the damages sustained by the employer because of the laborer's employment by such person.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Action by George W. Chatters against Lewis Armistead. From a judgment for plaintiff, defendant appeals. Affirmed.

Fitzgerald & Maynard, for appellant. E. Mayes and Glover & Sawyer, for appellee.

COOPER, J. The appellee brought this action against the appellant to recover the double damages allowed by law in favor of the employer as against any one who shall entice away his servant. The statute¹ is as follows: "If any person shall willfully interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises before the expiration of his contract, without the consent of the employer or landlord, he shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, and, in addition, shall be liable to the employer or landlord for double the amount of damage which he may have sustained thereby." The evidence for the plaintiff tends to show that he had employed three laborers or tenants who had commenced a crop on his land; that these men became dissatisfied, and had determined to abandon the service of the plaintiff, and had probably ceased to labor, but were yet residing on the plaintiff's place; that they applied to the defendant for work, who did not then employ them, but hired to them his teams to be used in moving their household effects from plaintiff's place, and

permitted them to move on his place, and afterwards employed them to labor during the term for which they had engaged with the plaintiff. The defendant contended in the court below (1) that if the laborers had broken their contracts with the plaintiff before they removed to the place of defendant, or were employed by him, he was not liable, under the statute, to the plaintiff's action; (2) that, if liable at all, the measure of the plaintiff's recovery would be double the damages sustained by the plaintiff because of the employment by the defendant of the laborers, and not double the damages sustained by the plaintiff by reason of the breach of their contract by the laborers. The defendant concedes that, if these propositions shall be decided against him, the damages awarded by the jury are reasonable, and the judgment should be affirmed.

The appellant's construction of the law cannot be maintained. It denounces a penalty, and fixes a liability, not only upon persons who "interfere with, entice away or induce a laborer or tenant to leave the service of his employer or landlord," but also against such persons who "knowingly employ" such laborer or tenant before the expiration of his term of service or tenancy, without the consent of his employer or landlord. The purpose of this clause of the law is to incite and constrain laborers and tenants who are under engagements for specified time to performance of their contracts, by rendering it difficult for them to secure employment elsewhere during the time for which they have engaged. It is made unlawful for a third person to interfere with, entice away, or induce a laborer or tenant to leave his employer or the leased premises before the expiration of his contract. But this is not all that the law declares. It is made equally unlawful to knowingly employ such laborer or tenant before the expiration of his contract, without the consent of his employer or landlord,—not before the breach of his contract, as appellant contends the statute to mean, but before the expiration thereof.

Nor is it true that the damages are to be apportioned, and a recovery by the plaintiff limited to such injury as he has sustained by reason of the employment, only, of the laborer or tenant by such other person. There cannot be an apportionment of damages between wrongdoers, but each is responsible for all injury inflicted. The statute does not inflict upon the laborer or tenant the criminal or civil responsibility it denounces against the third person; but such third person, by doing the thing forbidden, becomes liable to the employer or landlord for the damage he has sustained by the breach of contract by the laborer or tenant, to which breach he is made a party by doing the unlawful act. The judgment is affirmed.

¹ Code 1892, § 1068.

(71 Miss. 487)

KYLE et al. v. RHODES.

(Supreme Court of Mississippi. Jan. 1, 1894.)

DEEDS—DESCRIPTION—SUFFICIENCY—INJUNCTION—WHEN LIES.

1. A memorandum of an agreement to convey land, which describes it by a general reference to designations by which its boundaries may be made practically certain, is not void for uncertainty.

2. Where the possession of a vendee in a contract to convey land is forcibly invaded by the vendor, and the denudation of the land of its timber begun by him, the vendee is entitled to an injunction restraining the vendor from such acts pending the determination of the vendee's right to a conveyance.

Appeal from chancery court, Tunica county; W. R. Trigg, Chancellor.

Bill by Mary L. Rhodes against W. J. Kyle and another to enforce specific performance of a contract to convey land. From a decree for complainant, defendants appeal. Affirmed.

F. A. Montgomery, Jr., for appellants. Jas. R. Chalmers, for appellee.

WOODS, J. The action of the court below in overruling the demurrer of appellants to the original bill was not error. The written memorandum signed by appellants, whereby they agreed to convey to appellee the 47 acres of land involved in this litigation, is not void for uncertainty. There is no patent defect on the face of the writing. It is not an agreement to convey any land described by legal subdivisions, but it is a description of the premises agreed to be conveyed by a general reference to designations by which the boundaries of the lot may be made practically certain. It is a general rule that, where parcels of real estate are conveyed by well-known designations, such conveyances are valid, though resort to extrinsic evidence may be necessary to show what was accurately included in the general description employed in the conveyance. In the case at bar the memorandum in writing describes the premises by reference to extraneous facts, and in such instances it is proper to resort to extrinsic evidence to ascertain those facts, in order to show what was embraced in the general designation of the land which was employed by the grantor. *Eggleston v. Watson*, 53 Miss. 339; *Stewart v. Cage*, 59 Miss. 558. That resort to the extrinsic evidence referred to in the written undertaking to convey by these appellants will accurately ascertain what premises were intended, we can have no doubt.

The rule which requires the evidence of two witnesses, or one witness and corroborating circumstances, to overthrow an answer, was not disregarded or impinged upon by the decree of the chancery court. The bill of complaint avers a certain consideration for the agreement of the appellants to convey the 47 acres. This the answer denies, and sets up another consideration. The rule cited was applicable, in the peculiar at-

titude of the pleadings, and affidavits to them; and this rule was complied with when T. U. Rhodes, a witness for appellee, perfectly supports the averments of the bill on this point, and finds his evidence corroborated by more than one circumstance,—especially by the evidence of Owens. From the evidence of this witness, it appears that several months after the written agreement of appellants to convey had been signed and delivered, and some months after the lands embraced in the Miller lease should have been delivered up to appellants (if their version of the transaction was the correct one), and when they had not been so delivered up by Rhodes, conversations were had between Kyle and T. U. Rhodes, representing the appellee, looking to the execution of a quitclaim deed in pursuance of the written agreement to convey, and without any hint from Kyle that the quitclaim deed would not be made because of the alleged failure of Rhodes to assign the unexpired term of the Miller lease. There are other slightly corroborating circumstances to be found in the record before us, but we deem it unnecessary to refer to them in detail.

The injunction was not improvidently granted. The appellee had been, for some time before the appellants acquired title from Busby, in the possession and cultivation of the premises in controversy under a parol agreement of sale which existed between Busby and herself; and, after the acquisition of title by the appellants, appellee remained in the use and occupation of the same under the written agreement to convey of the appellants. While thus situated, her possession is forcibly invaded by appellants, and the denudation of the land of its timber is actually vigorously begun by appellants. Was the appellee required to supinely sit down, and see the premises laid waste, pending the determination of the question of her right to compel conveyance by appellants? Or might she not properly invoke the aid of a court of equity to restrain the onslaught of her adversaries during the time her appeal to the court for a settlement of the controversy was pending? The answer is not doubtful, and the injunction was properly granted. We concur with the chancery court in its conclusion as to the facts on the main contention, and the decree is affirmed.

(71 Miss. 949)

CHAMBERLAIN v. BOARD OF SUP'RS OF LAWRENCE COUNTY.

(Supreme Court of Mississippi. April 9, 1894.)

SCHOOL LANDS—OCCUPATION—LIMITATION—TAX SALES.

1. Code 1880, § 744, authorizing the board of supervisors to sue for any money due as part of a school fund for the support of schools in the county, empowers the board to sue for damages for the occupation of land selected in lieu of a sixteenth section of one of the townships of the county; and this though in the formation

of counties the land has been embraced in another county.

2. A board of supervisors' suit for damages for the occupation of land, for the benefit of the school fund, is subject to the statute of limitations.

3. Since school lands cannot be taxed or sold for taxes until legally leased (Code 1892, § 3780), and a tax collector's conveyance and list of lands sold to the state are prima facie proof that assessment and sale were legal (Id. § 1806), such conveyance and list show prima facie that the school lands included therein were legally leased.

4. One who claims land as sold under the abatement act of March 1, 1875, has the burden to prove that the lands were within the class to which that act applied, namely, lands delinquent for taxes of a year earlier than 1874.

Appeal from circuit court, Lincoln county; J. B. Chrisman, Judge.

"To be officially reported."

Action by the board of supervisors of Lawrence county against W. C. Chamberlain. Judgment for plaintiff. Defendant appeals. Reversed.

Cassedy & Cassedy and W. Trotter, for appellants. R. H. Thompson, for appellee.

COOPER, J. The recovery sought in this case is of money which, if collected, would constitute a part of a school fund to be applied for the support of schools in the county of Lawrence, and by section 744 of the Code of 1890 authority was conferred upon boards of supervisors to sue in such cases. Under the act of congress, the land to be selected was to be in lieu of the sixteenth section in Lawrence county "sold and patented to Will Whitehead," and it is affirmatively shown by the record that the land patented to Will Whitehead was in township 7 of range 11 east, in Lawrence county. The reservation of the land is sufficiently shown by the records, and under the act by which it was authorized its beneficial interest inured to those who but for the sale would have received the section patented to Will Whitehead, viz. the inhabitants of township 7 of range 11 east, in Lawrence county. The fact that, in the formation of new counties, the territory in which the land lies has been excised from Lawrence county, and is now a part of Lincoln county, has no influence upon the right of the beneficiaries to the enjoyment of property rights in the land, or upon the power of the board of supervisors of Lawrence county to maintain this suit. The bringing of a suit is not the exercise of a political power.

The demurrers to the seventh and tenth pleas were properly sustained. The title and possession of the land, if it has never been lawfully leased by public authority, remains in the United States, which cannot be dissembled. The demurrers to the third, sixth, and ninth pleas should have been overruled. The plaintiffs are subject to the bar of the statute of limitations. *Money v. Miller*, 18 Smedes & M. 531; *Brown v. Supervisors*, 54 Miss. 230.

It was error to exclude the evidence offered by the defendant to show that the lands had been sold for taxes, except as to the sale of 1875, and that he claimed under the tax sales. The tax collector's conveyance to individuals and list of lands sold to the state are declared to be prima facie evidence that the assessment and sale and all proceedings of sale were valid. Code 1880, § 526; Code 1892, § 1806. Since no valid sale of the land could have been made unless it had been previously leased by the authority of law, the tax deed and list of land sold to the state must be held to establish prima facie the fact that such lease had been made; otherwise, no effect would be given to the statute.

The evidence offered by the defendant to establish a sale of a portion of the land on the second Monday of May, 1875, under the act of March 1, 1875, known as the "Abatement Act," was properly excluded. The defendant did not propose to prove that the lands then sold were delinquent for taxes of a year prior to the year 1874, and it was only lands of that class which were subject to sale under the act of March 1, 1875. *Gamble v. Witty*, 55 Miss. 26; *Prophet v. Lundy*, 63 Miss. 603; *Chambers v. Myrick*, 61 Miss. 459; *Dingey v. Paxton*, 60 Miss. 1038. It devolves upon one claiming under a sale made under that statute to prove by independent evidence that the lands belonged to the class to which the statute applied. *Dingey v. Paxton*, 60 Miss. 1038; *Chambers v. Myrick*, 61 Miss. 459. The judgment is reversed, and cause remanded.

COCKRELL et al. v. MITCHELL.

(Supreme Court of Mississippi. Jan. 1, 1894.)
COMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENT.

Under Rev. Code 1890, § 1602, providing that no person shall testify to establish his own claim against a decedent's estate, which originated during decedent's lifetime, a party to an action for the possession of property cannot testify that decedent gave him the property. *Jackson v. Smith*, 8 South. 258, 68 Miss. 53, followed.

Appeal from circuit court, Monroe county; Newnan Cayce, Judge.

Action between S. J. Cockrell and others and T. A. Mitchell. There was judgment for Mitchell, and Cockrell and others appeal. Reversed.

Code 1890, § 1602, provides that no person shall testify as a witness to establish his own claim against a decedent's estate which originated during decedent's lifetime.

Gilleylen & Leftwich and Geo. C. Paine, for appellants. W. B. Walker, for appellee.

COOPER, J. The objection to the competency of the appellee as a witness should have been sustained. The purport of his testimony was to show that his father had given to him the mule in controversy, and, the

father being now dead, the appellee is disqualified to testify as a witness as to any transaction had with him. The case is within the principles of many adjudications of this court. It is entirely covered by *Jackson v. Smith*, 68 Miss. 53, 8 South. 258. Judgment reversed.

EDWARDS v. EDWARDS.

(Supreme Court of Mississippi. Feb. 19, 1894.)

ACTION TO RECOVER LAND—TRANSFER TO EQUITY COURT—WIFE'S PROPERTY—OCCUPATION BY HUSBAND AS A HOME—RENTS.

1. Defendant has no right to have an action to recover possession of property transferred to the chancery court, that he may interpose a claim to have the title divested from plaintiff, and vested in him, but his equitable rights will be unaffected by the legal action.

2. Where a husband buys property as a home for himself and family, and conveys it to his wife, and she afterwards goes into another state, for the professed purpose of visiting her father, and there obtains a divorce, he continuing to occupy the premises as his home, she cannot, in an action to recover possession, recover rents for the period prior to her divorce.

Appeal from circuit court, Adams county; W. P. Cassedy, Judge.

Action by Lella M. Edwards against Frank M. Edwards for recovery of land. Judgment for plaintiff. Defendant appeals. Reversed.

Jas. G. Leach, for appellant. Reed & Brandon, for appellee.

COOPER, J. The parties to this suit were husband and wife. During their coverture the husband purchased and caused to be conveyed to the wife the lands now sued for, and they were occupied as the home of the family. Several years ago the plaintiff, Mrs. Edwards, left her home, the defendant says for the professed purpose of visiting her father, who lived in the state of Arkansas, and who she reported to be in bad health, and not expected to recover. Mrs. Edwards, while in the state of Arkansas, exhibited her bill for divorce in the chancery court of Pulaski county, in that state, the grounds of divorce being cruel and inhuman treatment by the husband, and willful and obstinate desertion by him for more than two years. On the 30th day of January, 1892, on proof of publication duly made against the defendant as a nonresident, the said chancery court of Pulaski county passed a decree for the divorce of the parties *vinculo*. The present suit was instituted by Mrs. Edwards on the 6th day of October, A. D. 1892, to recover from Mr. Edwards the possession of the home he had bought and caused to be conveyed to her during their marriage. The defendant filed his petition in the court below, praying that the cause might be transferred to the chancery court, to the end that he might

interpose his claim to have the title of the land divested from the plaintiff, and vested in himself, to which relief he insists he is entitled in equity. The court below rightly declined to transfer the cause as prayed. In this action the legal title to the land is alone involved, and that should be tried in a court of law. Whatever equitable rights the defendant may have will remain to him unimpaired by the result of this action, and may be effectually asserted in a court of equity. The court below erred in permitting the plaintiff to recover for rents during her coverture with the defendant. The uncontroverted testimony shows that the property was bought and paid for by the defendant as a home for himself and family; that the plaintiff left the domicile of the husband for the professed purpose of visiting her father; and that the defendant continued to occupy the premises as his home, and is yet so occupying. Until the date of the decree for divorce secured by the plaintiff, she was the wife of the defendant, and he, as the husband, had the right to fix the matrimonial domicile and residence. For all purposes other than that of having her petition for divorce tried in the courts of the state of Arkansas, of which she claimed to be a resident, the residence and domicile of the husband was hers also. Although, by our constitution and laws, the disabilities of coverture are removed from married women as to property rights, and the husband, as such, has no estate in the lands of the wife, the possession of the husband *jure uxoris* of the family home is not so utterly destroyed as to render him liable to the demand of the wife, the owner of the land, for the rent of the home. The judgment is reversed, and cause remanded for a new trial.

(71 Miss. 691)

COLLINS et al. v. STATE.

(Supreme Court of Mississippi. Feb. 19, 1894.)

UNLAWFUL COHABITATION—INSTRUCTIONS—HYPOTHETICAL STATEMENTS.

Where the evidence of guilt, on a prosecution for unlawful cohabitation, is unsatisfactory, a conviction will be set aside by reason of an instruction hypothetically stating the evidence of the prosecution, the statements being an inferential argument, rather than fair recitals of the evidence, and it being stated therein that proof by an eyewitness is unnecessary if the existence of habitual sexual intercourse is shown by the circumstances in proof and the declarations of the parties, when the only declarations are those of positive denial.

Appeal from circuit court, La Fayette county; Eugene Johnson, Judge.

Jeff Collins and Susan Davidson were convicted of unlawful cohabitation, and appeal. Reversed.

J. W. T. Falkner and Kimmons & Kimmons, for appellants. Frank Johnston, Atty. Gen., for the State.

WOODS, J. In view of the unsatisfactory evidence made of the guilt of the appellants, we cannot resist the belief that the hypothetical statements of facts in the first instruction, which were the reverse of the sworn statements of facts of the witnesses, were potential in procuring the conviction of the accused. It is always dangerous to single out portions of the evidence, and charge the jury thereon; and, if the court proposes to state the evidence of the prosecution hypothetically, the statement must be made fully and fairly, and this was not done in the giving of this first instruction. In several particulars the instruction was unjust to the accused, and violative of the rule we have just announced. For example, the instruction informs the jury that proof of sexual intercourse by an eyewitness is unnecessary if the existence of habitual sexual indulgence by the parties is satisfactorily shown by circumstances in proof and the declarations of the parties. There are no declarations in the nature of admissions or confessions of guilt. The only declarations found are those of positive denial of all wrongdoing. Again, by the instruction, the jury is told that, "in determining the guilt of the defendants, you may take into consideration, if such appears from the testimony, that Jeff Collins is often seen and heard at Susan's house at late hours at night, and that he has been seen leaving at early hours in the morning; * * * that Jeff made the trade for the lot where Susan lives; that Jeff has paid money for Susan on said lot, and taken receipt for same; that Jeff has carried provisions to Susan, and eats at her table, and has clothes washed by her,"—when a careful examination discloses that the evidence distinctly and uncontradictedly demonstrates Susan made the trade for and bought the lot herself, that she paid for it herself, and that the receipts for such payments were given to her. Some, it may be all, of the other hypothetical statements of fact quoted by us, may be properly characterized as inferential argumentation, rather than full and fair recitals of the evidence of the witnesses. It cannot be safely affirmed that the suggestion by the court to the jury that these hypothetical statements in this instruction might be found in the testimony was not exceedingly prejudicial to the accused. Reversed.

(71 Miss. 337)

PATTY et al. v. WILLIAMS et al.

(Supreme Court of Mississippi. March 12, 1894.)

GUARDIAN AND WARD — ACTION BY WARDS FOR AN ACCOUNTING — PARTIES — DEFENSE — WHAT CONSTITUTES.

1. The voluntary grantees of a surety on a guardian's bond are proper parties to a suit in equity by the former wards against the personal representative of such guardian and the sureties on his bond for an accounting, and to hold the sureties liable for the result of such accounting:

2. The state, though the obligee on the bond, is not a necessary party to such a suit.

3. The fact that the administratrix of the guardian has filed accounts of the guardianship, which are pending on exceptions, is no defense to such suit.

Appeal from chancery court, Noxubee county; T. B. Graham, Chancellor.

"To be officially reported."

Action by B. G. Williams and others, against Ella H. Patty, administratrix of the estate of R. C. Patty, deceased, former guardian of plaintiffs, and others, for an accounting as to such guardianship, and to hold the sureties on his bond liable for the amount found to be due such wards. From an order overruling a demurrer to the petition, defendants appeal. Affirmed.

Mayes & Harris and C. B. Ames, for appellants. Rives & Rives, for appellees.

CAMPBELL, C. J. The voluntary grantees of Ames, one of the obligors on the official bond of R. C. Patty, on whom the guardianship of the minors was devolved in accordance with law, were proper parties to this suit, brought by the former wards to recover of their former guardian, and his sureties for performance of official duty, their estate in his hands, and to fasten liability for the result of the accounting sought on his sureties. It is true that the donees of Ames, one of those sureties, were not on the bond, and are not his personal representatives, but he is dead, and they are in possession, by virtue of conveyances from him, voluntarily made during his liability on Patty's bond, of all his property, and they are proper parties, on the principle announced in the following cases: *Van Winkle v. Smith*, 26 Miss. 491; *Garner v. Lyles*, 35 Miss. 176; *Ellis v. McGee*, 63 Miss. 168; and illustrated by *Bule v. Pollock*, 55 Miss. 309,—and since a voluntary conveyance by a debtor of all his property is fraudulent, in legal contemplation, we fail to see why a creditor of a debtor who makes a voluntary conveyance of all he owns may not invoke the benefit of section 503 of the Code of 1892; and on this ground the voluntary grantees of the surety Ames were properly made parties. The state of Mississippi is not a necessary party to such a bill. It cannot be made a defendant. It has no interest in the subject or object of the suit. No judgment that can be rendered can affect it, and its being a party to the suit is not matter of concern to the defendants. There is therefore no principle on which it can be held that the state should be a party. If a party, it would be a formal and nominal one, made such for no purpose, and accomplishing nothing. True, the general rule is that the holder of the legal title must be a party, so as to conclude the legal title by the decree,—that is because the holder of the title might assert it in another suit,—but the state could never be heard to assert any claim on the matter involved in this suit, and a decree in this suit would protect

the defendants against any demand on the bond to the extent covered by the decree. The state is the obligee in the bond, but it has made the bond a security for others who are entitled to resort to it as a means of satisfaction of their demands. The bond is mere inducement, used to show who are liable, and how to respond to the demand of complainants. At law, because of its regard for forms, the action would be in the name of the obligee in the bond for the use of the real parties in interest. Equity rises above such fetters, disregards merely useless forms, and looks only to substance, and hence requires only those to be parties who have some concern in the litigation, or whose presence is required to do complete justice between the parties; and, tested by this rule, the state is not a necessary party. The learned counsel for the appellants have not claimed that the state is a necessary party on the general rules of chancery procedure, but put the claim on the language of the statute requiring official bonds, which provides for them to be "made payable to the state, and shall be put in suit, in the name of the state, for the use and benefit of any person injured by the breach thereof." We do not regard the language quoted as intended to prescribe a formula for suits, or to do more than to declare that such bonds shall be held by the state as a security for all injured by their breach. The expression used may have been suggested by the fact that, when the statute was originally framed, all suits on such bonds, as now most of them, are brought in courts of law, where literally the direction of the statute is observed, and suit is brought in the name of the state for the use, etc. The statute under which the clerk of the chancery court may be made guardian declares that his official bond shall cover his liability as guardian, and it says nothing as to how suit shall be brought to enforce this liability. Another statute gives the right to resort to the court appointing a guardian to enforce the liability of obligors in the bond, which stands as security for the rights of parties. Counsel admit the jurisdiction of the court in this case, and complain only of the procedure, and, believing that to be free from any valid objection, the decree will not be disturbed on that account. The point that the administratrix of the deceased guardian has filed accounts of the guardianship, and they have been excepted to and are pending, is not available as an objection to this suit. That is a suit, as it were, by the personal representative of the deceased guardian against his former wards; while this is a suit by them, not only for an account of their estate in the hands of their guardian, but with the further object of reaching the obligors on the official bond of the guardian, and obtaining satisfaction of the decree sought. A final decree on the suit of the administratrix of the guardian might settle the sum for which the guardian

was liable, but nothing more, and the pendency of that presented no ground of objection to this. Even a final decree in the accounting by the representative of the guardian would be only *prima facie*, and not conclusive, against his sureties, which furnishes another sufficient answer to the objection that this suit is premature. The demurrer was properly overruled, and the decree is affirmed, with leave to answer in 30 days after mandate filed in the chancery court as of last term of said court.

(71 Miss. 367)

LOBDELL et al. v. MASON.

(Supreme Court of Mississippi. April 9, 1894.)
STATUTE OF FRAUDS — LEASES FOR MORE THAN A YEAR—APPOINTMENT OF AGENT.

1. Code 1880, § 1180, declaring valid "conveyances of land and contracts relating thereto," executed by an attorney in fact who is appointed by writing, executed and acknowledged by the principal, or proved like a conveyance, relates to the conveyances of estates of freehold, or for the term of more than one year, which section 1188 requires to be declared by writing signed and delivered, and not to the contracts for sale of realty, or leases for more than one year, which section 1292 requires to be in writing signed by the party to be charged, or an agent "thereunto lawfully authorized;" so that an agent orally authorized can make a written contract for a lease for more than one year.

2. Since a lease for more than one year must be by deed (Code 1880, § 1188), the agent's appointment to make it must also be by deed; but, if such appointment be oral, the lease may be enforced for the time over one year as a contract for a lease.

3. The action of unlawful entry and detainer (Code 1892, § 4461) involves only the right of possession, not the title; and will not lie against one who entered under a valid lease, and holds under a contract for a lease enforceable in equity.

Appeal from circuit court, Bolivar county; R. W. Williamson, Judge.

"To be officially reported."

Action for unlawful entry and detainer by O. S. Lobdell and others against Mrs. J. W. Mason. Judgment for defendant. Plaintiffs appeal. Affirmed.

Fred Clark, for appellants. Moore & Jones, for appellee.

COOPER, J. The appellants, who are the heirs at law of Mrs. E. J. Parkinson, brought this action of unlawful and forcible entry and detainer against the appellee to recover possession of the lands described in their petition. The case was tried by the judge on an agreed state of facts, and from a judgment in favor of the defendant the plaintiffs appeal. From the agreed facts it appears that in February, 1892, O. S. Lobdell, having verbal, but no written, authority from Mrs. Parkinson, executed to Mr. Mason a lease of the plantation of Mrs. Parkinson, of which the demanded lands were a part, for the year 1892. The concluding clause of the lease is as follows: "It is also agreed that the said J. W. Mason is to build a good plank cabin,

with brick chimney, front gallery, and shed room, near the northwest corner of the land, and on the northwest side of Brown's bayou, near the pool, and is to have the use of said land for the years 1892, 1893 & 1894." At the expiration of the year 1892, Mrs. Parkinson being then dead, the appellants notified Mason not to make the improvements on the land, as they would claim that the lease thereof beyond the first year was void under the statute of frauds, because Lobdell, the agent of Mrs. Parkinson, was not authorized in writing to make the lease. Mason assigned his term to his wife, the appellee, who, notwithstanding the notice by the appellants, proceeded to erect the cabin, whereupon the appellants instituted this action.

Our statute of frauds does not contain the first and third sections of the English act of 29 Car. II., by which the instruments therein referred to are required to be signed by the parties or by "their agents thereunto lawfully authorized in writing;" it is framed after the fourth section of the English act, and denies action upon the contracts it enumerates "unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized." Code 1880, § 1292; Code 1892, § 4225. Among the contracts it enumerates is the making of a lease for a longer term than one year. Under this statute the appointment of the agent by whom the contract is signed is not required to be in writing. *Curtis v. Blair*, 26 Miss. 309. Counsel for appellant concede that the authority of Lobdell to make the lease would not be required to be in writing by the statute of frauds, but contend that, after the decision in *Curtis v. Blair*, a new statute was adopted in this state, by reason of which no valid lease for more than one year could be executed by an agent having verbal authority only. The provision appealed to is section 1180 of the Code of 1880, and is as follows: "Conveyances of land, or contracts relating thereto, executed by an attorney in fact, for his principal, and duly acknowledged, or proved shall have the same force and effect as if executed and acknowledged by the principal; provided, such attorney be appointed by some writing, duly executed and acknowledged by the principal, or proved in the manner conveyances of land are required by law to be executed and acknowledged or proved; and when a conveyance by an attorney is in execution of letters of attorney, it shall pass the interest of the principal, though not formally executed in his name." The original of this section is found in the Revised Code of 1857, c. 37, art. 2, which Code was adopted several years after the decision in *Curtis v. Blair*. By another section of the Code it is provided that "No estate of inheritance or freehold, or for a term of more than one year, in lands or tenements, shall be conveyed from

one to another, unless the conveyance be declared by writing signed and delivered." Code 1880, § 1188; Code 1892, § 2434.

Shortly stated, the proposition of appellants' counsel is this: By section 1188 of the Code of 1880, conveyances in fee of freehold, or for a term of more than one year, must have been by deed; by section 1292, contracts for the sale of lands, tenements, or hereditaments, or the making of a lease thereof for a longer term than one year, were required to be in writing signed by the party to be charged therewith, or by an agent thereunto lawfully authorized; section 1180 declares what shall be necessary for the lawful appointment of an agent to execute for his principal the conveyances required by section 1188 or the contracts required by section 1292. Upon a cursory reading of the statutes, the position of counsel seems plausible and reasonable, but a careful examination of them shows it to be unsound. Prior to March 2, 1854, there was no law providing, *eo nomine*, for recording powers of attorney in this state. On that day an act was passed admitting such instruments to record, and making certified copies thereof admissible in evidence. Acts 1854, p. 156. This act, enlarged by the addition of three other articles, became, in the revision and codification of the laws, chapter 37 of the Code of 1857. One of the added articles authorized married women, jointly with their husbands, to appoint attorneys in fact by whom they could make conveyances of their estates; another provided for the appointment by one interested in the administration of an estate of an attorney in fact to represent him in such administration; the other (with some changes subsequently made) became section 1180 of the Code of 1880. This section has been brought forward from the Code of 1857 into those of 1871, 1880, and 1892, and in each of these Codes the statute of frauds as it was written when the case of *Curtis v. Blair* was decided has been reenacted. The effect now sought to be given to this section has never been suggested in any decision, and there is nothing in the history of legislation tending to show that it has received that construction in the legislative department. If the construction contended for by appellants be correct, no conveyance of land, or contract relating thereto, executed by an attorney in fact for his principal, would be valid unless the power of attorney be not only executed by the principal, but also "acknowledged by the principal, or proved in the manner conveyances of land are required by law to be executed or acknowledged or proved," for this is as much required by the statute as that the appointment shall be in writing. The error of construction into which counsel falls arises from the fact that he construes the words "contracts relating thereto" in section 1180 to have the same meaning as the words "any contract for the sale of lands,

tenements or hereditaments" in section 1292. This is a mistake. The "conveyances of land or contracts relating thereto" referred to in section 1180 are those which by section 1188 are required to be in writing, or contracts of like final character—contracts under and by virtue of which rights in land pass to and are vested in the party claiming thereunder, and which are usually spread upon the records under the recording acts as muniments of title. As we have shown, the original of this section was passed for the sole purpose of admitting to record powers of attorney, and making copies thereof receivable in evidence. The statute, substantially as it now exists, has been the law for nearly 50 years, in which time it has been four times reenacted in our Codes, in which Codes the statute of frauds has also been brought forward in the same language in which it existed when the decision of *Curtis v. Blair* was made. Under such circumstances, we should hesitate to adopt the construction of the statute now for the first time suggested, even if it appeared to be one which might have been reasonably adopted years ago. But we are satisfied that the construction given by us would have been accepted if the point had been then raised. Under section 1188 it was essential to the validity of a lease for more than one year that it should be made in writing, signed, and delivered. By section 993 of the same Code the use of private seals was dispensed with, and so the instrument required by section 1188 for the conveyance of the estates therein recited was the deed of the party. Since in the making of a lease for a longer time than one year it was essential that it should be by deed, the appointment of an agent to make such lease was also required to be by deed. *Story, Ag. § 49; Humphreys v. Wilson, 43 Miss. 328; Adams v. Power, 52 Miss. 828.* It follows from this that the lease, as a lease, was invalid from want of authority to execute it. But it is well settled that where an agent having power to make a contract for the sale of land, but no power to make a deed, makes a deed, though the instrument be void as a deed, it is good, in equity, as a contract to convey, and that a party entering upon lands under such an instrument is in equity entitled to retain possession. *Groff v. Ramsey, 19 Minn. 45 (Gil. 24); Thomas v. Joslin, 30 Minn. 388, 15 N. W. 675; Baum v. Dubois, 43 Pa. St. 260; Morrow v. Higgins, 29 Ala. 448; Walker v. Ledbetter, 31 Ala. 175; Worrall v. Munn, 5 N. Y. 229; Long v. Hartwell, 34 N. J. Law, 116; Reed, St. Frauds, § 337.*

The lease being invalid as a lease, but binding as a contract for a lease, the remaining question is whether the defendant, being in possession of the land, and claiming the same under such instrument, may defend her possession against the owner. The action of unlawful entry and detainer is a statutory action, and is given to "any one deprived of the possession of land by force, intimidation,

fraud, stratagem, stealth, and to any landlord, vendor, vendee, mortgagee or trustee or cestui que trust or other person against whom the possession of land is withheld by his tenant, vendee, vendor, mortgagor, grantor, or other person after the expiration of his right by contract express or implied to hold possession," etc. Code 1892, § 4461. The action is possessory only, and does not involve title (*Spears v. McKay, Walk. 265; Loring v. Willis, 4 How. 383*), and can be brought only in the cases specified in the statute (*McCorkle v. Yarrell, 55 Miss. 576*). The defendant entered upon the land in controversy under assignment of the right of her husband, who himself entered into a lease of the land valid as a lease for one year, and good as a contract of lease for three years. The owner was not therefore deprived of the possession of her property by force, intimidation, fraud, stratagem, or stealth, nor does the defendant retain possession as tenant "after the expiration of his right by contract to hold possession." On the contrary, the defendant is in possession, claiming under a contract by which she is entitled to compel the specific execution of a lease by the plaintiffs, and consequently is also entitled to the possession of the premises. A different question would be presented if the action was one in which the title to the property was involved. As the right of possession alone is involved here, the judgment of the court was properly rendered for the defendant, and it is affirmed.

(71 Miss. 580).

BUCKLEY v. GEORGE et al.

(Supreme Court of Mississippi. Feb. 19, 1894.)

JUDGE OF SUPREME COURT—AUTHORITY TO GRANT SUPERSEDEAS—APPEAL FROM APPOINTMENT OF RECEIVERS—EFFECT.

1. Code 1880, § 2311, provides that the chancellor may grant an appeal from any interlocutory order or decree whereby possession of property is to be changed, and that he "shall determine whether such appeal shall operate as a supersedeas." Section 1404 provides that the judges of the supreme court may severally grant writs of supersedeas and appeals from interlocutory decrees in chancery, whereby possession of property is to be changed, "provided such appeal shall have been refused by the chancery court." *Held*, that where the chancellor, on granting an appeal from an order appointing receivers, refuses a supersedeas, a judge of the supreme court may grant it.

2. A supersedeas granted on an appeal from an order appointing receivers, after the receivers have taken possession of the property, entitles the owner to an immediate restitution of such property.

Appeal from circuit court, Clarke county; S. H. Terral, Judge.

"To be officially reported."

Action by Mrs. J. E. Buckley against W. W. George and others to recover damages for the wrongful detention of personal property from the possession of plaintiff. From a judgment sustaining a demurrer to and dis-

missing the declaration, plaintiff appeals. Reversed.

Miller & Baskin, for appellant. Hamm, Witherspoon & Witherspoon, for appellees.

COOPER, J. This is an action at law by appellant to recover from appellees damages for injuries sustained by her under the following circumstances: On the 18th day of January, A. D. 1892, Putnam, Baldwin & Co. and others exhibited their bill against the appellant and others, and, by an order of the chancellor then made in vacation in said cause, the appellees were appointed receivers of the appellant's estate, consisting of a stock of goods, of the value of \$6,000; of notes, books, accounts, and other rights in action, of the value of \$20,000; and of her lands located in Clarke, Jasper, and other counties in this state, of the value of \$30,000. On the day of their appointment the appellees gave bond as receivers, and took possession of said estate. On the same day the appellant applied to the chancellor for an appeal, to operate as a supersedeas of the order appointing the receivers, and the chancellor granted the appeal, but refused to order the supersedeas. Upon the refusal of the chancellor to grant the supersedeas, the appellant presented her petition to the chief justice of this court, who made an order for the issuance of the writ of supersedeas upon appellant entering into bond in the penalty of \$20,000, which bond was executed by her, and was approved by the proper officer, who thereupon issued the writ of supersedeas, as required by the fiat of the chief justice, which writ was on the 25th day of January, 1892, duly executed upon the appellees. The appellant thereupon demanded possession of all her estate from the appellees, which was refused by them, and they continued in possession thereof until the 23d day of April, 1892. It is alleged in the declaration that, on the — day of —, 1892, the order of the chancellor appointing the receivers was reversed by the supreme court, and the receivers discharged. The declaration averred that, by reason of the defendants' withholding possession of her property from the 25th day of January, the day when the writ of supersedeas was served upon them, to the 23d day of April, when possession was restored to her, she has been greatly damaged; that the goods in the possession of the receivers were such as were usually kept in country stores, and depreciated in value during that time \$1,500; that her business was broken up, and her credit greatly injured, by her store being so long closed; and that during said period many of the claims due to her became barred by limitation, or otherwise impaired in value. Other injuries are specifically set forth in the declaration as having resulted from the act of the defendants in withholding from the plaintiff the possession of the property

after the service of the writ of supersedeas. The defendants demurred to the declaration, and assigned 34 special causes of demurrer. The demurrer was sustained, and the suit dismissed, and the plaintiff appeals. We shall notice specifically only a few of the numerous causes of demurrer. All have been considered; but many of them are disposed of by the statute which provides that "pleading shall not be deemed insufficient for any defect which could theretofore be objected to only by special demurrer." Code, § 703. It is contended by the counsel for appellees (1) that the defendants, being receivers of the chancery court, could not be sued without the permission of that court; (2) that, the chancellor having granted an appeal from the order appointing the receivers, and having refused to grant a supersedeas thereof, it was not competent for a judge of the supreme court to thereafter grant the writ; (3) that, if the supersedeas was lawfully granted, its effect was to preserve the status existing at the time of its service, and, since the defendants had then taken possession of the property under their appointment as receivers, it was their duty to retain it until the order or decree by which they were appointed should be vacated.

The first and third of these propositions may be examined together, for they are both determinable by the conclusion which may be reached as to the effect of the writ of supersedeas. Before considering this question, we will dispose of the objection that it was not within the power of one of the judges of this court to grant a writ of supersedeas after it had been refused by the chancellor. By section 2311 of the Code of 1880 it was provided that "an appeal may be granted by the chancellor in term time, or vacation, from any interlocutory order or decree whereby money is required to be paid, or the possession of property to be changed, or when he may think proper, in order to settle the principles of the cause or to avoid expense and delay; but such appeal shall be applied for within ten days after the date of the order or decree complained of; and bond shall be given as in other cases, and the chancellor shall determine whether such appeal shall operate as a supersedeas or not." By section 1404 of the Code it was also provided that "the judges of the supreme court may severally grant writs of supersedeas; they may grant writs of certiorari; they may grant appeals from interlocutory decrees in chancery, where by such decrees money is to be paid, or the possession of property is to be changed, or where such appeal is necessary to settle the principles of the cause; provided such appeal shall have been refused by the chancery court, or by the judge thereof in vacation," etc. It is urged by counsel that by section 2311 it is provided that the chancellor shall determine whether the appeal from an interlocutory decree shall operate as a

supersedeas, and counsel contend that it was never intended by the law to give to the judges of this court individually a supervisory jurisdiction over chancellors or chancery courts. Counsel are forced to admit that by section 1404 just that power is clearly conferred if the chancellor refuses an appeal from an interlocutory decree, but they contend that this statutory power should be strictly construed, and, since the chancellor did grant an appeal from the decree appointing the receivers, the chief justice had no authority to make an order for the supersedeas which the chancellor had denied. The argument of counsel is too refined and technical. The manifest purpose of the Code provisions is that the chancellor deciding a cause, and making an interlocutory decree therein of the class named, may grant an appeal therefrom with or without supersedeas, but that, if either the appeal or the supersedeas is refused by him, the party may apply to one of the judges of this court, who may grant the appeal or order the supersedeas; and such has been the practice for very many years. *Hill v. Robinson*, 23 Miss. 306; *Wilson v. Pugh*, 61 Miss. 449.

The real question involved is as to the effect of the supersedeas when served upon the receivers. Did it serve only to suspend further action under the decree, leaving the property committed by the order of their appointment to the receivers in their possession until the appeal should be finally determined, or was its effect to displace and discharge the superseded decree, and entitle the owner whose possession had been disturbed to an immediate restitution of the property? It is only by virtue of statutes that appeals may be taken from interlocutory decrees, and there seem to be but few states in which the right of appeal is given from an order appointing a receiver, as is the case in this state. It is uniformly held that an appeal from a final decree does not displace a receiver appointed by a prior interlocutory decree, but no light is cast upon the question here involved by that class of cases, for appeals from final decrees do not suspend administrative interlocutory decrees. In the states in which appeals are allowed from interlocutory decrees, we have found but one case in which the effect of a supersedeas upon an order appointing a receiver has been considered and decided, and that is the case of *State v. Johnson*, 13 Fla. 83. In that case a receiver had been appointed for a railroad, and a supersedeas had been allowed by the chief justice after the receiver had qualified and taken possession of the property. The chief justice, in addition to making an order of supersedeas, also directed an order to be made upon the receivers to restore the possession of the property to the appellants, to be by them held pending their appeal. This order the receivers refused to obey, and an attachment was issued against them for contempt. The question was very

thoroughly considered by the court, and the conclusion reached that the effect of the supersedeas was to retract and suspend the order by which the receiver was appointed, so that, though nothing which had been done before service of the writ was disturbed or its legal effect changed, there was no longer any efficacy in the decree to uphold action or the possession of the receivers. The character of the duties imposed upon the receivers in that case served to illustrate and support the argument of the court. In the order appointing them they had been directed to take charge of the Jacksonville, Pensacola & Mobile Railroad, the Tallahassee Railroad, and the Pensacola & Georgia Railroad, and to operate, manage, and conduct the same, "and to execute and perform the public trusts and obligations created in the charter of the Pensacola & Georgia Company, and in the agreement of the purchasers of said railroad in the extension of said road to the Chattahoochee river." It was contended for the receivers that the only effect of the supersedeas was to suspend further action on their part, and that it did not serve to withdraw from them the possession which they had received before the writ was granted. But the court said: "When the powers of the circuit court and the duties of its officers under the superseded order were suspended, what was the effect of the suspension? It seems to us that it was legally and logically this: The court and its officers are required to surcease and desist from taking and holding the railroads; their property and moneys; stop operating the same; stop receiving the revenues, paying expenses, building railroads out of the revenues; make no contracts; leave the roads as you found them until the determination of the matter by the court having cognizance of it." And, again, the receiver having no authority further to operate the roads, and refusing to allow the prima facie owners so to do, the necessary result is that the roads must cease their operations and business, the engines and cars must rest quietly upon the track, and the operatives be discharged, until the appeal be disposed of. The argument of necessity seems to us to be conclusive. Ordinarily, the rule undoubtedly is that a supersedeas fixes and preserves the existing conditions until the cause can be finally heard and determined. Nothing that has been done under the judgment or decree is undone, or its validity impaired; but nothing further can be done, for the judgment or decree being the sole authority for action, and it being suspended, there is necessarily a suspension of action. But it would be a fatal adherence to rules of procedure that would destroy an estate to preserve an analogy, and, when it is in the nature of things impossible that the status can be preserved by inaction, it necessarily follows that action of some sort by some one must be permitted. To give any effect to a supersedeas, it must

be held to at least suspend further action under the judgment or decree. It is true that at common law the rule was that, if the supersedeas was served after the levy of an execution, the officer sold the property, and retained the proceeds; but this rule was probably founded upon the theory that, by reason of the levy, the officer had acquired title to the thing seized, and that he was selling as owner, and not by virtue of the writ, for he could also sell such property after the return day of the writ, and even after the expiration of his term of office. Mr. Freeman thinks the power of sale after the return day, or after the expiration of the term of the officer, exists by reason of the authority of the writ, and not because of the property acquired by its levy; and so it seems to be held in some of the states. *Freem. Ex'ns*, § 106, and authorities there cited. But it is not a satisfactory derivation of the power to sell in cases where the authority of the writ is suspended by supersedeas of the judgment, which power also existed at common law. *Id.* § 32. But the common-law rule has never been adopted in this state, and with us the supersedeas discharges the levy of an execution. *Walker v. McDowell*, 4 *Smedes & M.* 118; *Parker v. Dean*, 45 *Miss.* 408. In other jurisdictions it is held that an injunction issued in favor of the defendant or a third person releases the levy of an execution. *Eldridge v. Chambers*, 8 *B. Mon.* 411; *Telford v. Cox*, 15 *Lea*, 298. Now, it is manifest that, when any action is to be taken by a receiver,—anything to be done by him with, or in reference to, the property committed to him by the court,—inaction by him would be a breach of his official duty, and a violation of the decree by which he is appointed. It is hardly necessary to say that in the great majority of cases of receiverships there is something more to be done than to hold an inert mass of property in an unchanged and unchanging condition. In all cases in which the order of the court, either expressly or by necessary implication, requires something to be done, inaction would itself be a breach of duty, if the supersedeas merely paralyzes the receiver as an actor, and leaves the property, as it were, in mortmain pending the appeal. The strange result will have been produced of changing the nature of the decree originally made, of authorizing that to be done which never would have been directed by any court, and of destroying the estate by enforced inaction and mere lapse of time. We are of opinion that the rule announced by the supreme court of Florida is the only one which can be enforced without danger of the destruction of estates, and that the legal effect of the supersedeas was to withdraw from the receivers the right to the possession of the property, and vest that right in the party from whom it had been taken. *State v. Johnson*, 13 *Fla.* 33; *Blondheim v. Moore*, 11 *Md.* 365. By her supersedeas bond, the

appellant had furnished full security to her adversaries; for, upon affirmance of the order appointing the receivers, she would have been required to restore the estate to them, in default of which they could have sued on the bond. *Everett v. State*, 28 *Md.* 190. The present suit is not against the appellees as receivers. No demand is made against them by reason of anything done by them officially. They are sued as individuals for a wrong done to appellant after their office had been suspended, and when, as receivers, they had no power to act. The judgment is reversed, demurrer overruled, and cause remanded.

(46 La. Ann. 141)

ARCHER et al. v. GONSOULIN. (No. 11,324.)
(Supreme Court of Louisiana. Jan. 15, 1894.)

APPEAL—DISMISSAL.

In this case, whether the appeal be considered as returnable in Opelousas at the term held in July, 1893, or in New Orleans at the term beginning in November, 1892, the appeal should be dismissed.

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; J. E. Mouton, Judge.

Action by W. R. Archer and others against Adrien Gonsoulin. There was judgment for defendant, and plaintiffs appealed. Heard on motion to dismiss appeal. Dismissed.

Philip H. Mentz and Gilbert L. Hall, for appellants. Foster & Broussard, for appellee.

On Motion to Dismiss.

PARLANGE, J. The judgment appealed from was rendered in May, 1892. The appeal was returnable to this court at its session held in Opelousas, and beginning on July 5, 1892. The appellants moved for an extension of time to file the transcript until the next session of this court at Opelousas in July, 1893. This motion was granted, although it was vigorously resisted by the appellee. After the extension had been granted, counsel for all the parties, averring that it was important to all the parties that the suit be finally determined as early as possible, joined in an application to this court, praying that the cause be made returnable at the next term of this court at New Orleans, which application was granted on July 8, 1892, and the order granting the same was duly entered on the minutes. The transcript was not filed at the term beginning in November, 1892. This court convened again at Opelousas on July 3, 1893. The transcript was filed at Opelousas on July 5, 1893. Thereafter the transcript was filed in New Orleans on August 11, 1893. The appellee has moved to dismiss the appeal.

Appellants' counsel states in an affidavit that in October, 1892, he wrote to the clerk of this court at Opelousas in regard to this case, and that the clerk, in his reply, stated that there was no order granted by this court

transferring this case to New Orleans. In his letter to the clerk, appellants' counsel wrote that he was quite sure that there was such an order; that it was applied for by counsel for both sides jointly; that he knew that he and the opposite counsel signed the motion and read it in open court, and that the court granted the same, but that he did not know whether the clerk had taken it down. The clerk states in an affidavit that, as appellants' counsel wrote that he knew that the motion was read in open court, and that the same was granted, he understood that the inquiry of appellants' counsel was whether a written order had been indorsed by the court on the paper containing the motion for the transfer. One of appellee's counsel has filed an affidavit in which, among other things, he states that he knew that the transcript was ready before the convening of this court in November, 1892; that after this court had been in session for a few weeks during its term beginning in November, 1892, he met appellants' counsel, and reminded him of the transfer of the cause to New Orleans; that appellants' counsel said that he had been informed that there was no order to transfer; that affiant then said that, if the order had not been taken down at Opelousas, he was willing to make an affidavit, conjointly with appellants' counsel, setting out that an order transferring this cause to New Orleans had been granted, the affidavit to be in place of the order said not to have been carried on the minutes, and that it was then agreed between the affiant and appellants' counsel to take up the case at once in New Orleans; that subsequently the affiant ascertained from the clerk of the lower court that the appellants had not taken out the transcript or paid for it; that the affiant then wrote two or more letters to appellants' counsel, asking him to take up his transcript. From an affidavit of the deputy clerk of the lower court, and from correspondence filed, it would seem that there was some delay in paying for the cost of the transcript, which was not settled until April, 1893. In his affidavit already mentioned, appellants' counsel avers that, until the clerk of this court at Opelousas wrote him that there was no order for the transfer, he intended bona fide, and was preparing, to file the transcript in New Orleans at the term beginning in November, 1892, but that, after receiving the clerk's letter, he believed that the order of transfer had not been rendered, and that he did not discover the truth until July 3, 1893; that in December, 1892, believing that the order had not been rendered, he so informed appellee's counsel, and that they agreed to dispense with the order and to take up the case in New Orleans, but that appellants' counsel required a certain sum of money for briefs, etc., which he requested by letter of his clients, from whom he received no reply.

In point of fact, this court, as already stat-

ed, granted on July 8, 1892, the joint application of the parties for the transfer of the cause to New Orleans, and the order was then duly entered on the minutes. No one denies that the order was made. It is evident that the court must be guided by its minutes. However regrettable may be the misunderstanding between appellants' counsel and the clerk, it is perfectly clear that it cannot have the effect of annulling an order rendered in open court, at the request of counsel for both parties, and in their presence. Besides, appellants' counsel, being erroneously informed, prior to the convening of this court in November, 1892, that the order had not been entered, made no attempt in this court to have the supposed omission supplied. Again, appellants' counsel having offered to waive the order supposed not to have been entered, and to try the cause at the term beginning in November, 1892, and appellants' counsel having agreed thereto, the agreement was not carried out by appellants' counsel, presumably because of appellants' neglect to supply the means necessary for briefs and other incidentals of the hearing. But even if any law had been cited to us, or if any had been discovered by us, which would authorize us to declare our order of July 8, 1892, null and of no effect, would appellants be benefited? The claim of appellants' counsel is that, having been misled into believing that the order had not been entered, he considered that the failure to enter the same revived the order previously rendered, extending the time for the filing of the transcript to July, 1893, at Opelousas. The authorities are numerous that, when an extension of time has been granted, the appellant is not entitled to three days of grace to file his transcript. *Cane v. Caldwell*, 28 La. Ann. 790; *Bienvenu v. Insurance Co.*, Id. 901; *Von Hoven v. Von Hoven*, 43 La. Ann. 1170, 10 South. 294, and other cases. This court convened in Opelousas on July 3, 1893, and the transcript was filed on July 5, 1893. It is therefore clear that whether the appeal be considered as returnable in New Orleans at the term beginning in November, 1892, or in Opelousas at the term beginning in July, 1893, the appeal must be dismissed. It is therefore ordered that the appeal be dismissed at appellants' costs.

BREAUX, J., recuses himself, having been of counsel.

(46 La. Ann. 286)
GATES v. GAITHER et al. (No. 11,467.)
(Supreme Court of Louisiana. March 12, 1894.)

MORTGAGE — LAW OF PLACE — JURISDICTION OF NONRESIDENT DEFENDANT — APPOINTMENT OF CURATOR.

1. An act executed in the state of Michigan between citizens of that state, and which, by the parties to the contract, is intended to operate as a mortgage on real estate situated in the

state of Louisiana, same will be given effect as a conventional mortgage affecting third persons after due inscription.

2. In case an absentee is sought to be reached and affected by a decree appertaining to real estate situate here, the appointment of a curator ad hoc to represent him is jurisdictional, and the *modus operandi* of appointment must closely conform to the constitution and law, on the pain of nullity.

(Syllabus by the Court.)

Appeal from district court, parish of Concordia; John S. Boatner, Judge ad hoc.

Action by Samuel G. N. Gates against H. B. Gaither and others to cancel a deed and for other relief. Defendants had judgment, and plaintiff appeals. Reversed.

C. L. Collins and Young & Young, for appellant. Lazarus, Moore & Luce, for appellees.

WATKINS, J. The codefendant Gaither was originally the owner of the Criton plantation. He sold to another codefendant (Washington) one-half interest, and to another codefendant (Caskey) the remaining half interest. Subsequently Washington sold one-fourth interest to Caskey, he thus becoming three-fourths owner, and Washington one-fourth owner. Caskey executed to the plaintiff in Michigan, where both parties resided at the time, a common-law mortgage upon his three-fourths interest, which was recorded on the 10th of March, 1891. Subsequently he executed to the plaintiff an act of sale to his three-fourths interest, which was recorded on the 26th of December, 1891. Intermediately between said mortgage and sale—on the 29th of September, 1891—Gaither instituted suit against Caskey to revoke the sale of one-half interest in the land for the nonpayment of the purchase price, and to recover damages for violation of his contract; and caused to be attached the one-fourth interest Caskey had purchased from Washington. Judgment was rendered dissolving the sale and sustaining attachment, and the amount of \$600 damages was allowed. Subsequently this one-fourth was sold under *fi fa.* and adjudicated to Gaither, he thus becoming invested again with three-fourths of the property, and Washington remaining the owner of one-fourth. In partition suit between Washington and Gaither there was a judgment ordering partition to be made by licitation of the Criton plantation, but no sale was made thereunder.

The following are the objects of this suit, to wit: First. The annulment of the sale of the one-fourth interest of Caskey in the Criton plantation made under attachment and *fi fa.* in the suit of Gaither v. Caskey. Second. To obtain judgment against Caskey for \$7,000, and enforce against the Caskey one-fourth interest in the plantation that he acquired from Washington plaintiff's common-law mortgage of March 10, 1891. Third. The annulment of the judgment of partition

in suit of Washington v. Gaither et al. On the trial there was a general judgment against the plaintiff, and he has appealed.

1. The averments of the petition in respect to the nullity of the judgment and sale in Gaither v. Caskey are: First. That said Michigan mortgage, at common law, has the legal effect of mortgage in Louisiana, and as such same was operative on the one-fourth interest in the Criton plantation prior to its attachment and sale; and that, as said mortgage was given to secure the payment of \$7,000, said sale and adjudication are null, for the reason that the price of sale was insufficient to discharge the aforesaid mortgage, having a preference over the attachment and sale of the judgment creditor. Second. That if said Michigan instruments are given effect as a sale of the property, then the attachment and sale were made of the property of another. Gaither and Washington make common cause, and unite in one answer, and they aver that "the alleged common-law mortgage and deed upon which the plaintiff sues and bases his demand has not the effect of a mortgage in Louisiana, nor the effect of a conveyance of real estate affecting third parties." In the alternative, they aver that if same ever existed it "was extinguished by payment or confusion, or by the alleged common-law deed;" but this allegation is supplemented by the additional one that if said deed was executed in alleged satisfaction of the aforesaid mortgage, same having been filed subsequent to the attachment of the property, it was without legal effect as a conveyance under the laws of Louisiana, and did not oust or divest their title, derived through previous attachment and sale. They also plead the proceedings and judgment in the partition suit of Washington v. Gaither et al. as *res adjudicata*, and as an estoppel. On this statement it is clear that the gravamen of the controversy is the common-law mortgage, and it must be determined by the legal effect that is to be given to it under the jurisprudence of this court. The deed not being recorded as a conveyance prior to the attachment, it is without effect, and may, consequently, be omitted from the discussion. This is apparently conceded by both parties. While noting the defendant counsel's contention in brief, to the effect that while this deed, unrecorded, did not affect defendant's title, it extinguished any rights Gates had under his mortgage, and released its grasp upon the property, we think it quite clear that it is unfounded in law; the legal effect of an avoidance of the sale being the revival of the mortgage which formed its consideration. *Chaffe v. Morgan*, 30 La. Ann. 1307, and authorities cited; 15 Am. & Eng. Enc. Law, p. 319; *Cooper v. Bigly*, 13 Mich. 463; *Tower v. Divine*, 37 Mich. 443.

With reference to the main question, the precept of our law is that "the form and

effect of public and private written instruments are governed by the laws and usages of the place where they are passed or executed. But the effect of acts passed in one country to have effect in another country is regulated by the laws of the country where such acts are to have effect." Rev. Civ. Code, art. 10. We have, therefore, in the present discussion—First, to determine whether the form and effect of the instrument in question, under the law and jurisprudence of Michigan, is such as to constitute same a mortgage at common law; and, second, if same is in effect a mortgage in the state of Michigan, what effect is to be given it in this state, where, by its terms, same was to have effect.

The following are the recitals of the act, viz.: "This indenture, made this twenty-fourth day of February, in the year 1891, between Joseph C. Caskey, of the city of Saginaw, in the county of Saginaw, and state of Michigan, party of the first part, and Samuel G. M. Gates, of Bay City, Bay county, state of Michigan, party of the second part, witnesseth that the said first party, in consideration of seven thousand (\$7,000) dollars to him paid by the second party, the receipt whereof is hereby acknowledged, has granted, sold, and conveyed, and by these presents does grant, sell, and convey, unto the said second party, and to his heirs and assigns forever, an equal undivided three-fourths interest in and to that parcel of land known as the 'Criton Plantation,' situated in the parish of Concordia, and state of Louisiana, and described as bounded on the north by Tecoa, east by Helena, south by swamp, and west by Onerupa, and being the south half of southwest quarter of section twenty-four, the south half of section twenty-three, all of sections twenty-five, twenty-six, twenty-seven, thirty-five, and thirty-six, and containing in the aggregate 3,606.45 acres of land, more or less, together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining. And the said first party, for his heirs, executors, administrators, or assigns, does covenant and agree with said second party, his heirs and assigns, that at the time of the delivery of these presents he is well seised of the above-granted premises in fee simple; that they are free from all incumbrances whatever; and that he will, and his heirs, assigns, administrators, and executors shall, forever warrant and defend the same against all lawful claims whatever: provided that these presents are on the express condition that if the said first party shall pay to the said second party all sums of money which may become due and payable from said first party to said second party at any time within one year from and after the date of these presents, according to the terms of a certain bond of even date herewith, executed by said party, and delivered to said second party, then

these presents and the said bond shall cease, and be null and void. But, in case of the nonpayment of the said sum or sums mentioned and described in the said bond, or the interest thereof, or any part of said principal or interest, at the time, in the manner, and at the place specified for the payment thereof, and the performance of all the conditions of the said bond, then, and in such case, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, and on such sale to make and execute to the purchaser or purchasers, their heirs and assigns forever, good, ample, and sufficient deed or deeds of conveyance in law, rendering the surplus moneys, if any there should be, to the said party of the first part, his heirs, executors, or administrators. And the said party of the second part, upon payment of all sums aforesaid, and the interest thereon, according to the terms of said bond, agrees that he will forthwith execute, or cause to be executed, and delivered to the said party of the first part, his heirs or assigns, a good and sufficient deed reconveying the land above described to said party of the first part, his heirs or assigns, without fraud or delay. The execution and delivery of this instrument shall not hinder or prevent the said party of the first part, his heirs, or assigns, from cutting, manufacturing, and removing any timber now standing, or being upon the land hereinbefore described: provided, that the security of said party shall not be impaired thereby. In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written. Jos. C. Caskey. [L. S.] Executed in presence of C. C. Stevens, J. K. Stevens, A. F. Lewis."

From the foregoing recitals it appears that the act is one under private signature, and was executed in the state of Michigan, by and between citizens of that state; that the consideration expressed is \$7,000 in cash, had and received, for which the property was sold and conveyed; that the property described was real estate situated in the state of Louisiana; the act containing the proviso that if the grantor shall pay all the sums of money due at a time specified the same shall be void, otherwise the grantee may sell and convey the property, and from the proceeds of sale realize the amount due. Taken as a whole, the act only evidences a quasi alienation of the res, and not an absolute title to the property,—a *jus in re*, though of a limited, or qualified character, and defeasible upon the happening of the condition specified. In *McIvaine v. Legare*, 34 La. Ann. 928, this court said: "We consider it well settled that the court will take judicial notice of the well-known fact that the common law forms the basis of the jurispru-

dence of our sister states of this Union," etc.; citing *Copley v. Sanford*, 2 La. Ann. 335; *Whiston v. Stodder*, 8 Mart. (La.) 98; *Colt v. O'Callaghan*, 2 La. Ann. 984. Under the title of "Absolute Conveyance Intended as a Mortgage," in the American and English Encyclopedia of Law, we find this principle announced, viz.: "One of the most notable instances of an equitable mortgage is that of an absolute conveyance intended as security for a debt, and to have the effect of a mortgage." Page 675. And it is supported by numerous authorities, collated from various common-law states. From the same work we find the description given of a common-law mortgage, in these words, viz.: "A formal or common-law mortgage has the component parts of a deed conveying the fee, with a condition added that it is to be void upon the payment of a specified debt, or the performance of some other designated thing. * * * Covenants against waste are sometimes inserted." Page 788, citing *Jones, Mortg.* § 60. Applying these precepts to the instrument in question, and the inference is clear that it is a common-law mortgage. This precept has been maintained by the Michigan court, employing these words, to wit: "According to the well-settled rules of law, a deed given to secure money lent, and redeemable by its payment, is itself a mortgage," etc. *Hurst v. Beaver*, 50 Mich. 612, 18 N. W. 165. In *Jeffery v. Hursh*, 58 Mich. 246, 25 N. W. 176, and 27 N. W. 7, the principle is even more distinctly stated as applicable to the instrument under consideration. "It is now settled," say the court, "as well as any principle of law can be, that an absolute deed, with a bond or defeasance or agreement executed at the same time to reconvey the estate upon payment of a certain sum of money, constitutes a mortgage, if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction; and, when this is the case, it is a conclusion of law that they constitute a legal mortgage,"—citing *Wilson v. Shoenberger*, 31 Pa. St. 295; *Reitenbaugh v. Ludwick*, Id. 131. The two instruments under consideration—bond and deed—are contemporaneous in date, and state the same identical consideration, and consequently same constitute a mortgage in the state of Michigan; and under an agreement of counsel the laws and decisions of the courts of Michigan are to be considered as if they were formally introduced in evidence. Hence our conclusion is that the first question above propounded must be answered in the affirmative, and we must now determine what effect is to be given this act as a mortgage in Louisiana, under the terms of our Code (article 10).

In determining the effect to be given to the act in the state of Louisiana we must lose sight of its phraseology, and look to its substance alone, as the law and jurisprudence of the state of Michigan must be con-

sulted with respect to its form; and, consulting the laws and jurisprudence of Michigan, we find its form is complete and perfect, so as to constitute the act in question a valid mortgage there; and, finding same valid in form in the state of Michigan, they must be assumed and treated as valid in form in Louisiana. The essential difference between a mortgage at common law and one in Louisiana consists in the fact that the former is a quasi alienation, and imports a delivery of possession, while the latter is a mere security, without importing delivery, to the mortgagee. Rev. Civ. Code, art. 3290. Such an instrument as the one in question is not, in essence or in form, a mortgage in this state; but, being a mortgage in form and in essence in Michigan, it must be given effect as a mortgage in Louisiana, where it was intended to operate and have effect.

Quite a contrariety of cases of this and similar purport have been presented to this court for investigation and decision, and it will be necessary to review and analyze some of them in order to find the settled theory of our jurisprudence on this mixed question. In *Bernard v. Scott*, 12 La. Ann. 489, the court dealt with an act quite similar to the one under consideration, the principal question being whether it was "a sale under a condition which had become absolute," or a mortgage; the property in controversy covered by the act being situated in Louisiana, while the parties to the act resided in the states of Mississippi and Ohio, respectively. Of this instrument this court said: "As the parties to the instrument were both residents in states where the common law prevails; as the instrument was executed in a common-law state, and in the form adopted to create a mortgage there; and as a part of the property subject to the action of the instrument was situated in the state of Mississippi,—there can be no question that the original intention of the parties to the act—the grantor and the grantee—intended to create a mortgage to secure the payment of a sum of money;" citing 2 Bl. Comm. 158, and 4 Kent, Comm. p. 159. The court further held that, as the act covered property situated in Mississippi and Louisiana, a purchaser was bound to inquire what effect the law would give to the same. Similar instruments have been held to be mortgages of property situated in a common-law state, and afterwards removed here. See *Smoot v. Russell*, 1 Mart. (N. S.) 522. "In the case of *Hayden v. Nutt*, 4 La. Ann. 71, the court recognized an instrument similar in form, executed in the state of Mississippi, and operating on the undivided interest of the grantor in a tract of land situated in the state of Louisiana, as a mortgage." Of similar import is *Watson v. James*, 15 La. Ann. 386. In *Bowman v. McKleroy*, 14 La. Ann. 594, it was held that "a deed of trust executed in Mississippi and recorded in this state, which expresses that it was given to secure a certain amount, * * *

cannot be enforced here against the property mortgaged to the prejudice of the other mortgage creditors, except for the amount specified." In *Miller v. Shotwell*, 38 La. Ann. 891, the decision of the court turned upon a proper construction of an act which was executed in the state of Alabama between citizens of that state on one part and a citizen of this state on the other part, and in respect to lands situated in this state. In terms the instrument under consideration in that case was very much the same as the one under consideration in the instant case, and of it this court expressed the opinion that "the text of the instrument, viewed in the light of our jurisprudence and of the laws of Alabama, * * * leaves no doubt in our minds as to the true intention of the parties thereto. It was clearly to create a mortgage by way of security for the purchase price of lands therein described." To the same effect is *Ricks v. Goodrich*, 3 La. Ann. 212; *Gause v. Bullard*, 16 La. Ann. 107; and *Howe v. Austin*, 40 La. Ann. 323, 4 South. 315. Indeed, there is no decision we can find, and there is not one to which we have been referred, which announces a contrary doctrine. The act under consideration in *Thibodaux v. Anderson*, 34 La. Ann. 797, was executed in the parish of St. James, this state, between citizens of this state, and couched in the form of a common-law mortgage or deed of trust, the property affected being situated in this state. His act was duly recorded, and came in competition with a mortgage which was executed in the form prescribed for mortgages in this state; hence the question of rank or priority properly arose on the distribution of the assets realized from the sale of the property under executory proceedings. Of this particular contract this court said: "This is, indeed, the first instance of this description which ever was submitted to this court for determination on a question of mortgage affecting third persons. We do not hesitate to declare that, as this nondescript act does not indicate its character, and does not clearly purport on its face to be a mortgage, third persons are not bound to ascertain its nature, object, and purport by analyzing its features by systems of reasoning which do not with certainty conduce to the conclusion that it is an act of mortgage. It is easier to say what the act is not than to say what it is. Whatever contract it was intended to evidence, it surely cannot be claimed that it is expressive of a mortgage given by Anderson to Boyd susceptible of affecting third persons, although it might have been entitled to be considered as security between the parties. Parties contracting in this state are required, in all their transactions affecting immovables situated therein, conferring or divesting real rights in such property, to comply with the forms prescribed by the local law and usages; * * * otherwise third persons, sought to be affected thereby, will not be concluded. *Index animi*

verbo. Reasonable doubt as to the true character of an act will always protect effectually third parties from the operation of the same." From the foregoing quotation it clearly appears that the real distinction between the contract in question in that case and those examined in cases previously cited is visceral, and consists in the difference in the situs of the contracts and the citizenship of the contracting parties. Such a contract as the one treated of in that case does not come within the saving power of article 10 of the Civil Code, because it was not an act passed in one country or state to have effect in another country or state. But it was a contract between citizens of this state with regard to real property in this state, and couched in the terms of a common-law deed of trust; hence the entire subject-matter of the covenant came under the operation of the laws of this state, which give no sanction to either trust deeds or trust estates. The conclusion is, therefore, quite clear that on both reason and authority there is no incompatibility between the principle announced in *Thibodaux v. Anderson* and that announced in *Miller v. Shotwell* and previous cases.

Giving to the Michigan contract the legal effect it was, by the parties, intended to have in this state, where it was by them intended to operate, and the conclusion is irresistible to the effect that, operating as a mortgage under our law, its timely and proper inscription affected third persons, and creditors of the grantor and mortgagor in this state, just as completely as if same had been couched in the form prescribed by our law; and this principle is distinctly announced in *Bowman v. McKleroy*. Giving to the Michigan contract effect as a mortgage in this state, two consequences necessarily follow, to wit: First, that, it having been duly inscribed in the book of mortgages in the parish where the property is situated prior to the attachment of Gaither, it primed the privilege he acquired by his seizure; second, that, it being a mortgage evidenced by contract, it must be given effect as a conventional mortgage under our law. Giving to it the effect of a conventional mortgage under our law, and the amount it was given to secure being \$7,000, with interest, the price of sale under *fi. fa.* issued under Gaither's judgment was insufficient to cover it, and the adjudication is necessarily void *ab initio*, and conveys no title to the purchaser. Code Pr. 684. The general rule formulated under that article is that property specially mortgaged cannot be sold at the suit of a third party, unless the price bid exceed the amount of such special mortgages; for, if there be no surplus of proceeds after the payment of the mortgage, there is no price, and the adjudication would have no consideration.

2. In view of the opinion we entertain of the Michigan contract, the plaintiff is undoubtedly entitled to its enforcement against the one-fourth interest in the Criton planta-

tion which Caskey acquired from Washington, and was subsequently attached by Gaither. Consequently plaintiff is entitled to personal judgment against the defendant Caskey—he having personally appeared in the court below and answered, submitting himself to the jurisdiction of the court—for the sum of \$7,000, with recognition of lien and mortgage on the property described, to take date from the 10th of March, 1891, the date of recordation.

3. With regard to the nullity of the judgment in the partition suit we are fully satisfied. The averment of the petition is that the suit was instituted by Washington against Gaither and petitioner, the latter being a citizen of the state of Michigan; and that no curator ad hoc was appointed to represent him as an absent defendant, the clerk of court having appointed an alleged curator, without affidavit being made of the absence of the judge of the district court from the parish at the time, and the record of said partition suit disclosing that the curator thus appointed neither accepted the appointment nor acted under it by filing an answer or otherwise. The theory of plaintiff's counsel is that in such case the appointment of a curator ad hoc is jurisdictional, and we have so held in many cases. It is manifestly a *sine qua non*. *Butler v. Washington*, 45 La. Ann. 279, 12 South. 356; and *Young v. Upshur*, 42 La. Ann. 362, 7 South. 557. The only means of subjecting the property to the power and jurisdiction of the court is by citing the plaintiff as an absentee by means of a curator ad hoc. The petition has this indorsement, to wit: "The foregoing petition considered, it is ordered that John Dale be appointed curator to represent the interest of Samuel G. N. Gates. This signed in chambers, 13th January, 1892. W. H. Shields, Clerk of said Court." This order is not preceded by any affidavit. The constitution confers upon the general assembly the power "to vest in clerks of court authority to grant such orders and do such acts, as may be deemed necessary for the furtherance of the administration of justice;" and it further declares that "In all cases, powers thus vested shall be specified and determined." Const. art. 122. In pursuance of this constitutional authority, the general assembly enacted a statute which provides that, "in the absence of the judge from the parish, or in cases of his recusation, they [clerks of district courts] shall have power to allow interventions, grant orders of third opposition, * * * appoint special tutors, or tutors ad hoc to minors, appoint curators, and curators ad hoc, appoint advocates to absentees." Act 43 of 1882, § 4. And this statute further provides that "in all cases, in which the clerk is empowered by this act to grant orders in the absence of the judge from the parish, or in case of his recusation, the oath of the party, or of his attorney, that the judge is absent from the parish, or being recused he is unable to give the order, must be annexed to the petition, or application. Id. § 6.

The power thus vested by the legislature in the clerks of court is particularly specified, and the mode of its exercise is also specified in mandatory terms, and same cannot be exercised in any other manner. There is no room for construction. The statute is plain. The requirement of the law directing the appointment of curators ad hoc to absentees is jurisdictional, and the manner of its observance is a rule of propriety. In the case of *Washington v. Gaither* there is not the least appearance of this statute having been complied with, and the result is the absolute nullity of the judgment pronounced in so far as the present plaintiff's rights are concerned; and it is our province and duty to thus declare it. The judgment appealed from is erroneous, and must be reversed. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is further ordered, adjudged, and decreed that there be judgment in favor of the plaintiff—First, annulling the judicial sale of the one-fourth interest of Joseph G. Caskey in the Criton plantation which he purchased from John Washington; second, that he have and recover of and from the defendant Caskey the sum of \$7,000, with recognition of his lien and mortgage, taking date from the date of its registry, March 10, 1891; third, annulling the judgment rendered in the partition suit of *Washington v. Gaither*. It is finally ordered and decreed that the defendant and appellee Gaither be taxed with the costs of both courts.

(46 La. Ann. 509)

AUSTIN v. WILLIAMS (HEWITT, Intervener). (No. 11,483.)

(Supreme Court of Louisiana. March 26, 1894.)

SEQUESTRATION—THIRD OPPONENT—RIGHTS.

A third opponent, contesting the rank of plaintiff's privilege, as well as the bona fides of his claim, must stand or fall by his allegations. Reserving the benefit of a suit against the defendant he had previously filed prevents his taking anything by way of opposition that he seeks advantage of in such pending suit. Third opposition in one court cannot be used or employed as an accessory of another suit in a different court.

(Syllabus by the Court.)

Appeal from district court, parish of Red River; W. Pike Hall, Judge.

Action by L. L. Austin against T. J. Williams, Jr., in which J. E. Hewitt became intervener and third opponent. Judgment for plaintiff against the defendant, who alone appeals. Modified.

J. F. Pierson and C. W. Elam, for appellant. Goss & Parsons and J. C. Pugh, for intervener and third opponent, appellee.

WATKINS, J. The original suit was instituted by plaintiff on a claim of \$600 for services rendered the defendant as overseer on his Elmwood plantation, in the parish of Red River, for and during the year 1893,

and falling due on the 1st of December of that year. Averring a special lien and privilege upon the crops grown on said plantation during that year, and his fear and belief that the defendant will part with or remove same, he obtained a sequestration thereof. Soon after the aforesaid sequestration, the intervener appeared, and filed opposition in the sequestration suit, the purport of which is that he had filed a suit on the 12th of December, 1893, against same defendant in the district court of the parish of De Soto, wherein he claimed judgment for the sum of \$8,653.41, and in which he had procured the sequestration of certain property of the defendant, consisting of corn, cotton, and cotton seed, which suit and seizure are referred to and made parts of his said opposition; that in said court he also obtained an attachment of the defendant's property in said suit, situated in the parish of De Soto, "and which your petitioner hereby affirms, and in no way abandons." The opponent further represents that said sum of money was advanced by him to the defendant to enable him to make and gather his crops on the aforesaid plantation in the parish of Red River during the year 1893, and to secure which he has a lien and privilege on said crops, as the furnisher of necessary plantation supplies. He further represents that the plaintiff's suit was brought at the instance and through the procurement of the defendant, and that his property was sequestered with his consent; averring that the plaintiff was not indebted to the defendant at the time in any amount. His prayer is for judgment against the defendant, enforcing his lien and privilege on the defendant's crops of 1893, and rejecting the demands of the plaintiff altogether, and especially his demand for a lien and privilege. The plaintiff excepted to the petition of intervention, on the ground that it disclosed no cause of action, and no interest in the subject-matter of his suit which opponent seeks to protect or defend, and therefore his opposition should be dismissed. In the alternative of said exceptions being overruled, the plaintiff answers, and avers that third opponent has not intervened in good faith, but that the purpose and object thereof is to hinder and delay him in recovering a judgment against the defendant with a recognition of privilege on his crops. He further avers that by virtue of third opponent's having judicially made claim to a priority of privilege on the crops of the defendant over respondent, he has estopped himself from disputing the debt and privilege he asserts against the defendant, and hence the opposition should be dismissed. The defendant, in answer to the third opposition, denies all and singular the allegations therein contained, and specially denies the allegations of fraud and collusion therein charged. His answer to plaintiff's demands is a general denial. On these issues the case was tried,

and the following judgment rendered, to wit: First. In favor of the plaintiff against the defendant for the sum of \$586, recognizing and enforcing his lien and privilege as overseer on all the crops by the defendant produced on his Elmwood plantation in the parish of Red River in 1893, condemning same to be seized and sold. Second. In favor of third opponent as against the defendant, "recognizing and enforcing his lien and privilege as furnisher of necessary plantation supplies to the extent of \$7,135 on all the crops made and raised by [the defendant] during the year 1893." Third. That, as between the plaintiff and the intervener, the former is entitled to preference on the proceeds of sale. From that judgment the defendant alone appealed, after making an unavailing effort to obtain a new trial. In this court neither the plaintiff nor the opponent has made any appearance by counsel or brief, and neither has answered the appeal.

In this court defendant's counsel makes complaint of the second paragraph of the judgment alone, thus acquiescing in other portions of the decree. The question for decision is whether third opponent was entitled to recover judgment against the defendant, "recognizing and enforcing his lien and privilege as furnisher of necessary plantation supplies to the extent of \$7,135 on all the crops made and raised by [him] during the year 1893;" or should it have been restricted to the question of fraud on the part of the plaintiff and defendant in the institution of this suit, and that of the relative rank of the respective privileges of the plaintiff and third opponent? The defendant's contention is that third opponent's right to judgment is confined to the last two propositions, and that the second paragraph of the judgment is *ultra petitionem*, and was a complete surprise to him, from the effect of which he is entitled to relief at our hands. From the foregoing synopsis of the petition of third opposition it appears that the complaint is that at the time plaintiff filed suit and sequestered the defendant's crops on his plantation in Red River parish, nothing was due him, and that the suit and sequestration were the result of a fraudulent combination between the plaintiff and defendant. It is apparent that the object to be obtained thereby was the defeat of plaintiff's seizure of defendant's crops, on which opponent claimed a superior or ranking lien and privilege, and against which he had obtained writs of sequestration and attachment in his suit in De Soto parish, though he had not, at the time, procured a seizure thereunder. Third opponent's effort was undeniably to forestall the plaintiff's seizure, and secure control of the defendant's crops, in such manner as to render his suit and writs in the parish of De Soto effective. The opening averment of his opposition proves this, for it makes specific reference to the De Soto suit, stating its date, amount claimed, the

writs therein issued, and the relief prayed for, and is concluded by the statement, "and which [suit] your petitioner hereby affirms, and in no way abandons." The further averment in reference to the lien and privilege is only adjutory of the allegation previously quoted in regard to the De Soto suit, to which it must be held to refer. His prayer for judgment against the defendant for the recognition of his lien on the crops of 1893 must be taken in connection with the immediately following request that the demands of the plaintiff be rejected, and especially his demand for a lien and privilege, the two being correlative parts of the same relief, each having reference to the principal object to be obtained by the suit,—the control of defendant's crops. It must be observed that the third opponent demanded no writ and obtained no seizure under his opposition. The assertion of his rank and priority over the claim and privilege of the plaintiff, as well as his charge of fraud against the plaintiff and defendant, are admissions of plaintiff's dominion and control of the res, rendering his opposition necessary. We think third opponent's demand, properly construed, restricts his right to judgment in respect to the question of fraud and rank of privilege, and that he was entitled to no other judgment or relief. Reserving, as he does on his petition, all of his rights and claims in the De Soto suit against the defendant, the third opponent must resort to that jurisdiction for the ascertainment and determination of same. His third opposition in the Red River court cannot be employed as an aid or auxiliary of his suit in the De Soto court against same defendant. We are of opinion that the contention of the defendant is correct, and that the judgment appealed from should be amended and affirmed. It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to eliminate therefrom that portion which recognizes the lien and privilege of third opponent for necessary plantation supplies furnished to the defendant to the extent of \$7,135 on all the crops made and raised by him during the year 1893, and, as thus amended, same be affirmed; costs of appeal to be taxed against third opponent as appellee.

(46 La. Ann. 536)

COCHRAN v. COCHRAN. (No. 11,350.)

(Supreme Court of Louisiana. March 26, 1894.)

COMPROMISE—MATTERS DETERMINED—BEST AND SECONDARY EVIDENCE.

1. The plaintiff claimed a ninth in his grandfather's succession, after having settled his interest in the property of his grandmother.

2. The title to the property was in the name of the grandmother, though it belonged to the community between the grandmother and grandfather. But it was inventoried as her property, and in the compromise the whole of it was treated as property belonging to her succession.

3. Having compromised on the basis that

the property belonged to her succession, the heir is without right to recover, a second time, part of the same property, as coming to him from his grandfather's estate.

4. The defendant had made reasonable search for the lost document.

5. The foundation required had been laid. Secondary evidence to prove its contents was admissible.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Clarence Cochran against Mrs. Agnes Cochran to recover an interest in property in defendant's possession. Judgment for defendant. Plaintiff appeals. Affirmed.

Gus A. Breaux, for appellant. Walter D. Denegre, curator ad hoc, for appellee.

BREAUX, J. The plaintiff sues, as an heir of his grandfather, to recover an interest in property in defendant's possession. He is one of three forced heirs of the succession. The defendant and her sister were the other heirs. The sister, Emma Cochran, died in 1889. By last will and testament, the defendant inherited all property left by the sister. In 1878 plaintiff's grandmother, authorized by her husband (his grandfather), bought a lot and improvements in New Orleans. On the face of the papers, it was community property existing at the time between plaintiff's grandfather and grandmother. The former died in 1884, and latter in 1886. The succession of the grandfather was opened in Kentucky, and his will was propounded for probate in that state. He bequeathed his property to his wife. The mother of plaintiff (he being a minor, at the time, represented by her) contested the application for probate. The opposition was withdrawn on the execution of two notes of \$250 each by the legatee under the will (plaintiff's grandmother) in favor of plaintiff's guardian. There was litigation in Kentucky to recover the payments of these notes. Payment was refused on the ground that the guardian was without authority to represent her son, and that the notes were without consideration, for the reason that the grandfather had, by will, disinherited plaintiff, his grandson, and that he was absolutely without interest to recover anything. A judgment was pronounced, decreeing that the plaintiff was entitled to the sums represented by these notes. We glean from the testimony that the withdrawal of the opposition to the probate of the will, and the interest claimed for the opponent in the grandfather's estate, were the moving causes of the compromise, and the execution of the notes. These notes were paid in execution of the judgment rendered. The grandfather owned very little, if any, property, other than community property, in this state. Pending the litigation of these notes, the grandmother died; leaving her property to her daughters, and omitting, as had the grandfather, to

mention the plaintiff, her grandson, as a legatee. Her legatees offered her will for probate in this state, in which, as an absentee, she had immovable property. The will was probated, and the defendant and her sister, from whom she has since inherited, were recognized as heirs, and, as such, were placed in possession. In the inventory the property is described and appraised as belonging to the succession of the grandmother. No reference is made to the grandfather as part owner. The plaintiff, availing himself of his forced heirship, contested defendant's rights to the entire property. There was a compromise effected, under the terms of which he was promised the sum of \$3,000. In order to enable the two heirs to raise the amount, they mortgaged the property of which plaintiff claimed to be part owner. In all these proceedings in court, and in all transactions regarding the heirs and their interest, the succession is referred to as that of the grandmother alone. But the property is described as a whole, and a value is placed upon it as belonging exclusively to her succession. In other words, the compromise relates to plaintiff's estate, *eo nomine*, but the description of the property includes the property of the grandfather. Plaintiff's counsel, in support of the demand of his client, argues, substantially: That the compromise did not contemplate including any of the rights of plaintiff, as forced heir, in the grandfather's succession, but that it was limited, exclusively, to the grandmother's property. The defendant interposes the plea of payment, and pleads that plaintiff has no further interest in the property; that he has been settled with, and paid in full,—not only for the interest in the grandmother's estate, but also for his entire interest in the property, both as heir of his grandmother, and as heir of his grandfather. The judgment of the court *a qua* was in favor of the defendant. The plaintiff prosecutes this appeal.

Bill of Exceptions.

The original compromise agreement was forwarded to the heir now deceased. It was lost, and in consequence the defendant offered to supply the loss, and to that end produced a copy, substantially, of the document, and offered verbal testimony. The plaintiff objected on the ground that the foundation had not been laid to admit secondary evidence of loss. The testimony was admitted over plaintiff's objection.

The issue presented in the bill of exceptions is the first which presents itself for our determination. The defendant deposed that her sister had sole charge, and acted in her own right, and as her (defendant's) agent, in making the compromise; that she never saw any of the papers; that she made thorough and diligent search in her sister's papers that came into her possession after her death, and searched in those places where there was

any likelihood of finding them; that she had made every possible effort, and inquired of those who might have seen it, all in vain. There is no absolute rule upon the subject. The required evidence to show the contents of an original paper will vary according to circumstances. This defendant shows that she has exhausted her sources of information, and the means of inquiry which suggested themselves. Nothing creates the impression that the search has not been made in good faith. All that can be required, in the absence of the least cause of suspicion, is reasonable diligence to find the original. In the case of *Baines v. Higgins*, 2 La. 222, cited by plaintiff's counsel, the statement was made that the witness had seen the bill of sale among the papers of the deceased, and that some of the papers were lost. The glaring defect is that the witness had never made search for the document, and did not establish a reasonable certainty of loss. In another of the cited cases (*Lockhart v. Jones*, 9 Rob. [La.] 386), affiant deposed that he had handed the letter to his attorney, and that since he had made search for it in his own office. Having handed it to his counsel, an account of his search in his own office will not always make it evident that the writing is lost. In *Ticknor v. Calhoun*, 29 La. Ann. 278, the court held the evidence did not establish the loss; the deposition of the attorney who testified about a transfer did not show that his client had exhausted all sources of information. We do not think the case at bar would justify excluding the evidence that was admitted regarding the contents of the written compromise.

On the Merits.

The principle enunciated—that compromises regulate only such matters as appear to be embraced in them by the intention of the parties, and that they should not be extended to other things—is plain and self-evident. It remains for us to determine whether the facts of this case are within the application of the principle. In the proceedings before the court having probate jurisdiction in Kentucky, the appearance of plaintiff's guardian was not limited to an opposition to the probate of the grandfather's will. The interest of the plaintiff in the estate is referred to, and does not appear to have been overlooked when notes were executed in favor of the guardian. That interest is stated as being the consideration. It is not established that the withdrawal of the opposition to the probating of the will was all that was required of the plaintiff, in order that he might recover the amount promised. If he had no right in the estate at all, the withdrawal of the opposition was without any importance whatever, and offered no consideration for executing two notes. It is stated in positive terms, in the pleadings, that the notes were given in consideration of the interest of Clarence Cochran, plaintiff in this

sult. We do not think it devolves upon us to decide that he was absolutely concluded by the proceedings before the court in Kentucky. This was in 1884. His guardian had closely litigated the rights of her ward, and had received payment of the notes. She must have been advised of the extent of the interest of her son in the property in this state, and the son, on reaching his majority, in 1886, must have known that the property of which he claimed part was carried in the inventory of his grandmother's estate as belonging exclusively to that estate. In all the calculations made with the view of agreeing upon an amount for his interest, the value of the whole property was the basis. After the amount had been agreed upon, the funds needful to pay the plaintiff were raised by placing a mortgage on the whole of the property to secure the loan that was applied to the payment of the plaintiff. That method of obtaining the amount needed was generally discussed, and the court has no reason to conclude that plaintiff's guardian, and afterwards the plaintiff himself, were not fully informed upon the subject. The act of compromise contains the declaration that upon payment of the \$3,000, which were paid subsequently, the plaintiff obligated himself to execute a complete discharge of all the rights and interest belonging to the succession of Mrs. Martha A. Cochran in Louisiana,—particularly, the property described and set forth in the inventory. To illustrate: A. and B. were the owners of property. The title was in the name of the former, but it was well known that the latter owned half. After their death, C. and D., heirs, entered into a compromise, and treated the property as belonging exclusive to A.'s succession, and they make a settlement entirely on that basis. D., who received his share, determined by reference to the value of the whole property, has no right to claim an interest in B.'s half after having received his portion of the whole property. The res, and not a mere name, enters into the consideration of the question involved. The plaintiff has received his fractional interest in the thing; whether in the name of his paternal ancestor or in the name of his maternal ancestor, it does not alter the fact that he is paid in full.

The defendant, before this court, prays for damages for frivolous appeal. The issues are not frivolous, and not such as authorize us to grant damages. The judgment is affirmed, at plaintiff's and appellant's costs.

(46 La. Ann. 467)

STATE NAT. BANK OF NEW ORLEANS v.
LANAUX et al. (No. 11,434.)

(Supreme Court of Louisiana. Feb. 12, 1894.)

DISMISSAL OF APPEAL—ACQUIESCENCE IN JUDGMENT—REMAND.

On motion to dismiss an appeal on the ground of acquiescence in, and voluntary execution of, judgment, this court will not deter-

mine the question on ex parte affidavits filed first in this court, in the absence of admissions of their truth by the appellant, but will remand the case to the lower court, in order that evidence may be heard, and a record returned to this court for final action.

(Syllabus by the Court.)

Appeal from district court, parish of Assumption; Walter Guion, Judge.

Action by the State National Bank of New Orleans against Pierre Lanaux and Theodore Venissat. From a judgment for plaintiff, defendant Venissat appeals.

Beattie & Beattie, for appellant. James McConnell and Horace E. Upton, for appellee.

On Motion to Dismiss the Appeal.

BREAUX, J. The appeal was taken by Theodore Venissat, one of the defendants. The grounds for the dismissal of his appeal are that the defendant and appellant has acquiesced in the judgment or order of sale appealed from by permitting the order of judgment appealed from to be executed without objection, opposition, or protest. The appellee annexes exhibits to his motion, consisting of affidavits, setting forth substantially that, although present in the parish of Assumption at the date of seizure of the property and at the date the plantation seized under the writ of seizure and sale was sold and adjudicated to the plaintiff, the State National Bank of New Orleans, the defendant and appellant remained quiescent, and offered not the most remote opposition; that he was in the actual possession of the plantation at the date of seizure and when it was sold; that the expenses of cultivating the plantation from the date of the seizure were paid by the plaintiff bank; that a short time after the adjudication to it the bank sold the property to Ernest Roger; that after the latter's purchase, the defendant and appellant having continued to occupy the dwelling on the plantation, he was notified to vacate. He complied with the notice, and delivered possession. General averments are made by the opponents, all to the effect that the appellant acquiesced in the judgment. Able counsel for the defendant and appellant have not presented any argument in opposition to the motion. In argument the appellee, the bank, does not ask that these ex parte affidavits be passed upon by the court, but relies upon them in support of its application to remand the case. It also urges that other facts be heard prior to decision. It occurs to us that the interest of the appellant in this appeal is not at all manifest. Though we do not finally pass upon that question, we think it of sufficient importance to give it some consideration in remanding the case. It has generally been held that a sale under execution after the delay for a suspensive appeal passes title, though the judgment is subsequently annulled, on the principle that the destruc-

tion of a power does not carry with it the destruction of the effect previously produced by the power. *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233; *Farrar v. Stacy*, 2 La. Ann. 211; *Williams v. Gallien*, 1 Rob. (La.) 94; *Baillio v. Wilson*, 5 Mart. (N. S.) 214. It is therefore ordered that the case be remanded to the lower court, with instructions to the judge to hear evidence contradictorily on the question of acquiescence, and send up the record thereof according to law. Rehearing refused.

(46 La. Ann. 356)

PARISH OF CONCORDIA v. BERTRON et al. (No. 11,473.)

(Supreme Court of Louisiana. March 12, 1894.)
POLICE JURIES — DELINQUENT TAX COLLECTORS — SALE OF PROPERTY — PRESCRIPTION.

1. Police juries have the capacity to buy the property of delinquent tax collectors, seized, sold, and adjudicated at sheriff's sale under the judgment and execution of the jury against the delinquent. Const. art. 218; Rev. St. §§ 3321, 351, 354; 2 Hen. Dig. p. 1557, No. 1 et seq.

2. To divest the title of the owner, the adjudication of his property for taxes must be preceded by notice to him. Const. art. 210; *Bank v. Lannes*, 30 La. Ann. 871; *Smith v. City of New Orleans*, 43 La. Ann. 726, 9 South. 773; *Breaux v. Negrotto*, 43 La. Ann. 427, 9 South. 502.

3. The prescription of three years will not avail the adjudicatee at the tax sale, or those claiming under him, when no such notice has been given the owner. *Id.*

(Syllabus by the Court.)

Appeal from district court, parish of Concordia; John S. Boatner, Judge ad hoc.

Petitory action by the parish of Concordia against S. R. Bertron to recover certain lands. From a judgment for plaintiff, defendant and his warrantors appeal. Affirmed.

Elam & Dale, for appellant R. S. Bertron. Clinton & Garrett, for appellants warrantors. Lazarus, Moore & Luce, for appellee.

MILLER, J. The plaintiff, the parish of Concordia, instituted the petitory action to recover certain lands. The title of the plaintiff is derived from the sale of the lands under execution of the judgment of the parish against P. W. Chase, at which sale the parish became the adjudicatee. When the sheriff's sale was made, the lands were assessed for taxation for the year 1888 against P. W. Chase, and on the 4th May, 1889, were adjudicated to the state by the tax collector, the basis of the adjudication being this assessment for the year 1888. Thereafter, the lands were listed to the board of commissioners of the fifth levee district, the lists being recorded on the 24th April, 1891, in the office of the clerk of the court, and ex officio recorder of Concordia. Act No. 44 of 1886, § 11. The levee board conveyed the lands to S. R. Bertron, the defendant, on the 15th December, 1891; the convey-

ance embracing the lands in controversy, as well as all lands in Concordia acquired by the board under Act No. 44 of 1886. The defendant asserts title under the conveyance of the board. Avers the parish is estopped from disputing his title, because, subsequent to his purchase, the parish authorities assessed taxes against him on the property; that the parish itself has no title, because incapable of acquiring the property. Pleads the prescription of one, three, and five years. And finally calls in warranty the levee board, and, in the event of eviction, claims judgment against the board for the price, and the amount of certain taxes alleged to have been paid by the defendant for the years 1888 to 1892. The levee board, answering the call in warranty, specially deny any liability for counsel fees claimed by defendant in the event of eviction, and adopt his defenses. The judgment of the lower court was in favor of plaintiff, against defendant, for the land, and in favor of defendant, against the warrantor, for the price, reserving the question of taxes paid. The appeal is by defendant and his warrantor.

The main defense in this court is the asserted incapacity of the plaintiff to acquire the property at the sheriff's sale. That sale was to satisfy the judgment of the parish against Chase for parish taxes collected by him as sheriff and ex officio tax collector, and for which he had not accounted. Defendant's argument supposes the parish cannot acquire property at a sheriff's sale to satisfy the judgment of the parish against the delinquent tax collector. The property of the debtor is the common pledge of his creditors. It is the right of the creditor to recover judgment against his debtor, issue execution, and subject his property to sale for satisfaction of the judgment. The plaintiff in execution, under the general rule, certainly, can buy the property at the execution sale, if, to protect his interest, he chooses to purchase. The purchase is a mode of satisfying the judgment. On what ground is a parochial corporation to be excluded, when a judgment creditor, from the right to purchase the debtor's property accorded by law to the seizing creditor? The theory of the defendant and warrantor seems to be that the purchase of property by the police jury at the sheriff's sale made under execution against its debtor is forbidden by law and public policy. The competency of the police jury, created for purposes of parochial government, to acquire property, without any restrictions, may well be doubted. That general question is not involved in this case. The purpose of the purchase, in this case, was to restore the funds derived from its taxes, not accounted for by the tax collector. Such purchases affirm no capacity of the jury to purchase property generally, and hence contravene no public policy. They suppose, only, that the parish may realize funds diverted from its coffers by the de-

linquent tax collector, and for that purpose may, if necessary, purchase his property at the sheriff's sale under the execution of the parish. This theory that assails the capacity of the parish to purchase at the execution sale would, it is presumed, equally deny that the property, if tendered by the debtor in satisfaction of his debt, could be received by the parish. The view we have expressed of the right of the parish to purchase under its execution—sufficiently obvious, it would seem—finds confirmation in our statutes authorizing bonds of tax collectors, and suits by police juries on these bonds. It is difficult to appreciate why the jury, authorized to sue, recover judgment, and issue execution, should not have the right to buy at the sheriff's sale, when necessary to make that execution effective. Const. art. 218; Rev. St. §§ 3321, 351, 354; Hen. Dig. p. 1557, No. 1, et seq.

It is urged in defendant's brief that the supreme court of Minnesota, under a statute authorizing a county to purchase land for public use, held that the county cannot buy property at an execution sale to satisfy a judgment on an official bond. The statute is restrictive of any capacity to purchase, except for public use. The limitation of such legislation doubtless exerted its influence in the Minnesota decision. We have no such statute, and the power of the parish to buy, in this case, we think, is implied by the laws defining the functions and powers of police juries.

The defendant and warrantor rely on the defendant's tax title, i. e. the adjudication of the property to the state for the taxes of 1888, the listing of the lands to the levee board, and the conveyance of the board to the defendant. The parish was owner when that tax adjudication was made. It is in proof that no notice was given to the parish of that adjudication, as required by the constitution, and notice, under our jurisprudence, is essential, to divest the title of the owner. Const. art. 211; *Bank v. Lannes*, 30 La. Ann. 871; *Smith v. City of New Orleans*, 43 La. Ann. 726, 9 South. 773; *Breaux v. Negrotto*, 43 La. Ann. 427, 9 South. 502.

There is an allusion in the brief for defendant and warrantor to the prescription of three years. This prescription is of no avail in a case like this; and, besides, the tax adjudication was in 1889, and the suit was filed in 1891.

In the brief of defendant, it is said this suit (petitory in its character) should not have been brought against defendant. The suit to try title is properly directed against defendant asserting title under his deed.

Again, it is urged by defendant that, in this action, plaintiff must show title better than any that can be opposed to him. We think plaintiff has met this requirement.

We have thus disposed of the defenses urged in this court, and of other points in the answer nothing need be said.

The defendant asks for the affirmance of the judgment in his favor against the warrantor for the price paid by defendant. The warrantor insists that he should not pay counsel fees. As to the restitution of the price, there is no question (Rev. Civ. Code, art. 2506), and that is all the judgment against the warrantor awards. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs against the appellants.

(46 La. Ann. 380)

EDWARDS et al. v. PLAQUEMINE ICE & COLD-STORAGE CO. (No. 11,478.)

(Supreme Court of Louisiana. March 12, 1894.)

ACTION FOR PRICE—REDUCTION FOR DEFECTS—LIMITATIONS.

1. The purchaser sued for the price is entitled, notwithstanding the prescription of the action *quantum minoris*, to claim the reduction of the price for defects in the thing sold. Rev. Civ. Code, arts. 2541, 2544; *Thompson v. Milburn*, 1 Mart. (N. S.) 468; *Girod v. His Creditors*, 2 La. Ann. 546.

2. When a machine stipulated to be furnished is delivered to the party bound to receive and pay for it, and who, after a fair opportunity for examination and trial of the machine, promises payment of the price, with conditions afterwards waived by him in the suit brought to compel that payment, the burden of proof will be on the defendant to prove the defects in the machine alleged to exist.

(Syllabus by the Court.)

Appeal from district court, parish of Iberville; E. B. Talbot, Judge.

Edwards and Kurz, as assignees of John S. Moore and O. W. Knight, sue to recover the balance due from the Plaquemine Ice & Cold-Storage Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Kernan & Laycock and Alex. Hébert, for appellant. Johnson Armstrong and D. H. Cross, for appellees Edwards and Kurz. Frank McGloin, for appellees Moore and Knight.

MILLER, J. The plaintiffs, as assignees of John S. Moore and O. W. Knight, brought suit in the lower court to recover the balance claimed to be due by the defendant company on a contract of Moore and Knight to deliver and erect an ice manufacturing machine, with all fittings and appurtenances. The defendants excepted that by the terms of the contract no suit could be brought until the manufacture of ice had commenced, and it was proven that the machine could manufacture 10 tons of ice daily; the exception insisting the machine had never demonstrated this capacity. The defendants answered, denying that the assignors of plaintiffs had fulfilled their contract, averring that the machine furnished was defective, not adapted to the purpose, nor according to the contract; that by reason of the defects the defendants were entitled to \$4,710, for which defendants claimed judgment in reconvention against

the assignors, residents of New Orleans. The assignors pleaded their domicile to the reconventional demand against them in the fourteenth judicial district court of Iberville. The exception was sustained, and from that judgment there is no appeal. This eliminates the reconventional demand from consideration. The judgment of the lower court was in favor of plaintiffs, and defendants appeal.

The defendants' contention is well-founded that the plaintiffs, as assignees of Moore and Knight, are subject to all defenses against the assignors. Nor the defenses of defendants precluded by the prescription pleaded by plaintiffs of one year applicable to the action *quantum minoris*. It is well settled the purchaser sued for the price may always claim a reduction for defects in the thing sold. Rev. Civ. Code, arts. 2541, 2544; *Thompson v. Milburn*, 1 Mart. (N. S.) 468; *Girod v. His Creditors*, 2 La. Ann. 546. The appeal submits the issue of fact whether the ice machine was delivered and erected by Moore and Knight in accordance with their contract. The answer and the testimony of defendants undertake to maintain that the ice machine in all its parts was defective, and unfitted for the purpose of the contract. The boiler, it is contended, was not of the capacity—i. e. 50 horse power—stipulated; and it is charged that the generator, absorber, ammonia well, condenser, exchanger, valves, and other appurtenances were each and all defective. The witnesses for the defense are the engineer of the defendants, and an expert who never saw the machine in operation, and testifies some months after its erection. These witnesses insist that there is but one test to determine the capacity of a boiler, and that test is against this boiler. On this point the testimony is at variance with that of four witnesses of plaintiffs, three of whom are connected with foundries in this city. The conclusion from their testimony is that the measurement of the different parts of a boiler are generally accepted as indicating the capacity of the boiler. There are also produced the "catalogues," as they are called, of five leading manufacturers of and dealers in boilers. It appears that the dimensions of boilers given in their catalogue as those of 50 horse power conform to that furnished under the contract. Again, it appears the boiler was bought from the Nagle Company for \$1,172, 2 per cent. off. The expert of defendants testifies the boiler was diminished in value to the extent of \$1,000. This would make the boiler worthless. If this expert testimony is accepted, then the Nagle Company received, and Moore and Knight paid, over \$1,100 for a comparatively worthless boiler. It seems to us that defendants' testimony on this branch of the case proves too much, and that of plaintiffs must prevail. As to the generator, absorber, valves, and other appurtenances, in all of which defendants' testimony points out se-

rious defects, there is opposed to defendants' witnesses the testimony of those who constructed for the contractors these portions of the machine. The plaintiffs' witnesses testify that these parts of the machine were of the best material and workmanship. This testimony, based on personal knowledge, and from disinterested persons, is entitled to great weight, and outweighs, in our opinion, that of defendants' engineer, and of the expert, who mingles with his testimony statements which appear to be based on information given to him. We think on this branch of the case the defense fails. As to the actual working of the machine the engineer testifies that it failed to turn out the required quantity of ice. On the other hand, the testimony of one of the contractors, who operated the machine for about 60 days after it was erected, is that the capacity to manufacture the quantity stipulated was fully demonstrated. He testifies there were some defects developed incident to new machinery, and of no importance. Besides the engineer, defendants called an assistant connected with the working of the machine. He points out but one defect, and that of a trifling character. In this condition of the record it cannot be said that defendants have supported their case as to the actual working of the machinery. But it was arranged between the defendants and the contractors there should be a test of the machine, and to this effect there was a resolution of the company, which, if not written by one of the contractors, was at least fully assented to by him, and must be accepted as manifesting his entire confidence in the result of the test. There was some delay after the resolution was passed, but the defendants were not pressing for the test, and finally the contractors sent up a person to make it. On this application the company answered the machine was not working, and on this account the test proffered to the company was declined. Nor does it appear the test was ever afterwards sought or desired by defendants. Thus matters remained until the works were destroyed by fire. Payment being refused, this suit was brought for the balance due on the contract.

The rule so often applied in this class of cases, that acceptance of the work of the contractor binds the owner, or at least creates a presumption in favor of the contractor, is reasonable. The machine was erected and put in operation early in April, 1891. On May 21, 1891, the company adopted the resolution to the effect that, if certain enumerated articles were furnished by the contractors, and the test made of the machine, the company would pay. This was certainly a qualified acceptance of the machine. The articles then required to supply alleged defects, it is proved, were of value little over \$100. It is utterly impossible, in our opinion, to reconcile the qualified acceptance with the existence of the serious defects to which

the defendants' engineer and expert undertake, months after, to testify. If any such defects existed as that testimony undertakes to support,—i. e. a worthless boiler, and aperturances grossly defective in workmanship and material,—the machine would, in our opinion, have been rejected, and payments refused. Instead, payments on account were made, and the work accepted with the qualification only specified in the resolution of the company. The significance of this action against the company is made more impressive. The contractors sent up a portion of the articles specified in the resolution. Those articles were never removed from the warehouse, and the company avowed it would not receive the residue of the articles called for by the resolution. As to the test proffered by the contractors, that was, in effect, refused. Weight is due to the judgment of the lower court in a case like this. It was in favor of plaintiffs, and we think the record shows no basis to reverse it. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, at the costs of appellant.

(46 La. Ann. 408)

MONTGOMERY v. MARYDALE LAND & LUMBER CO., Limited, et al.

(Supreme Court of Louisiana. March 12, 1894.)

TAXATION—ASSESSMENT TO DECEDENT — CERTIFICATE TO ASSESSMENT ROLL—NOTICE—SALE FOR TAXES.

1. Half of the property was assessed in the name of the owner, many years after his death, although, by the records of the clerk's office, it was made public that his succession was opened, the property inventoried, and an executor appointed. When the fact is known that the owner is dead, and his succession is opened, the assessment should be made in the name of his estate.

2. The certificate of a tax collector to the assessment roll applies, under the terms of the statute, only to those who are notified by publication.

3. A certificate to establish that notice was given by mail to a nonresident taxpayer will not be held conclusive. It must yield to absolute proof. The evidence is conclusive that no sufficient notice was ever mailed to plaintiffs.

4. Statutes to divest title must be strictly pursued.

5. The requisite notice must be given according to statute.

6. Notice being a condition precedent to the validity of the sale, the absolute want of notice is not cured by the prescription of three or five years.

7. The deed of sale by the warrantor contained a stipulation of no warranty. The buyer, not being aware of the danger of eviction, is entitled to recover the price paid.

(Syllabus by the Court.)

Appeal from district court, parish of Texas; Field F. Montgomery, Judge.

Petitory action by L. F. Montgomery and others against the Marydale Land & Lumber Company, Limited, and others, to recover certain land. Judgment for plaintiff, and defendants appeal. Affirmed.

Clinton & Garrett, for defendants and appellants. Elam & Dale, for warrantors and appellants. R. H. Snyder, Jr., for appellee.

BREAUX, J. This is a petitory action, in which the plaintiff, alleging that he is the owner of "Cow Slough" plantation, prays to be decreed the owner and placed in possession. The property was acquired jointly by L. F. and A. J. Montgomery. At the latter's death, in 1808, the title of one-half remained in L. F. Montgomery, and the title of the other half vested, one-fourth in the widow and survivor in community of A. J. Montgomery, and the other fourth in his children, eight in number. His will was admitted to probate in Tensas parish in 1808. An inventory was made. L. F. Montgomery and the widow of the testator qualified, under the will, as executors. The property was assessed for the taxes of 1881, 1882, 1883, and 1884, in the name of L. F. and A. J. Montgomery. It was adjudicated to the state of Louisiana in 1885, for the taxes of those years, and subsequently it was transferred by the state to the fifth Louisiana levee district, warrantors. The Marydale Land & Improvement Company, holding under the Louisiana levee district, made defendant, answers that the property was legally assessed for many years prior to the adjudication to the state, during which plaintiffs failed to pay their taxes and to exercise any rights of ownership. It pleads prescription, and calls the levee board in warranty to defend the title, and asks, in case of its eviction, that it (the defendant company) recover judgment against its vendor for the price and taxes paid. The defendant Blanche also pleads prescription,—that of two, three, and five years,—and prays for judgment against his vendor, the Marydale Company, for the price and taxes he paid on the portion of land bought by him. The defense of the warrantors is substantially the same against plaintiff's demand. The levee board warrantors, in their answer, as against the defendant the Marydale Company, deny that it is bound in warranty, and contend that it is not obliged to return the price in case of eviction. The deed of sale of the levee board contains a clause of no warranty in case of eviction, and it is relied upon by the warrantors as being an effective bar to the demand of the Marydale Company, vendee, for the return of the price. The record does not disclose with certainty that any notice was given to L. F. Montgomery to pay his taxes prior to the sale, either by postal card or publication. The evidence of the notice is also uncertain as to the half of which A. J. Montgomery was the owner. Judgment was rendered recognizing plaintiff's ownership of the property, and there was judgment for defendants against warrantors for the purchase price paid, and a judgment against the plaintiff for the amount of the taxes paid by defendants on the property. The

terms of the judgment reserved, in addition, certain rights to the defendants. From this judgment the defendants and warrantors appeal.

The following propositions, assailing the tax title, present the important issues of the case: (1) The assessment of property in the name of a person long since dead, whose succession has been opened, inventory made, and executors appointed, in the parish where the property is situated and where the tax sale was made, is null and void. (2) A tax sale made since the adoption of the constitution of 1879, without notice to the tax debtors, is null and void.

The Assessment.

Although it must have been known that A. J. Montgomery was dead, the assessment of his property was made in his name. His will was probated in 1868; executors were appointed to execute the will; and inventory had been taken. The proceedings were recorded in the succession record of the parish. They were ample notice to the assessing officer that the proprietor of a large tract of land was no longer alive and the owner. These proceedings and the many years intervening between the death of the owner and the date of the assessment preclude the possibility of concluding that this officer did not know of the owner's death. The property was sold under Act No. 96 of 1882 and the amending revenue act of 1884. Under neither can sanction be found for assessing property in the name of the deceased after the assessor has become aware of the death of the owner. The succession, so far as the record discloses, has not been accepted by the heirs; therefore the assessor could not be expected to assess the property in their names. But the words "estate of" were essential, under the circumstances, to identify the property as required, and complete the assessment. In *Sewell v. Watson*, 31 La. Ann. 591, Justice White, for the court, said: "The property stood on the public records as that of James H. Coleman, and was so assessed. It was vacant property, and the owner did not reside in the parish. The assessor, in listing the property for taxation, could have assessed it in no other way than as it stood on the records of the county, unless it be considered that it was his duty to be informed of facts not public, not to be ascertained from the condition of the property or from its occupants, for it had none." The inference is plain, if the fact was known—if it was publicly known—that the owner was dead, the assessment should not have been made in his name under the revenue act of 1882. The question received consideration in a well-considered case, in which an assessment in the name of an owner who had been dead for 10 years was decreed illegal. The court states that the name of the owner had been formally notified to the proper officers, and was ascer-

tainable from the archives of their own offices. *Stafford v. Twitchell*, 33 La. Ann. 524. It is argued by warrantor's counsel that the case of *Kent v. Brown*, 38 La. Ann. 807, is a comparatively recent utterance of the court upon the subject, and that it is conclusive upon the point under discussion. The facts in that case are different from the facts in the case at bar, as made manifest from the following quotation, taken from the cited case: "We must take judicial cognizance of the state of war in which the country was then engaged, of the closing of the courts during several years, of the difficulty, and, at times, of the impossibility, of communication between the parishes of Concordia and Carroll, and from the records it appears that no positive information could be had from the records of Concordia of his whereabouts or as to the fact as to whether he was dead or alive. From the only source of knowledge within the reach of the assessor, he had no alternative but to list the property in the name of that owner to whom it had been assessed, and who had paid the taxes thereon for years past. Those circumstances, which are entitled to great weight, entirely remove this question from the rule or scope of the two decisions mainly relied on by plaintiff's counsel." These two cases referred to are the *Stafford Case*, 33 La. Ann. 520, and the *Hickman Case*, 35 La. Ann. 1086. Neither of the cases was overruled by the *Kent Case*, 38 La. Ann. 807. The facts were different, and the court so states. The correct rule is indicated in *Carter v. City of New Orleans*, 33 La. Ann. 816. The assessment was regular, for the property had been assessed in the name of an estate; there being no proof of record that the heirs had been placed in possession. In the case at bar, the records, which should not have been ignored by the assessor, years after the owner's death, showed that the property was that of the estate of A. J. Montgomery. It should have been assessed in those words, in so far as the property was owned by the succession. See the *Surget Case*, 43 La. Ann. 877, 9 South. 561. We, at this time, pass the plea of prescription, and take up the question of notice to the taxpayer. Although this plea is urged as applying to both the informality in the assessment and the want of notice, we will hereafter decide it only in so far as it applies to notice, for it disposes of the case.

Notice to the Taxpayer to Pay Taxes Assessed.

In no unmeaning terms, the constitution (article 210) orders that "after giving notice to the delinquent in the manner to be provided by law." That article, as touching the point involved, has been interpreted by this court in several decisions. The leading case is that of *Breaux v. Negrotto*, 43 La. Ann. 438, 9 South. 502, from which we quote: "The constitution and Acts No. 77 of 1880

and No. 96 of 1882 require a notice to be given to the tax delinquent. No notice was given. It was an essential prerequisite to the sale of the 'property;' and it approvingly cites *Stafford v. Twitchell*, 33 La. Ann. 520, and *In re Douglas*, 41 La. Ann. 765, 6 South. 675. This conclusion was affirmed in *Norres v. Hays*, 44 La. Ann. 912, 11 South. 462. The question of notice to the taxpayer prior to the sale of his property was involved in the case of *Webre v. Lutchter*, 45 La. Ann. 579, 12 South. 834. The sections 49, 50, of Act No. 96 of 1882, in so far as relates to that notice, were specially considered. The sheriff did not know the post-office address of the nonresident taxpayer. He could not be required to issue a notice by mail to a taxpayer whose residence was entirely unknown to him, and of whom he knew positively nothing. While it is true that that officer must exhaust the means of ascertaining the address, he cannot be held to further diligence when the taxpayer is absolutely unknown. The only possible notice to be given after diligent inquiry, and after it has become evident that he is unknown, is by publication. The taxpayer who has neglected to make a return of his property as required, who has not complied with the law by giving his name and post-office address, who has no known agent in the parish in which the property is situate, has no cause of complaint if the sheriff resorts to publication as a notice after it has become manifest that, though his name is carried on the assessment roll as being known, he was unknown at the date the assessment was made, or he has subsequent to the assessment become unknown. The tax collector, to whom, under the circumstances, no blame can attach, for he sought to notify the taxpayers by all reasonable means,—by mailing the notices,—did not, it seems, mail any notice to L. F. Montgomery at the post office of his residence. It was mailed to Canton, Miss. His residence was in Madison county, of that state. The names were properly given L. F. and A. J. Montgomery, and would have bound the surviving partner had it been mailed to the post office of his residence. The assessment against L. F. Montgomery is legal and binding, and the taxes due. The sheriff appended a certificate to the tax roll for the years for which the taxes were due, certifying that notice had been given as required. Had he testified that the certificate was correct, his oath, together with the presumption that sustains the regularity of an officer's act, would have proved the notification against which the mere denial of the taxpayer as a witness would not suffice to set it aside. But the tax collector testified that he had sent the notice to another post office than that of the taxpayer's residence. The taxpayer never resided in the county in which that post office is, i. e. the post office to which it was sent for delivery. The notice to the other owners was equally as de-

fective. It was addressed to A. J. Montgomery, and not "his estate," and mailed to that address, to be delivered at Canton, Miss. The heirs not having accepted the succession, and being, as to the property, unknown, an advertisement in the name of the estate of A. J. Montgomery would have found them. The notice to them was not in the required form, and the attempt to notify them failed. The revenue act might be improved by legislation regarding nonresident owners of immovable property, by making the failure of the taxpayers to furnish their names and post-office address to the assessor, at the date of assessment, cause to notify them by advertisement, without further inquiry prior to the sale. As to nonresidents, the legislature may substitute notice by publication for notice by mail. *Desty, Tax'n*. Without further legislation, we are not authorized to hold otherwise than we have.

Plea of Prescription.

It is argued by counsel for warrantors that the plaintiff had long before the tax sales abandoned the ownership of the property; that they had acquired a tax title, duly recorded, that placed plaintiff upon inquiry; that the purchase alone gave them (the warrantors) possession. Our examination of the record does not satisfy us that the warrantors took actual possession. The possession claimed in the case at bar does not supply the want of notice. The notice is a condition precedent, the want of which is not cured by the prescription pleaded. The notice was insufficient and entirely irregular, and as such even the purchaser in good faith is without right to avail himself of a term of prescription less than 10 years. The following is one of the last utterances of this court upon the subject: "Hence our opinion in *Barrow v. Wilson*, 39 La. Ann. 410, 2 South. 809, was error, to the extent of holding that, in respect to this notice, the prescription of three and five years was tenable." *Breaux v. Negrotto*, 43 La. Ann. 441, 9 South. 502.

Return of Price by Warrantors.

The defendants demand, in the event that the tax title is annulled, that they recover judgment against warrantors for the purchase price. In the deed by warrantor to the Marydale Land & Lumber Company, Limited, it is stated: "It is expressly understood that this act shall have the force and effect of a quitclaim deed; this vendor only warranting as to such title as may be vested in it." The warrantors' contention is that they are under no obligation to refund the price, and they claim that the defendant company bought at its risk and peril, and waived thereby all right to demand a return. The vendor who has received the price must return it, because it is in his hands without cause. The purchaser has paid it in execution of a sale that is null. The record does

not disclose that the vendee was aware at the time of the sale of the danger of eviction. The stipulation of no warranty is effective in relieving the vendor from the payment of damages, but does not release him from the obligation of restituting the price. Warranty of title is the sale, and always governs unless waived. The express waiver may include the waiver of the restitution of the price, in case of eviction, and the sale made at the entire risk of the purchaser. A waiver, however silent as to the restitution of the price, does not exclude the obligation of returning the price in event of eviction, unless the purchaser had knowledge of the causes of eviction. In other words, a "no warranty of title" clause in a deed, without knowledge on the part of the vendee of the cause of the eviction, and without an express waiver of the return of the price, leaves the vendee, after eviction, a creditor for the price paid.

An Essential.

The obligation of the taxpayer to contribute to the expenses and necessities of the government when enforcement becomes necessary is subordinated to certain requirements that must be observed in order to divest him of his property. In case of formality, not of the essence, he has no remedy to recover after his property, under a tax title, has passed into the hands of an innocent purchaser. The decisions heretofore have treated notice as an essential. We adhere to the principles heretofore enunciated. We therefore must affirm the judgment. It is ordered, adjudged, and decreed that the judgment is affirmed, at appellants' costs.

WHITE et al. v. EASON.

(Supreme Court of Mississippi. April 2, 1894.)
FUTURES — CONTRACT MADE WITHOUT THE STATE — ENFORCEMENT WITHIN THE STATE.

Under Act March 7, 1882, making it unlawful to deal in futures "in this state," and providing that "no money advanced for the purchase of futures, nor any agreement for the payment of any sum for such purchases shall be enforced in this state," contracts between purchasers of futures and their brokers, made without the state while such statute was in force, cannot be enforced in Mississippi, though valid where made. *Lemonius v. Mayer* (Miss.) 14 South. 33, followed.

Appeal from circuit court, Tate county; Eugene Johnson, Judge.

Action between F. H. White and others and J. T. Eason. From a judgment for Eason, White and others appeal. Affirmed.

J. F. Dean and J. R. Flippin, for appellants. I. D. Oglesby, G. D. Shands, and N. A. Taylor, for appellee.

COOPER, J. In the recent case of *Lemonius v. Mayer* (Miss.) 14 South. 33, we held that access to the courts of this state to re-

cover upon contracts of the class involved in this case was denied by the act of March 7, 1882, entitled "An act to prohibit the sale and purchase of 'futures' in the state of Mississippi." Acts 1882, p. 140. The facts of this case bring it within the control of that decision. Judgment affirmed.

FERGUSON v. STATE. (71 Miss. 806)

(Supreme Court of Mississippi. March 12, 1894.)

SEDUCTION—INDICTMENT—EVIDENCE—CORROBORATION.

1. An indictment for seduction under a statute not using the words of "previous chaste character," or like ones, need not allege that the woman was of previous chaste character, as this will be presumed.

2. A conviction for seduction will not be disturbed because there is not a direct averment in the indictment or evidence that the woman was unmarried, where the pleading avers, and the evidence proves with reasonable certainty, that fact.

3. On a prosecution for seduction by means of a false promise of marriage, the woman may testify that she yielded because of the promise and her belief therein.

4. Permitting the woman seduced to testify to subsequent acts of intercourse and the birth of a child, which facts were admitted, is not reversible error.

5. The fact that the woman, after the time of the alleged seduction, continued to have intercourse with defendant, does not affect his guilt, though it may be considered by the jury as bearing on her previous chaste character.

6. To warrant a conviction of seduction under promise of marriage there must be corroboration of the woman's testimony as to the promise of marriage, and the fact of intercourse.

Appeal from circuit court, Panola county; Eugene Johnson, Judge.

M. Ferguson was convicted of seduction, and appeals. Affirmed.

Stone & Lowrey, for appellant. Frank Johnston, Atty. Gen., for the State.

WOODS, J. The action of the trial court in overruling the demurrer to the indictment is brought under review by the first assignment of error. The demurrer raises two questions, and we examine them in their order: (1) The indictment does not charge that the woman alleged to have been seduced was of previous chaste character; (2) the indictment does not charge that at the time of the alleged seduction, under promise of marriage, the woman was unmarried.

On the first proposition it is to be said that section 1293, Code 1892, prescribes the punishment of seduction of any woman or female child over the age of 16 years by means of pretended marriage or of false promise of marriage. The object is to protect the chastity of women and children above 16 years of age (seductions in other cases being provided for in sections 1002 and 1004) from attack by false marriages or false promises of marriage. The statute *ex vi termini* is to be confined to the abuse of unmarried fo-

males and unmarried females of previous chaste character; but the previous chastity of the female said to have been seduced need be neither alleged nor proved. The presumptions of law spring from and rest upon the general knowledge and universal experience of mankind. In the multitudinous and varying conditions and ranks of womanhood, personal chastity is the rule. A lapse from virtue is the rare and painful exception. Until the rare exception has been proved, the legal presumption must prevail, and this legal presumption need be neither charged nor proved. The adjudged cases and authorities holding the contrary view will be found, on critical examination, to stand on one or the other of two grounds, or on both, viz.: The statutes creating and defining the crime of seduction in some of the states employ the words "previous chaste character," or similar words, and so are supposed to require those words in indictments for such offenses. This fact appears in all, or nearly all, the reported cases which we have examined in which this identical question was passed upon. This is notably true of the early and unsatisfactory case of *West v. State*, 1 Wis. 186, which is the foundation and perpetual reference of the later cases holding that chastity must be alleged and proved. But in those later cases which follow the early Wisconsin decision we shall discover, on thorough inspection of the various statutes of the several states on which the indictments founded thereon were examined, and the sufficiency of their averments passed upon, that the words, "previous chaste character," or other like ones, are uniformly to be found, as we now remember the results of our extensive and protracted research on this point. Said that eminent jurist, Cooley, J., speaking for the supreme court of Michigan in *People v. Brewer*, 27 Mich. 138, commenting on the early Wisconsin case of *West v. State*, hereinbefore referred to: "The Case of *West* * * * was decided upon the phraseology of the Wisconsin statute, which was thought to make the 'previous chaste character' of the person seduced an ingredient in the offense. Our statute [Michigan] is very simple, and merely provides that, 'if any man shall seduce and debauch any unmarried woman, he shall be punished,' etc. Section 7697, Comp. Laws 1871." The Wisconsin court itself, in the opinion in *West's Case*, employs this language: "The previous chaste character of the female is one of the most essential elements of the offense, made so by the express words of the statute," etc. Bishop, in his works on *Statutory Crimes* (section 1106) and *Criminal Procedure* (volume 1, §§ 647, 648), suggests, rather than declares, that the previous chaste character of the female seduced should be averred and proved in cases where these words are not in the statute. But the adjudged cases to which he refers as his authority for the suggestion do not support his

text. The case of *People v. Roderigas*, 49 Cal. 9, is authority for the proposition involved in the Wisconsin case, *West v. State*, already adverted to, that when the statute creating and defining the crime makes the previous chaste character an essential ingredient in the offense, then it is necessary to charge and prove this ingredient. In the Case of *Roderigas* the indictment, which was demurred to, charged the prisoner with enticing an unmarried female to a house of ill fame for purposes of prostitution, without alleging that she was of previous chaste character. On an appeal from a judgment sustaining the demurrer the supreme court held the indictment insufficient for failing to charge the previous chaste character of the female enticed to the disreputable house, the court saying: "To entice a female into a house of ill fame or elsewhere for the purposes of prostitution is not an offense under section 265 of the Penal Code, nor under the provisions of the act of March 1, 1872, unless such female was of previous chaste character." By reference to the Penal Code of California, and the act of March 1, 1872, of that state, it was, we find, made penal to entice a female of previous chaste character into a house of ill fame. The decision commands our respect and concurrence, for it was not the enticing to a house of ill fame of any female which was made a felony, but only one of previous chaste character. The other case on which Bishop's text is supposed to rest is that of *West v. State*, 1 Wis. 186, already examined. Counsel for the accused also cite us to 21 Am. & Eng. Enc. Law, p. 1046, and note 7; but this authority is content to observe that "probably this averment [previous 'chaste character'] must be made, even though the statute makes no mention of chastity, as that, as has been stated, is regarded by the courts as an essential feature of the offense." The cases cited by the author in support of this qualified and guarded remark, and found in note 7, are *Polk v. State*, 40 Ark. 482; *People v. Clark*, 33 Mich. 112; and *People v. Roderigas*, 49 Cal. 9. The last-named case, as we have already seen, is not support for the rule as generally announced by 21 Am. & Eng. Enc. Law, 1046. The decision in that case was upon a statute which made penal the enticing of a female of previous chaste character into a house of ill fame for the purpose of prostitution. In *Polk v. State*, 40 Ark. 482, the prisoner was indicted under a statute which made penal the "obtaining carnal knowledge of any female by virtue of any feigned or pretended marriage, or of any false or feigned promise of marriage." The question on the indictment arose thus, as is stated in the opinion of the court: "The defendant moved in arrest of judgment, because the indictment only stated the parties were past the age of puberty, and did not state that they were of full age, and so able to make valid and binding promises to

marry without consent of parents or guardian; nor even that they were of sufficient age to be capable in law of contracting marriage. This objection is frivolous." It thus appears that the necessity for the averment and proof of previous chaste character was not raised or passed upon in any ruling in which that point was directly involved. It is worthy of remembrance, however, that in considering the proper method of impeaching the previous chaste character of the female alleged to have been seduced the court used this language: "Since, in the female sex, chastity is the rule, and want of it the exception, the presumption is in favor of virtue. No evidence is required to establish it in the first instance, and the burden is on the defendant, if he would assail it, notwithstanding the presumption of his innocence." The remaining case cited in 21 Am. & Eng. Enc. Law, 1046, is that of *People v. Clark*, 33 Mich. 112. In this, as in the Arkansas case just referred to, the necessity for averring and making proof of previous chaste character is not raised or passed on. The error of the editors of that most valuable work is all the more surprising in view of the following passage from the opinion of the court in the *Clark Case*, in 33 Mich., to wit: "The chastity of the female at the time of the alleged act is in all cases involved, and, the presumption of law being in favor of chastity, the defense have the right to show the contrary." It would appear to necessarily result from what is said both in the Arkansas and Michigan cases that the reverse of the guarded statement of the text of the editor of the Encyclopedia is correct. If the previous chastity of the woman is the legal presumption, no evidence need be offered to prove it primarily; and, if no evidence need be offered to prove it, its averment would seem to be unnecessary.

It remains to consider the other ground of contention on this point, which is that the previous chastity must be averred in the indictment and established in the evidence, otherwise the presumption of the defendant's innocence will be overthrown by the presumption of the woman's purity. To put it otherwise: The strength of the presumption of the defendant's innocence cannot be weakened by any counter presumptions of womanly virtue. This same view was ably urged upon our attention in the case of *Hemingway v. State*, 68 Miss. 371, 8 South. 317. We need look no further than the opinion we then delivered in order to silence the present contention. "By this second proposition we suppose it is meant to be said that the presumption of innocence is affected or destroyed in part by the legal presumption of the correctness of the records, and that this favored presumption of innocence cannot be met by another presumption, but must be destroyed by positive proof. This contention rests upon the unsubstantial ground that the general presumption of innocence is irrebut-

table by any other and favored presumption. The rule is, in conflicting legal presumptions, the special and favored must prevail, or take precedence over the general; and the practical operation of this rule we see constantly exemplified in trials for murder. In these trials for even capital offenses, we shall constantly find the legal presumption of malice arising from the use of a deadly weapon, and we shall see the presumption taking precedence over the general presumption of innocence, in the absence of any other evidence showing circumstances of justification or excuse for the homicide. * * * But, after all, it remains to be said that * * * all that was done was to permit the jury to be informed that there was a legal presumption of the correctness of the official books, and, if this was not permissible, then it must be conceded that the presumption of innocence is irrebuttable by any other presumption,—a proposition not to be tolerated in a court of law,—for conflicting presumptions must always go to the jury, as other conflicting evidence." There was no attempt to show any want of virtue in the unhappy girl in the case at bar before she fell a victim to the devilish lust of the prisoner. Undeniably he robbed his victim of the jewel of her virginal purity, and it is with scoundrelly grace only that he can invoke the vanished figment of the legal presumption of his innocence, insisting that the well-founded and universal presumption of maidenly modesty and womanly virtue shall be overlooked and denied the wretched creature whose character he has put to death.

As to the second ground of demurrer, it is sufficient to say that we are of opinion that the indictment reasonably shows that the female seduced was unmarried. It is to be regretted that the pleader did not distinctly and positively aver that the female was unmarried; but she is twice addressed by the prefix to her own proper name which is solely and universally applied to an unmarried woman, and she is described as one to whom offers of marriage were falsely made,—lawful marriage,—and hence she is by necessary inference a female capable of contracting such marriage; that is, that she was marriageable,—unmarried. The evidence, too, we see with surprise, is not direct and positive as to her state; but, again, it reasonably appears that she was unmarried, for it is shown that she was a member of her father's household, and living under parental control. She was uniformly addressed by the prefix to her name used only in cases of unmarried females. She received from the prisoner such attentions as mark the courtship of the marriageable female by the man who would make her his wife, and she is called in the letters written her by the accused, "my girl," "my love," etc., and he writes her, "I don't know when we will marry, but some time, of course," etc. But one conclusion can be reached, on the averments

of the indictment and on the evidence produced on the trial, by an honest mind, and we shall refuse to hunt for or yield to mere technical rules of pleading and evidence, now happily growing less and less regarded by the courts striving to administer substantial justice where the pleading avers, and the evidence proves with reasonable certainty, that which a close adherence to technical forms would have made stand out in bolder relief. That the unfortunate girl was of previous chaste character the law presumes, and this legal presumption it was not incumbent on the state to aver or prove primarily. We have no doubt from the pleading and the evidence that she was unmarried, and we are therefore of opinion that the demurrer was properly overruled.

The second assignment of error draws in review the action of the court below in permitting the unhappy creature seduced to tell the jury that she yielded her person to her lover's embrace because of his promise of marriage, and her blind reliance thereon. We approve the action of the court, for, in the very nature of things, it will be impossible generally, perhaps ever, to make this evidence if the ruined victim of the betrayer is forbidden to speak. As she alone knows, she cannot be held incompetent to communicate that knowledge to court and jury. We are aware that the authorities are not harmonious here, but reason and the preponderating weight of authority pronounce in favor of the righteousness of allowing the outraged and ruined female to testify that she fell because of the believed promise of marriage of her seducer. *Kenyon v. People*, 26 N. Y. 203; *Armstrong v. People*, 70 N. Y. 83; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

The third assignment challenges the propriety of the trial court's permitting the female seduced to testify as to acts of sexual intercourse between herself and the prisoner, and as to the birth of her child, subsequent to her seduction. There was no controversy as to these facts. The repeated acts of sexual intercourse were testified to by the accused, and the birth of the child was not disputed. The evidence, we think, was incompetent, either as connecting the accused with the crime of the seduction or as corroborating the evidence of the female seduced. But we are unable to see in what manner it could have excited the minds of the jury against the prisoner. Confessedly, after having first yielded her person to her betrayer, and after the revolting crime of her seduction had been accomplished, she had sexual intercourse many, many times with her seducer, and, confessedly, also, the child afterwards born was not the fruit of the first intercourse had when she fell from the path of virtue. We can readily see how this might have prejudiced the victim who thus continued to yield herself to his embraces by causing the jury to pause and hesitate in de-

termining whether she was the real owner of a previous chaste character when she took the first step downward on the way to irretrievable shame. How it could have roused the feelings of a jury against the man, we are at a loss to conceive. The error is not, in this case, reversible error.

On the fourth assignment it is necessary only to say that whether the accused was married or unmarried was wholly immaterial. If he was in fact unmarried, as he testifies, the fact was not improper to be shown to the jury, for it may have had power in facilitating his approaches to his object, and have been potential in moving his victim to listen to him, and, listening, yield.

The second instruction, of which complaint is made in the fifth assignment of error, is not open to the criticisms made by counsel. It does not authorize a conviction on the uncorroborated evidence of the woman seduced. It is silent on that point; but more than once, and plainly, the jury was instructed that, in order to convict, the evidence of the woman seduced must be corroborated. This instruction is free from the fatal vice mistakenly supposed by counsel to inhere in it. By it the jury were informed that if their minds and consciences were satisfied by the evidence that the sexual intercourse was brought about by virtue of a promise of marriage made by defendant before or at the time of the alleged intercourse, and that, if this satisfaction of minds and consciences was produced by conscientious belief of the evidence, then the jury believed beyond all reasonable doubt, and they should convict, although they might believe from the evidence, further, that the woman seduced afterwards (after her fall) yielded herself to the defendant's embraces to gratify her own passions,—her own aroused and now uncontrollable passions,—and was not now, since her seduction and fall from virtue, a woman of chaste character. Whether the unhappy wretch continued to wallow in the mire and filth of personal depravity to which defendant's revolting villainy had reduced her in no way affects his guilt or her previous purity, if these had been established by the evidence.

The third instruction for the state is neither vague nor uncertain. By this charge the jury were simply informed, at the state's request, that corroboration of the testimony of the female seduced was necessary before conviction could be had. This was true, and if the accused desired to have defined the extent and reach of the general proposition contained in our statute, that "the testimony of the female seduced, alone, shall not be sufficient to warrant a conviction," he should have asked supplementary and explanatory instructions, with ampler definitions of the general statement contained in the state's instruction now complained of.

The sixth assignment goes to the court's action in refusing certain charges for the de-

fendant. The first instruction refused is clearly erroneous. The subsequent acts of intercourse, it was sought to have the court tell the jury, overcame the presumption of previous chaste character. This was not true, in and of itself. The subsequent acts of sexual intercourse were matters to be carefully pondered by the jury, and their character and value were fair subjects for argumentation before the jury, but nothing more. To instruct the jury that these subsequent acts of illicit personal intercourse had overcome the legal presumption of the previous chaste character of the poor woman was to charge upon the weight of the evidence, and, in effect, take the case from the jury. The second, third, and fourth instructions refused were properly refused. The second instruction asked the court to direct the jury that it was the duty of the state to prove the character of the female seduced to have been chaste prior to the act of intercourse which accomplished her seduction. We have already seen that this is not sound. The third refused instruction is improper, because without evidence to support it. The fourth refused instruction is manifestly erroneous for the reason just given. It was unsupported by evidence. There is no testimony, nor hint of evidence, that this seduced woman "had already fallen, and was not at the time pursuing the path of virtue," and the instruction which assumes as proved that which is not proved would be monstrous. The fifth refused instruction was also properly rejected by the court below. By it the prisoner sought to have the jury advised that "all her testimony must be corroborated by other evidence upon every fact necessary to make out the crime." There is much diversity of opinion as to what extent this corroboration extends. There are cases in which it has been held sufficient corroboration of the female seduced if there was other evidence of the promise of marriage only. At the other extreme will be found cases holding that the corroborating evidence must support all the necessary elements in the constitution of the crime. The cases lying between these two classes announce the true rule, viz. the testimony of the female seduced must be corroborated by other evidence as to the promise of marriage and the act of sexual intercourse. The object of the law is to prevent the conviction of one accused on the unsupported testimony of one participating in the commission of the offense. As with the accomplice, so here, corroboration to the extent of fairly tending to connect the accused with the commission of the offense should be held sufficient. The female seduced appears on the witness stand as quasi particeps criminis, and under a cloud. Whatever other evidence will fairly satisfy the jury that she is truthful and worthy of belief must be held sufficiently corroborative; and when she is sup-

ported as to the promise of marriage and the act of sexual intercourse,—the two great fundamental essentials,—the corroboration, we think, will be sufficient. In the case at bar the corroborative evidence (partly furnished by the defendant's evidence and by his letters) as to the act of intercourse and the promise of marriage is not wanting, and the jury has passed upon its worth and weight, and has, in our opinion, correctly estimated it.

We have here a fresh exemplification of the truth of the inspired maxim, "The way of the transgressor is hard." But, if character is to be held safe from infamous attack, and the law for its security is to be maintained and honored, this transgressor should be made to feel just punishment in all its fullness, and with inexorable certainty. Affirmed.

(71 Miss. 245)

HOLMES et al. v. SIMON et al.

(Supreme Court of Mississippi. Jan. 8, 1894.)

TRIAL—INSTRUCTIONS.

Where it is not clear that a verdict for a party might not be permitted to stand, a peremptory instruction for his opponent is error.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Action between G. W. Holmes and others and J. Simon & Co. From a judgment for Simon & Co., Holmes and others appeal. Reversed.

Southworth & Stevens and S. R. Coleman, for appellants. B. G. Humphreys, Rush & Gardner, and E. F. Noel, for appellees.

CAMPBELL, C. J. The peremptory instruction should not have been given. When "the evidence is sufficient to warrant a verdict for the plaintiff (or other party), in any view of it which might be legally taken," a peremptory instruction to find for the other party cannot properly be given. *Railroad Co. v. Boehma*, 70 Miss. 11, 12 South. 23. It will not do for the judge to take the case from the jury, and decide it himself, simply because he thinks it should be decided that way. It is only where a verdict could not be permitted to stand, if rendered, that the judge may rightly anticipate the result, and peremptorily instruct the jury. In this case it is by no means clear that a verdict for the claimant might not be permitted to stand. The fact that the judges, if jurors, might find for the plaintiff is not decisive of the propriety of disturbing a verdict found, without any error of the court in the trial. We not unfrequently refuse to set aside verdicts we would not have given. Such is our system, and it must be upheld, in the manner stated. Reversed, and remanded for a new trial.

(71 Miss. 357)

HAUGHTON v. SARTOR.

(Supreme Court of Mississippi. Jan. 1, 1894.)

DEED—DESCRIPTION—PATENT AMBIGUITY.

Where land is described merely by the government survey, an omission of the number of the range west is a patent ambiguity incurable by parol evidence. *Foute v. Fairman*, 48 Miss. 536, overruled.

Appeal from circuit court, Monroe county; Newnan Cayce, Judge.

Action by P. H. Haughton against Mrs. M. E. Sartor. Judgment for defendant. Plaintiff appeals. Affirmed.

El. O. Sykes and W. H. Clifton, for appellant. Geo. C. Paine, E. H. Bristow, and Houston & Sykes, for appellee.

COOPER, J. The appellant sued the appellee upon an instrument in writing which he contends is a contract to convey lands to him, and which appellee contends is itself a conveyance. The instrument recites that the appellee has that day sold to appellant certain lands, at a price to be thereafter paid. The lands sold are described in the instrument as the "south half ($\frac{1}{2}$) of section seven (7), township fifteen (15), range — west; also the east half ($\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$), of section twelve (12), township fifteen (15), range nineteen (19) west," in Monroe county. Upon this instrument being offered in evidence, the defendant objected to so much thereof as related to the land in section 7, upon the ground that as to such land there was a patent and incurable ambiguity, in that the range in which the land was located was not named therein. The defendant stated to the court that, in connection with said instrument, she proposed to prove by parol that the said land was actually located in range 18 west, as was known, understood, and intended by the plaintiff and defendant at the time of the purchase by him, and that the word "eighteen" was omitted after the word "range" by accident and mistake. The court ruled that the ambiguity was patent, and could not be aided by proof. Whereupon the plaintiff dismissed so much of his action as related to the other lands, and, as to the remainder of his suit, there was a jury, and verdict for the defendant.

It will thus be seen that the single question for decision is whether the ambiguity in the instrument is patent or latent. There is much learning upon the subject of latent and patent ambiguities to be found in the books. But for the decision of this court in *Foute v. Fairman*, 48 Miss. 536, we would, we think, be safe in saying that no case could be found in which an ambiguity of the character here shown had ever been held to be latent. In that case the omission was of both the township and range, and yet the ambiguity was held to be latent, and not a patent one. In delivering the opinion of the court, Judge Simrall said: "We know that

there are several tracts of land in Copiah county to which the descriptive words equally apply. It requires, therefore, if the deed shall take effect at all, that extrinsic evidence shall be employed to identify what particular lands were meant. This is a latent ambiguity which is made to appear by extrinsic evidence." It will be noted that the learned judge appreciated the fact that, from the mere inspection of the deed, the ambiguity appeared; or, in other words, that it lay on the face of the instrument, which, as he correctly stated, could have no effect at all, unless aided by extrinsic evidence. And yet this test, which, under all the authorities, is held to discover a patent ambiguity, was accepted as that of an ambiguity *latens*. In *Bowers v. Andrews*, 52 Miss. 596, all the judges delivered opinions, in which the question was fully discussed. Judge Simrall was then a member of the court, but neither in his opinion nor that of the other judges was any reference made to the case of *Foute v. Fairman*. That it was virtually overruled by *Bowers v. Andrews* is evident from the language of Campbell, J., in which it is said: "But none will deny that, when the mere perusal of the instrument shows plainly that something more must be added before the reader can determine which of several things is meant by it, the rule is inflexible that no evidence can be admitted to supply the deficiency." It would have been well for the court to have declared in the latter case that *Foute v. Fairman* was not the law, and was overruled, but such was the necessary result, and it is now expressly announced. The ambiguity in the instrument here sued on was clearly a patent one, and the court below correctly so ruled. The judgment is affirmed.

(71 Miss. 237)

CHRISTIAN v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi. Jan. 8, 1894.)

RAILROAD COMPANIES — INJURIES TO TRESPASSER ON TRACK—DUTY OF COMPANY'S SERVANTS—INSTRUCTIONS—QUESTION FOR JURY.

1. In an action against a railroad company for personal injuries received by plaintiff while a trespasser on defendant's track, it is error to charge that plaintiff could not recover unless the engineer intentionally and purposely ran him down, and unless the conduct of defendant's servant "was regardless of consequences, and without effort to prevent injury."

2. Servants of a railroad company are not bound to keep a lookout for trespassers, but, if they see one, and realize his danger, and that he cannot, by the exercise of reasonable effort, extricate himself, they must exercise reasonable care to prevent injury to him.

3. What is reasonable care in such case is a question of fact determinable by the circumstances.

Appeal from circuit court, Panola county; Eugene Johnson, Judge.

Action by R. J. H. Christian against the Illinois Central Railroad Company to recover damages for personal injuries received by

plaintiff while a trespasser on defendant's track, and caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. Reversed.

Stone & Lowrey, for appellant. Mayes & Harris, for appellee.

COOPER, J. We will not review particularly the 16 instructions asked and received by the defendant. Some of them may be correct, but throughout them as a whole runs the wholly erroneous proposition that the mere negligent injury of a trespasser by the servants of a railway company is not ground of action by the trespasser. Under the sixth instruction the jury was, in effect, told that the plaintiff could not recover unless the engineer intentionally or purposely ran him down. If that were true, the plaintiff, being a trespasser, must show such injury that, if it had resulted in his death, the servant of the company inflicting the injury would be guilty of murder. By the seventh instruction the jury was told that the plaintiff could not recover unless the conduct of the defendant's servant "was regardless of consequences, and without effort to prevent injury." The true rule is that the servants of the company are not bound to keep a lookout for trespassers, but, if they see one, and appreciate his danger, and that he cannot, by the exercise of reasonable effort, extricate himself, then they in turn must exercise reasonable care to prevent injury to him, and what is such reasonable care is a question of fact determinable by the circumstances. *Jamison v. Railroad Co.*, 63 Miss. 33; *Railroad Co. v. Williams*, 69 Miss. 631, 12 South. 957; *Railroad Co. v. Watly*, 69 Miss. 145, 13 South. 825; *Railroad Co. v. Cooper*, 69 Miss. 368, 8 South. 747.

Judgment reversed.

(71 Miss. 247)

ALABAMA & V. RY. CO. v. BLOOM.
(Supreme Court of Mississippi. Jan. 8, 1894.)
EMINENT DOMAIN — RIGHT TO COMPENSATION —
RAILROAD IN STREET—FEE OF STREET.

Under Const. 1890, § 17, forbidding the taking or damaging of private property for public use unless compensation be first made, an owner of lots abutting on a street owned in fee by the city has an action for damages against a railroad whose track in the street, though authorized by the city, is, as operated, a nuisance; obstructing access to his house, and diminishing its value as a residence by nightly noises of trains, and discomforting stenches from live stock.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by Elias Bloom against the Alabama & Vicksburg Railroad Company for damages for a nuisance. Judgment for plaintiff. Defendant appeals. Affirmed.

W. L. Nugent, for appellant. Calhoon & Green, for appellee.

WOODS, J. This was an action instituted by Elias Bloom against the Alabama &

Vicksburg Railway Company for damages resulting from the construction of a track along and upon the street in the city of Jackson, on which his residence was situated, and where he had lived for 20 or 30 years. Bloom alleged in his complaint that said track was laid down without his consent, and over his protest; that in the construction of said track the railway company tore up and destroyed a stone crossing which he had laid, more than 20 years ago, to enable himself and family to go over the street, on their way to the business portion of said city, dry shod, and without wading in mud; that said track, when laid down, was in effect used merely as a side track, and that the street and the crossing at his place of residence were often blocked by cars and trains of cars so as to seriously interfere with ingress to and egress from his home, as he had theretofore been accustomed to enjoy the same; that night was made hideous with the din and noise of engines and cars on said track, and the very air about his house polluted with the stench arising from droppings of live animals loaded on cars on said track, and from filth dumped out near his premises, to the great inconvenience and discomfort of himself and his family, and to the damage of his residence property. The declaration concedes that the fee in said street is in the city of Jackson, and that said city had unlawfully authorized the construction of said track. But the plaintiff averred, also, that the municipality of Jackson held such title to the street, in contemplation of law, in trust, that the same should be used as a public street, and that his rights, as an abutting lot owner, were to have free access to and from his property over said street, and to make such use of it as was customary and reasonable, and free from unusual, dangerous, and permanent obstruction therein, and free from nuisances therein, or any misuse thereof which diminished his comfort as an abutting lot owner, or the value of his property, unless upon legal condemnation and payment of damages first made.

It will be well to bear in mind that the construction of the said track, and the infliction of the said supposed several injuries, were after the adoption of the constitution of 1890. Section 17 of that instrument declares that "private property shall not be taken or damaged for public use except on due compensation being first made," etc. Without examining in detail the several pleadings, and the rulings of the court below thereon, it is sufficient to say we find no errors in any of these. The questions raised were, substantially, whether Bloom could recover on the case stated in his declaration, the fee to the street being in the municipality, and whether, in any case, Bloom's property had suffered such damage, flowing from the acts of the railway company, as warranted the recovery. The first question was answered affirmatively in a

declaration, not of the force of settled adjudication, in the case of Theobald v. Railway Co., 66 Miss. 279, 6 South. 230, and was again affirmatively and authoritatively answered by the decision of this court in the case of Stowers v. Telegraph Cable Co., 68 Miss. 559, 9 South. 356. In this latter case, Stowers averred ownership in fee in himself to the middle of the street. The answer of the telegraph company denied this averment of the bill, and no proof whatever was taken on this point. Upon elementary principles, we were shut up to treat the fee of the street as in the municipality of Vicksburg; and on this state of case, in which the question was distinctly presented, we held that no different rights were involved, in such cases, no matter whether the fee was in the public, or the abutting lot owner. We have carefully considered the elaborate argument of the learned counsel for appellant, seeking to convince us of the propriety of overruling our former decision in the case last named, but we find no reason to shake us in our conviction of the perfect soundness of our former opinion. It is impossible to imagine a state of facts which would authorize a recovery in such cases as the one at bar, if the declaration and evidence in this litigation does not show it. We are not called upon to express any opinion as to the rightfulness of a recovery in cases not embraced in our constitutional provision for compensation for damages to private property, as well as the taking of the same for public use. The learned counsel seems to concede that a recovery could be had in this and similar cases if the words "or damaged" were in our original law. The counsel, of course, failed to note the insertion of these enlarging words in our present constitution. We are unable to say we feel such dissatisfaction with the amount awarded as would authorize us to pronounce it excessive, and so require us to set aside the judgment of the court below, and award a new trial. Affirmed.

(71 Miss. 506)

OHISM et al. v. ALCORN.

(Supreme Court of Mississippi. Jan. 1, 1894.)

ACTION ON ACCOUNT—EVIDENCE.

Evidence that a landlord appropriated the crop of his tenant, after agreeing to waive his lien thereon and to permit it to be applied to the payment of an account owed by the tenant, does not support an action against him on the account.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Action by Chism Bros. against Annie A. Alcorn on an account. From a judgment for defendant, plaintiffs appeal. Affirmed.

Fitzgerald & Maynard, for appellants. Rucks Yerger, for appellee.

COOPER, J. We infer from the briefs of counsel that the court below gave the gen-

eral charge for the defendant on the ground that plaintiffs were attempting to charge her to answer for the debt of another upon a mere verbal promise made by her through her agent, Mr. Alcorn. We do not see that the statute of frauds has any application. The plaintiffs testified in their own behalf, and positively denied that Mrs. Alcorn, either through her agent or personally, ever agreed to be bound for the payment of the account on which the suit is brought. Their cause of action, as stated by them, is not that she promised to pay, and has neglected and refused so to do, but that she agreed to waive her lien as landlord upon the crops of Bush, her tenant, and that Bush might apply it to the payment of his account, and afterwards, and in violation of that agreement, received the cotton grown by Bush, and appropriated its proceeds to her demand for rent. If they had sued for money had and received to their use or in an action on the case, their testimony would have tended to support their action. This they did not do, but sued both Mrs. Alcorn and Bush, the tenant, on the open account for goods, wares, and merchandise sold and delivered to Bush. If the truth be, as the plaintiffs testified, that Mrs. Alcorn never promised, in writing or verbally, to pay this account, the statute of frauds can cut no figure in the case. The difficulty is that the plaintiffs sued on the account, for which in evidence they show that Mrs. Alcorn was not at all bound, and seek to recover for the breach of another distinct agreement, viz. that Bush's crop should be first applied to the payment of the account. The peremptory instruction was properly given. Affirmed.

(71 Miss. 407)

MARTIN v. COPIAH COUNTY.

(Supreme Court of Mississippi. Jan. 22, 1894.)

FLEEING HOMICIDES—ARREST—REWARD.

Under Code 1892, § 1387, allowing a reward for the arrest and delivery of one who has killed another and is fleeing, it is not necessary that the victim should be dead when the arrest of the fugitive is made to entitle the person making the arrest to the reward, but it is sufficient that the victim has received a wound which results in death.

Appeal from circuit court, Copiah county; J. B. Chrisman, Judge.

Action by B. C. Martin against Copiah county to recover a reward for the arrest of a fugitive from justice. From a judgment for defendant, plaintiff appeals. Reversed.

Geo. S. Dodds, for appellant. Frank Johnston, Atty. Gen., for the State.

CAMPBELL, C. J. The statute¹ allowing a reward for the arrest and delivery of one "who has killed another and is fleeing," etc., has relation to the cause of death, as held in Board v. Wells, 67 Miss. 151, 6 South. 614,

¹ Code 1892, § 1387.

and therefore the reward is payable by the county in which the cause of death is given. The question now presented is whether, for the reward, the person killing may be said to have killed another when the mortal blow is struck of which the person soon dies, although death does not occur until after the arrest of the fugitive who gave the mortal wound. The manifest purpose of the act giving a reward is to incite to the arrest of fleeing homicides, and secure them for trial; and an interpretation of the statute which requires that the victim of a mortal wound shall be actually dead before arrest to entitle to the reward is too literal, and would exclude cases which fall clearly within the spirit and purpose of the law. The law at an early day was that, for several purposes, he who gave another a mortal stroke, where death ensued in a year and day, was held to have killed when the stroke was given, and not when the offense was consummated by the death. 1 Hale, P. C. p. 428; 1 Hawk. P. C. p. 93. The recognized doctrine is that where a mortal wound is given, and the wounded person dies within a year and a day, the intentment of the law is that the wound caused the death. The wound is the cause, and death a consequence. In popular language, and in legal phraseology, for some purposes, a party is said to have killed one on whom he has inflicted a blow of which the wounded person soon dies. If a mortal blow was struck, and the party wounded languished a few hours before the heart ceased its pulsations, and the escaping criminal was arrested but a few minutes before the death of his victim, all would feel that it was too literal an interpretation of the statute to deny the reward to the person who arrested and delivered the fleeing homicide. If, in that case, the reward would be due, so in any case where an arrest is made of one who has given a mortal wound which results in death, for a distinction cannot be made, with reference to the statute, between a few minutes or hours or days. Reversed and remanded.

(46 La. Ann. 529)

AUGUSTI v. CITIZENS' BANK OF LOUISIANA. (No. 11,304.)

(Supreme Court of Louisiana. March 26, 1894.)

CITIZENS' BANK—PROPERTY OF MORTGAGE SHAREHOLDERS—SALE FOR TAXES—ASSESSMENT.

1. No sales, whether judicial, forced, or voluntary, of property mortgaged by the Citizens' Bank, can affect its right secured by the twenty-fourth section of the charter.

2. But, as to taxes, it must be presumed that the legislature did not intend to deprive the state of any prerogative, right, or property, unless in terms expressive, or inference irresistible.

3. The property of the mortgage stockholders was always subject to taxation, and the remedy to compel payment remains unimpaired by the charter.

4. The law does not contemplate that the assessor shall test titles, in order to make assessment of the property.

5. A prima facie title, suffered to remain unquestioned on the official records, taken, in good faith, as a basis for the assessment, is a compliance with the requisition of the statute regarding assessments.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Petition by Antonio Augusti against the Citizens' Bank of Louisiana for an injunction, and asking that plaintiff be quieted in the enjoyment of his possession of land. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry Denis, for appellant. Farrar, Jonas & Kruttschnitt, for appellee.

BREAUX, J. The record discloses that on the 16th day of July, 1836, Honore and Alexander Coulon mortgaged the lot, and improvements thereon, claimed in this suit to the Citizens' Bank, to secure the payment of a stock debt of \$7,000. This mortgage was foreclosed in 1890, and the property was adjudicated to the defendant. The plaintiff was the adjudicatee of the property at tax collector's sale for state taxes of 1887. The assessment was made in the name of Joaquin Sambola. The latter acquired the property by authentic deed, duly recorded, in May, 1885, from J. B. Henry, Jr. Henry became the owner at tax sale made for taxes of the year 1883, under an assessment in the name of the estate of Alexander Coulon. The property was assessed for the taxes for the years 1870 to 1885 in the name of the estate of Alexander Coulon; for the years 1886, 1887, and 1888, in the name of J. Sambola; and for years subsequent in the name of plaintiff, Augusti. The state taxes for the years 1871, 1872, 1874, and 1875 were paid by the defendant, the Citizens' Bank.

The testimony shows that there is a large amount unpaid of bonds issued under the law of 1836, amendatory of the charter of the bank. These bonds, it is urged by defendant, have such a guaranty from the state that the state cannot, in consequence, lessen the security by selling for taxes property mortgaged for their security. The plaintiff alleges that the Citizens' Bank has slandered, and continues to slander, his title, and disturb him in the enjoyment of his ownership of the property. The prayer of his petition is for an injunction restraining the bank from interfering with the petitioner or his tenants, and from asserting that it is the owner of the property, and that plaintiff be quieted in the enjoyment of his possession. In the answer the defendant pleads a general denial, and specifically sets forth that plaintiff has no title to the property; that the property was not assessed in the name of the owners in 1883; that the tax sale of 1885 was an absolute nullity; the adjudicatee, Henry, acquired no title, and could not transfer any; that in consequence the second ad-

judicatee, having to trace his title to the first, acquired no title, as the true owner had never been divested. In the alternative, the defendant's argument, through counsel, is that if the sale be valid it would not, under the provisions of the charter of the Citizens' Bank, affect the mortgages upon the property, for the reason that all mortgages executed for stock or bonds may be closed at any time, in whosoever hands or possession the property mortgaged may be, notwithstanding any alienation or change of possession. See section 24 of the Citizens' Bank act of 1833.

The first question which presents itself for our determination is, if the sale is not void, what effect must be given to the nonalienation claims of the bank's charter? The second question: Is the tax title to the property based upon the tax sale of 1887 a valid title?

This court has expressed its recognition of the binding force of the section cited of the Citizens' Bank charter, and stated with some emphasis that no sale—whether judicial, forced, or voluntary—of property mortgaged to the Citizens' Bank can affect the rights secured to that institution by the twenty-fourth section of its charter; that the legislature intended no exception, and made none. *Bertoli v. Bank*, 1 La. Ann. 120. In the different cases to which our attention is directed, the interests were private, and the suits related to the disposition of the property sought by persons seeking to realize rights which they had acquired subsequent to the bank's mortgage. In those cases the rights involved were passed upon as if the property was in the possession of the mortgagor. The question at issue in the case at bar is different. The constitution ordains that all property shall be taxed in proportion to its value. While this provision does not extend to or include public property of the general government of the state, or any of its subordinate subdivisions, or property specially exempted, it extends to and includes all property in commerce. The state is not the owner of the property taxed. The property of the mortgage stockholders was always subject to taxation, and the remedy to compel payment remained unimpaired by the charter. The taxes attach primarily to the lands, and remain until satisfied by payment, or from the proceeds of the sale for their payment. Nothing in the charter prevents a tax sale of the property of a mortgage shareholder. There exists a presumption against the legislative intent to affect government. Unless sovereignty is expressly embraced by the terms of the statutes, it does not come within the terms of law regulating rights among persons. The rights of the state to collect her taxes should not be treated as relinquished or conveyed away by inference. The liability of the original stockholder to pay his taxes does not become ineffective from the moment the bank proceeds to foreclose its mortgage. This exceptional

right, in opposition to the state, cannot be created by legal construction. "It is presumed that the legislature does not intend to deprive the crown of any prerogative, right, or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. *End. Interp. St.* p. 223. There is no direct expression in the statute upon the subject, and there is nothing in its terms which makes the impression irresistible.

The Tax Sale.

The validity of the tax sale involved in the case at bar must be determined irrespective of the charter. It is made the duty of the assessor, by statute, to examine the records of the conveyance office, to ascertain what taxable property there is in his district or parish. The record of deeds of conveyance and of mortgage are taken as the basis of the assessment. It does not devolve upon him to test the validity of these acts, in order that he may ascertain in whose name to assess the property. If an act be not radically null upon its face, he is within the law, in taking as correct a recorded deed, that interested parties have for years permitted to remain on the record as an adverse title, unquestioned and unassailed. There was a notarial deed of record, dating from 1885. It devolved upon the owner, annually, to make a return of the property,—a required formality, uncomplished with. He knew that the property had not been assessed in his name. The notarial record in the conveyance office was a notice that title was recorded in the name of the person to whom it was addressed. The owner has no legal cause of complaint of the sale of the property for the taxes.

Two years prior to the registry of the notarial act of sale to Sambola, in whose name it was assessed when the last adjudication,—that of 1887—was made for taxes, the property was adjudicated to Henry, who was Sambola's author. The objection is directed against this tax sale, i. e. the tax sale to Henry in 1883; null, it is urged, because assessed in the name of the estate of Alexander Coulon, it being at the time the property of the estate of Honore and Alexander Coulon. Defendant's counsel forcibly urges in support of the proposition that the defect in the tax sale of 1885 is fundamental, and not curable by monition. Be that as it may, it does not follow that the tax sale of 1888, pleaded in the case at bar, is also null. The deed itself is *prima facie* evidence of a compliance with the requisition of the law. The deed was evidence of title. When the party claiming adversely shows that a prerequisite to the validity of the title has been complied with, the *prima facie* is destroyed, the presumption defeated, and the deed becomes entirely useless as a title. The defendant, a mortgage creditor, having a direct interest,—possibly more valuable than that of the owners themselves,—suffered the *prima facie* evidence to

remain unquestioned. The property passed into other hands under this title. The ministerial officers performed every duty imposed by law. The assessment was made by reference to the deed of record, and every other condition essential to the character of the deed was complied with. It therefore became conclusive evidence of title. The tax deed, generally, is an original title, not derivative, and cannot be defeated by a missing link in the chain of title. The record of titles in the record office is made the basis of the assessments of real property. Titles that are intrinsically null, if permitted to remain unquestioned, may become the basis of an assessment that will result in a valid sale. Any other ruling upon this point would compel the assessors to investigate titles, and ascertain as to their conclusive validity. This was never contemplated by the law. The evidence of a prima facie title is the requirement. Such evidence was of record when the assessment was made on the property sold at tax sale in 1888. The judgment appealed from is therefore affirmed, at appellant's costs.

MILLER, J., recused.

(46 La. Ann. 486)

BRYANT v. STOTHART. (No. 11,455.)
(Supreme Court of Louisiana. March 26, 1894.)

DISSOLUTION OF SALE—PARTIES—TENDER.

1. The dissolving condition in the contract of sale cannot be enforced when the plaintiff in the suit represents only part of the price remaining due. Rev. Civ. Code, arts. 2045, 2046; *Leflore v. Carson*, 7 La. Ann. 67; *Castle v. Floyd*, 33 La. Ann. 589.

2. In the action to dissolve the sale for nonpayment of the price, tender to the purchaser of the price he has paid is a prerequisite for maintaining the action, and hence cannot be dispensed with on the ground that the purchaser's liability for the revenues compensates the price to be returned by the vendor. *George v. Knox*, 23 La. Ann. 354; *McDonold v. Vaughan*, 14 La. Ann. 719; *Ware v. Berlin*, 9 South. 490, 43 La. Ann. 534; *Latham v. Hicky*, 21 La. Ann. 425.

(Syllabus by the Court.)

Appeal from district court, parish of Red River; W. Pike Hall, Judge.

Suit by Henry Bryant against Mrs. Stothart to dissolve the sale of a plantation. From a judgment, both plaintiff and defendant appeal. Reversed.

J. O. Egan, for plaintiff. J. F. Pierson, for defendant.

MILLER, J. The plaintiff seeks to dissolve, for nonpayment of the price, the sale of a plantation sold by him to the defendant. The terms on which the property was sold were a cash payment, two notes of defendant for the credit portion of the sale, and the assumption by defendant of certain notes of plaintiff. At the date of the institution of this suit, the plaintiff had received the cash payment, the defendant had also

paid one of the notes, and made payments on account of the others assumed by her. The price was \$8,121. Defendant's payments are stated in the brief filed on her behalf at \$2,101; the plaintiff's brief makes the amount less, but the difference is unimportant. There were outstanding and unpaid when the suit was brought the two notes held by plaintiff, amounting to \$2,480, excluding interest, and \$3,540 of notes assumed,—all held by the American Freehold Mortgage Company of London, named in the act of sale in which defendant assumed payment of the notes. One of the outstanding notes held by plaintiff and some of the outstanding notes held by the loan company had matured when the suit was brought. The default on these matured notes was the basis of the suit. The petition claimed the dissolution of the sale; that defendant be condemned to pay for alleged depreciation and consumption of the personal property attached to the plantation at the time of the sale, and for diminished value of the plantation; and, besides, judgment is asked against defendant for the fruits of the property since the sale. The defendant filed various exceptions; among others, that there had been no tender by plaintiff of the part of the price paid by her, and that plaintiff, entitled to demand only part of the price still due, could not enforce the dissolving conditions. The exceptions being overruled, the defendant, answering, contested plaintiff's demand for the dissolution of the sale, or the liability of defendant, in case the sale was dissolved, for the amounts claimed in the petition. The case was tried by a jury, and there were verdict and judgment dissolving the sale, condemning the plaintiff to pay rents, and that plaintiff restore the price paid, and for the improvements. Both plaintiff and defendant appeal.

The exception that plaintiff represents only part of the price still due first engages our attention. The dissolving condition accomplished in the contract of sale places the parties as they stood before the sale. The vendor takes back the property. The purchaser is restored the price he has paid, and is entitled to a complete discharge for any part of the price he has not paid. Can this last result—i. e. the discharge of the purchaser—be obtained in this suit? If not, the action fails. Under the contract, the notes of the plaintiff given to the loan company were to be paid as part of price, and for this payment the defendant became bound. Part of these notes were unpaid and held by the company. The company does not join in this suit. It is made a defendant. Answering, the company disclaims interest in the controversy; avers the mortgage granted by plaintiff to secure its notes; recites the subsequent sale of the mortgaged property to defendant; alleges that, advised the defendant was to make the remaining payments on the notes, it notified both plaintiff

and defendant of those payments as they matured; avers the company never formally accepted defendant as the debtor; and the answer closes with reserving all rights under the mortgage. We have considered the plaintiff's argument that the company accepted the assumption by which defendant bound herself for the notes held by the company. But, as stated, the company gave defendant notice of the payments as they matured. That would avail as an acceptance. Besides, such a stipulation may be accepted at any time, unless by some act of the creditor it is barred. If it had been intended by the company, by its answer in this suit, to discharge the defendant, it is to be presumed that purpose would have been expressed. But the answer, guarded in its terms, stops short of a discharge. It is therefore our conclusion that the defendant may be still held to the company on the assumption. The plaintiff, however, tenders a bond to secure the defendant against any demand of the company. If defendant is entitled to a discharge as an incident of the dissolution of the sale, she cannot be required to accept, in lieu of the discharge, a bond of indemnity. The plaintiff only representing a part of the price remaining due, it follows, in our opinion, he cannot enforce the dissolving condition, which exacts the release of defendant of all liability for the whole price. See Rev. Civ. Code, arts. 2045, 2046; *Leflore v. Carson*, 7 La. Ann. 67; *Castle v. Floyd*, 38 La. Ann. 589. We think the exception, on the ground already discussed, should have been sustained.

We have, however, read with interest the argument of defendant on another exception; i. e. that, to maintain this action, the plaintiff was bound to tender to defendant the amount she had paid on account of the price. The plaintiff's answer is that the defendant's liability for rents and revenues of the property since the sale compensates the debt of plaintiff for the price, and hence plaintiff is under no obligation to tender the price. But we think it fixed in our jurisprudence that, altogether irrespective of defendant's liability in cases of this character for the revenues of the property, it is a prerequisite for maintaining the action that plaintiff shall tender the price paid by the purchaser. Until that tender, plaintiff, in such an action, can invoke no relief. The precise contention of plaintiff that tender is not requisite, because of defendant's liability for rents, was held unavailing in one of the cases we cite in this connection. We think the exception on this ground was well taken. *George v. Knox*, 23 La. Ann. 854; *McDonald v. Vaughan*, 14 La. Ann. 719; *Ware v. Berlin*, 43 La. Ann. 534, 9 South. 490; *Latham v. Hicky*, 21 La. Ann. 425. The views expressed on the exception determine the controversy, and render unnecessary any examination of the plaintiff's argument on other points. It is therefore, ordered, adjudged,

and decreed that the judgment of the lower court be avoided and reversed, and that plaintiff's suit be dismissed, with costs.

(46 La. Ann. 515)

HOLLINGSWORTH v. ATKINS et al. (No. 11,456.)

(Supreme Court of Louisiana. March 26, 1894.)

TRANSFER OF LEASE—LIABILITIES OF LANDLORD—PROVISIONAL SEIZURE—CITATION TO PARTNERSHIP—WAIVER OF OBJECTIONS.

1. The defendants sought to recover rights of the transferrers to them of a lease. These rights preceded in date the transfer of the lease to them. The unsworn declaration of a partner, reduced to writing some time after the transfer (the partner testified in the case, and said nothing of additional interest included in the transfer), will not be admitted in evidence to add to, or to explain the terms and conditions of, the contract of lease transferred.

2. On the dissolution of a provisional seizure, for informality, the plaintiff owes actual damages caused by the wrongful writ. The citation was addressed to the defendant partnership.

3. It was served on one of the partners, as if the partnership was a commercial partnership.

4. It was not a commercial partnership quoad the lease to them of immovable property. One of the partners bonded the property (provisionally seized) in the name of the partnership, and received and disposed of the property in the name of the partnership.

5. The partnership is no longer in a position, legally, to invoke the want of citation of one of the partners.

6. The real property leased to a commercial partnership creates, quoad that property, a joint and not an obligation in solido.

7. The transfer of a lease without stipulation does not carry with it other rights than those stated in the contract of lease.

8. The testimony to prove the number of acres leased is conflicting. The weight of the testimony supports the jury's verdict.

9. The lessor must bear the expense of extraordinary repairs rendered necessary by an overflow. The inundation of the land was not unprecedented, and gives no cause for reduction on rent account.

10. Proof fails to establish an amount of assessment for taxes reduced, of which the defendant claims the benefit.

(Syllabus by the Court.)

Appeal from district court, parish of Red River; W. Pike Hall, Judge.

Action by R. B. Hollingsworth against Atkins Bros. From a judgment for plaintiff against defendants in solido, plaintiff appeals. Affirmed.

J. C. Egan, for appellant. Pugh & Wilkinson, for appellees.

BREAUX, J. Plaintiff claims rent as a lessor of a plantation on Red river known as the "Jordan Ferry Plantation." The defendants held as transferees of Smith Bros. for the years 1891, 1892, 1893, and 1894. For the year 1892 the defendants, after they had become transferees of the lessee, executed two notes,—one for the sum of \$2,082.66, due November 1, 1892, and the other for \$588, due on the 30th of that month. Prior to their maturity the plaintiff instituted suit on these notes, and caused a writ of provisional sei-

zure to issue. The defendants moved to dissolve this writ of provisional seizure, on two grounds: (1) That the writ issued without cause; (2) that the affidavit to the petition for the writ was made by the attorney when the plaintiff was present. The first ground was overruled. The second was pronounced fatal to the writ. The provisional seizure was dissolved for the reason that it is only in the absence of the principal that the attorney can make the affidavit. Atkins Bros. (the defendants) obtained a release of a portion of the property seized, by executing a forthcoming bond, on the 11th day of October, 1892. A second forthcoming bond was executed on the 17th of October, and all the property under seizure was released. Plaintiff amended his original petition, and procured another writ of provisional seizure, and caused the seizure of the property on which he claimed a privilege. On the 10th day of January, 1893, the defendants executed a forthcoming bond, and obtained its release, from the second provisional seizure made. Subsequently, one of the partners interposed an exception on the ground that he had not been cited. The exception was overruled. The defendants answered. The case was tried by jury. The verdict was for plaintiff, against defendants in solido, for the sum of \$1,470. The judgment based upon this verdict was signed. After an ineffectual attempt to obtain a new trial, the plaintiff appeals.

Bill of Exceptions.

The defendants, on trial, attempted to prove their right to any overpayment made of rent for the year 1890 by those from whom they leased. To that end they offered to prove that, in the transfer of the lease to them by Smith Bros., the latter intended to convey their right to claim any overpayment of rent on account of any deficiency of acreage in the year before stated. The paper offered to prove intention was signed by a member of the firm of Smith Bros. some time after the suit at bar had been instituted. This member of the firm had testified as a witness in the case, and said nothing about this transfer not shown on the face of the contract of lease under which the defendants held as lessees. The court *a qua* held that, if he was authorized to give an interpretation to the transfer different from what it showed on its face, he should give it under oath, and not by written statement. No rule sanctions the method adopted to prove the intention of the contracting parties. If the act needed interpretation, in order to include all the rights transferred, this writing offered, being unsworn to and *ex parte*, was not admissible, for it could add nothing to the legal rights of the parties. The ruling was correct, and the document properly excluded. The amended petition for a provisional seizure, and the second seizure made, leaves but little to dis-

cuss in matter of the dissolution of the original writ, save the damages due because of its illegality.

Alleged Want of Citation.

One of the defendants pleads and argues that he was not cited, that the partnership of which he was a member was not a commercial partnership, and that the service of the citation addressed to the partnership does not cure the want of citation on the partner not cited. The defendants, having, in the name of the partnership, applied to the court to bond the property, and having executed a forthcoming bond in favor of the sheriff, and taken possession of the property, have cured any defects of citation, or the absolute want of citation. Be the partnership commercial or ordinary, the fact remains that the bond was executed in the name of the partnership, to whom the property seized was delivered. A partnership cannot repudiate a bond, whereby it has obtained possession of the property. The records do not disclose that it was the act of one of the partners, as argued, but that it was the act of the partnership. There was an appearance made in the case, by the act of bonding. It was the condition precedent to obtain release of the property on a forthcoming bond. Such was the ruling in a number of cases of this court, the first case being *Rathbone v. Ship London*, 6 La. Ann. 439. *Bush v. Dewing*, 24 La. Ann. 272; *Williams v. Commission Co.*, 45 La. Ann. 1013, 13 South. 394.

An Ordinary Partnership.

The lease of real estate by a commercial partnership will not have the effect of binding the partners in solido. The lease and the purchase of real estate are not different, in so far as relates to the extent of the ownership of the partners, and their responsibility. The real property bought by a commercial partnership is the joint property of the individual partners. The same rule will apply to a lease. The articles of the Code limit commercial partnership to the purchase of any personal property, and its sale; to carrying personal property for him in ships or other vessels. Rev. Civ. Code, 2825. In interpreting the provisions of the law relating to commercial partnership, the court has decided that the purchase of real estate is foreign to the purpose of a commercial partnership. The reasoning which leads to this conclusion, and establishes its correctness, applies with equal force to the contract of lease. The immovable property leased by a commercial partnership is held by the partnership, for the purposes of the firm, under conditions similar to those attending the ownership of immovable property, and ordinarily the obligations of the partners are joint. It occurs that in the case at bar the responsibility of the lessors is not materially lessened by the joint liability. All the property provisionally seized was subject to the

lessor's privilege. The right is not limited by the joint responsibility, for the lessor's privilege covers the whole property. Even the property of third persons is subject to that privilege, when it is found on the property leased. A partner whose obligation is only joint, and who has furnished a release bond to pay the judgment, should he be condemned, can be held bound to an amount equal to his obligation on the bond. Thus bound to produce property affected by the lessor's privilege, it must be of little moment to him whether the obligation is joint or in solido. Moreover, the judgment appealed from condemns the defendants, in solido, to pay the amount pronounced due. The jury returned that the defendants were liable in solido. Neither of the defendants has answered the appeal, and prayed for the amendment of the judgment. The judgment, as to them must remain irrevocable. Code Pr. art. 889. To the amount of the judgment the question of solidarity is finally determined. In reference to the balance due, it is secured to the limit of the obligation on the bond of release.

Acres of Land Leased.

The defendants claim in their reconventional demand a deduction for 28% acres, alleged shortage in the number of acres for the years 1890, 1891, and 1892, at \$4.50 an acre, and a deduction for a shortage of 31 acres for the year 1890, at \$5 an acre. The jury, in making up their verdict, erroneously included overpayments by Smith Bros., transferrers of the lease to the defendants, though the court had excluded testimony offered to prove that claim. A lease transferred will not include a right to amounts overpaid by the transferrers at the date of the transfer, unless it is expressly declared that the right is transferred with the lease. It is a right distinct from those under the lease, and not carried with the transfer of the lease, without some statement to that effect. The defendants not having been subrogated to the right, it remained with those who paid the amount without having received consideration therefor. The right of a purchaser of a lease (without qualification), for its unexpired term, commences from the date of the purchase. *Walker v. Dohan*, 39 La. Ann. 745, 2 South. 381. The overpayments made by the defendants themselves were for lease on lands for 1891 and 1892, and we are now to determine whether they should be deducted, as claimed. Regarding this area, it is proved that in February, 1892, the plaintiff and one of the defendants, for the purpose of fixing the amount of the rent notes that were executed by the defendants to the order of plaintiff (the lessor), agreed that there were 428% acres of land contained in the tracts leased. Subsequently, the defendants had the land surveyed, in order to establish the number of acres they had leased from the plaintiff. The land was leased subject to

measurement. The surveyor, after his survey, fixed the number of acres at 407 acres, and informed the defendants that that was the entire area of the leased lands. The plaintiff was not notified. After the suit had been instituted the plaintiff employed the same surveyor as the one that defendants had previously employed. The survey was made ex parte. No notice whatever was given to the defendants. The last survey shows an increased area of 28% acres. We gather from the conflict of testimony that in the last survey a less number of acres was deducted, as uncultivable, than was deducted in the first survey. There are sloughs, and other places not cultivable, in the fields; also, skirt lands not cleared for cultivation. The jury determined that the first survey was correct. The difference is not great. It is a question, purely, of fact. The evidence is conflicting. The principle is laid down, and generally received as correct, that where there is no decided preponderance of evidence on either side, the case depending mainly upon the conflicting testimony of the parties themselves, who are equally respectable and unimpeached, the jury are the proper persons to decide between them, as to whose testimony is entitled to the greatest credit, and the verdict ought not, for this cause, to be disturbed. *Proff. Jury Trials*. There is in the case at bar a preponderance of testimony in support of the verdict. The surveyor himself does not depose that his first survey, considered correct by the jury, was incorrect. A verdict is entitled to the regard of an appellate court on questions of fact.

The Overflow.

The next item claimed in defendants' reconvention is for repairs and reconstructions on the land leased. During more than a month in 1892 the place was covered by water several feet in depth. The fences, the houses, and cisterns were greatly damaged, and partly destroyed. Extraordinary repairs were necessary. Subsequently, these expenses were incurred by the defendants. These improvements consisted of reconstructions and repairs not in the line of the ordinary. They were permanent, and added value to the place. The plaintiff must bear the expense of extraordinary repairs rendered necessary by an overflow.

Alleged Unprecedented Overflow.

The defendants claim that in consequence of an annual, extraordinary, and unforeseen overflow, they were able to grow only about 25 or 30 per cent. of a crop after the water subsided, and to that per cent. they ask the rent price be reduced. The testimony does not support defendants' contention. Inundations of those lands were not unprecedented. Witnesses deposed that they were entirely under water during several floods in preceding years. The intervals between

the overflows were not of such number of years as to afford reason to exclude all apprehension upon the subject. The accident was not of such an extraordinary nature that it could not be foreseen, and therefore it would not justify a reduction of the rent. The lands are on a navigable stream which periodically overflows its banks in that section of the state. It has never been decided by this court that the lease of lands thus exposed is subject, in effect, to the "high-water clause," without stipulating that condition. The following decisions control the case on this point: *Vinsom v. Graves*, 16 La. Ann. 162; *Masson v. Murray*, 21 La. Ann. 535; *Jackson v. Michie*, 33 La. Ann. 728; *Payne v. James*, 45 La. Ann. 381, 12 South. 492; and article 2743 of the Revised Civil Code.

The defendants, in the order of their defense, next claim that the police jury having passed an ordinance by which they reduced the assessment on all overflowed lands 50 per cent., provided that, in case of lessors, they allowed a corresponding reduction in the rental, they are entitled to the bounty offered to the unfortunate landowners and lessees who were the victims of the overflow in 1892. The records disclose that there was a reduction of the assessment made of defendants' property. The amount of the whole assessment is not proved, nor is it established, with sufficient particularity, that reduction was made which should inure to the benefit of plaintiff's lessee. There was an attempt made to complete the proof regarding this reduction. Upon objection the testimony was excluded, and no bill was reserved.

Dissolution of the First Writ.

The plaintiff is entitled to damages, in a limited amount, for the wrongful suing out of the first writ of provisional seizure. The evidence satisfies us that \$150 is a reasonable amount. This includes the fees of attorneys, and other expenses incurred in a defense, on motion to dissolve, which resulted in a dissolution of the writ. Though the lessor has the right to detain the property on the leased premises until the rent is paid, and the removal of it gives just cause for the writ, the law requires compliance with its terms; and, if dissolved because of informality, the defendant is entitled to damages. *Fleetwood v. Dwight*, 8 La. Ann. 482.

It is therefore ordered, adjudged, and decreed: That the judgment appealed from be amended by increasing the principal of the judgment against defendants from \$1,470 principal to \$2,620.66, with 5 per cent. interest on \$2,032.66 from November 21, 1892, and 5 per cent. interest on \$588 from November 30, 1892, subject to the following credits, viz.: \$30, an admitted error of calculation; \$130, overpayments on acreage of lands leased; \$250, for extraordinary repairs; \$150, damages caused by the illegal provisional seizure. That the defendants are bound in

solids to the amount of \$1,470, and interest thereon, and jointly for the remainder due. That plaintiff's provisional seizure be sustained, and his lessor's lien and privilege recognized in all of the property seized, until payment of the whole amount of the rent, and that same be enforced on the whole of the property seized, to the whole amount of this judgment, interest, and costs. As amended, the judgment is affirmed, at appellees' costs.

(46 La. Ann. 1417)

BOLAND et al. v. SLIDELL BRICK & TILE MANUF'G CO. (No. 11,487.)

(Supreme Court of Louisiana. April 9, 1894.)

Appeal from district court, parish of St. Tammany; Robert R. Reid, Judge.

Action by Boland & Gschwind against the Slidell Brick & Tile Manufacturing Company, Limited. From a judgment appointing one Perilloux receiver, J. D. Peet appeals. Reversed.

Farrar, Jonas & Kruttschnitt, for appellant. H. L. Garland, Jr., for appellees.

McENERY, J. After the case was argued and submitted, all parties in interest filed an agreement for a consent judgment. By reason, therefore, of the stipulation and agreement filed in open court on the 30th day of March, A. D. 1894, and on the motion of counsel for appellant, it is ordered, adjudged, and decreed that the judgment of the lower court appointing a receiver of all the property of the defendant corporation to manage the same, and for the other purpose named in said order, be annulled, avoided, and reversed, and that E. F. Perilloux, appointed receiver under said order, be discharged from his trust as receiver, all at cost of appellant.

(46 La. Ann. 695)

Succession of GAINES. (No. 11,867.)

(Supreme Court of Louisiana. April 9, 1894.)

COSTS DUE ATTORNEYS—PAYMENT UNDER ORDER OF COURT.

1. Costs follow the judgment, and therefore it is not necessary for parties to whom costs are due to appeal.

2. Where the court orders costs to be taxed against a defendant, the plaintiff has not such an interest in the matter as to be entitled to notice of the granting of the order. If the party to whom the costs are due appeals from the order, it is not necessary to make plaintiff a party thereto.

3. An attorney at law is presumed to know what transpires in the litigation in which he is employed, so far as it affects his interest. If he permits his associate to claim docket and deposition fees in the federal courts, and an order in his favor is rendered for the same, the party owing the fee will be protected in paying according to the terms of the order.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Opposition to account filed in the succes-

sion of Myra Clark Gaines. From the judgment of the civil district court, the executor and executrix of William Reed Mills appeal. Affirmed.

Farrar, Jonas & Kruttschnitt, for appellants. Richard De Gray and Browne & Choate, for appellee W. H. Wilder, executor. Thomas J. Semmes, for appellee W. W. Whitney, administrator.

McENERY, J. This is an opposition to the account filed in the succession of Mrs. Myra Clark Gaines, and this part of the opposition relates only to an amount claimed as costs due the succession of the opponent, W. R. Mills. W. R. Mills, deceased, was an attorney at law, and resided in the city of New Orleans. He had been employed by Mrs. Gaines to prosecute certain suits in her litigation with the city of New Orleans. In these suits Mrs. Gaines collected costs to the amount of \$34,000, in which were included the costs due the opponent. The amount of costs due to said Mills was ascertained and fixed in the following order rendered by the United States circuit court for Louisiana: "The exception of W. R. Mills, filed on 22d May, 1878, to the report of J. W. Gurley, master, herein filed on the 20th May, 1878, is sustained, and it is ordered that said opponent, W. R. Mills, be, and he is, as solicitor of complainant, entitled to the docket fee, to be taxed as costs as against each defendant, wherein reference is made to a master to determine the question of fruits and revenues. It is admitted that in the cases called the 'Agnelly and Monseaux Cases,' Mr. J. Q. A. Fellows was associated as counsel with Mr. Mills in recovering the judgment in those cases; that is to say, the law firm of Fellows and Mills, composed of said Fellows and said Mills, was the solicitors in said cases." The validity of this alleged judgment, as against Mrs. Gaines or her succession, is denied, and, among others, on the following grounds: (1) Because the proof fails to show she had any notice of the proceedings which culminated in said alleged judgment, or that she ever voluntarily appeared therein, and because the same is not final, but contemplated future action which is not shown to have been had; (2) because the proof shows said fees were the property of the law firm of Fellows & Mills, composed of J. Q. A. Fellows and said W. R. Mills, and that said alleged judgment was rendered without any notice to said Fellows, or any appearance by him in the proceedings in which it was rendered, and there is no proof that the alleged future taxation was ever had.

We presume the federal court, in granting the order to tax costs, followed the practice in said courts, and that there was no law requiring notice to be served on the complainant, or on the solicitor who was associated in the case. We see no reason why

Mrs. Gaines should have been made a party to the proceeding, or that she should have been served with notice of the same. She was without interest in the matter, and she was equally without interest to inquire whether the taxed costs were due Mills or Fellows & Mills. It was immaterial to her to whom the costs were to be paid. In fact, she was in no way interested in the order, and it matters not whether it was final or not, so far as she was concerned. She could not have collected the costs, except in pursuance of this order. She assumed the right to collect the costs, amounting to \$2,953.10, and, having collected the same under an order of court recognizing W. R. Mills as the owner, she was bound to account to him for the amount so collected. Fellows, the associate of Mills, is asserting no claim to the costs, and, in the absence of any process of court arresting the amount in her hands, now in the succession, the succession will be protected under the order in paying the amount to the succession of Mills. In argument it was contended that Fellows, if a payment was made to Mills' succession, might thereafter claim his part of the costs from the succession of Gaines. This position is untenable. Fellows was an attorney of record, associated in the cases, and he must be presumed to have had knowledge of what transpired in the litigation in which he was employed. He permitted his associate and law partner to claim the costs, and procure an order in his favor for the amount. After payment of the amount to Mills, Fellows would be estopped from claiming any part of the costs from the succession of Gaines. The succession of Gaines goes further than denying the right of the succession of Mills to recover the costs, and claims the whole amount as the property of the Gaines' succession.

The following is an extract from the brief filed on behalf of said succession: "But there is another objection that goes to the whole of this claim, and will appear from the following: Among other things in evidence is the above 'Transcript of Record, Supreme Court of the United States, City of New Orleans vs. Myra Clark Gaines,' 7 vols. From pages 1101 and 1102, vol. 1, of said transcript, it appears Mrs. Gaines, on the 5th day of May, 1893, recovered a judgment in the United States circuit court for the eastern district of Louisiana against said city of New Orleans for \$1,925,667.83, with interest, and said sum of \$34,000, amount of costs taxed against various defendants in the Agnelly and Monseaux cases, and the suit in which this judgment was rendered was brought by Wm. Reed Mills as the solicitor of Mrs. Gaines. Volume 1, pp. 1 to 13. From this judgment an appeal was taken by the city of New Orleans to the United States supreme court (page 1102), where said judgment was reversed, and the amount was re-

duced to \$576,707.92, with interest, with permission to the city of New Orleans to show what credits, if any, were to be allowed on said amount, and the cause was remanded for that purpose. See 131 U. S. 191, 9 Sup. Ct. 745 (in evidence herein), and especially page 220, 131 U. S., and page 745, 9 Sup. Ct. When the case came back to the circuit court, the above amount of \$576,707.92 was reduced to the extent of \$15,394.50, and said claim for \$34,000 costs (in which it is claimed were Mills' said docket and deposition fees) in said *Agnelly and Monseaux* cases was rejected. Both parties appealed,—the city because more deductions were not allowed her, and the Gaines succession because said deductions of \$15,394.50 had been made, and because said \$34,000 costs had been disallowed and rejected. These were the only parties to that appeal,—the only ones that ever complained thereof; but Mills, although it is claimed he was interested to the extent of his alleged docket and deposition fees, and was, as solicitor, a party to the cause, never complained, or joined in that appeal, notwithstanding the pretense that he was interested, as above. Surely it was his right and duty to have complained and joined in that appeal from the circuit court; but, not having done so, but, on the contrary, having acquiesced therein, his claim for docket and deposition fees is ended, for the reversal of the judgment of the lower court did not inure to his benefit, but to the sole benefit of the appellant,—the succession of Mrs. Gaines. See 138 U. S. 615, 616, 11 Sup. Ct. 423, also in evidence. Nor is this by any means a case where the succession has collected a claim or judgment as the property of William Reed Mills. When the above judgment and costs were awarded against the city of New Orleans, and in favor of Mrs. Gaines, and were collected by her succession, they were awarded and collected, not as the property, in whole or in part, of W. R. Mills, but as the property of Mrs. Gaines. In other words, they were not collected under the ex parte, interlocutory order of the circuit court, made on the exceptions of Mills, but under the judgment of the United States supreme court rendered in her favor, and reported in said 138 U. S. and 11 Sup. Ct. There is therefore nothing in the collection of said \$34,000 costs which would estop the appellee from denying any interest or ownership on the part of Mills therein." Costs followed the judgment, and we can see no reason why Mills should have appealed from a decree which made it necessary for complainant to appeal from the entire judgment. The costs followed as a necessary incident to the judgment. There is nothing in the case reported 138 U. S. 595, and 11 Sup. Ct. 423, that sustains the pretenses of the succession of Gaines. In that suit the costs were taxed in favor of the complainant, as in all cases where the judgment is against the party cast. The decree in the case referred to, relating to the

costs, is "that the decree of the court below should be modified by adding to it the amount of said costs, to wit, \$34,000, with interest, as adjudged in the original decree of said court." The decree appealed from must therefore be amended, allowing interest on the amount of costs—\$2,952.10—from the 10th of January, 1881, until paid. As thus amended it is affirmed; the succession of Gaines to pay costs of appeal.

(46 La. Ann. 709)

STATE v. WILLIAMS. (No. 11,536.)

(Supreme Court of Louisiana. April 23, 1894.)

JUSTIFIABLE HOMICIDE—CHARACTER OF DECEASED.

1. The mere fact of going to the place where the accused lives, and seeking an explanation from him, does not in itself constitute such an act of hostility as would justify the taking of human life. In order to constitute the overt act or hostile demonstration that would justify the taking of human life, there must be some demonstration made by deceased against accused as to impress upon the latter that he was in imminent danger of his life or some great bodily harm.

2. In some instances, the extent of the overt act which would induce the accused to act in his self-defense is measured by the character of the deceased for a violent, quarrelsome, dangerous, and turbulent disposition, notorious in the community, or known to the accused.

(Syllabus by the Court.)

Appeal from district court, parish of Lafourche; L. P. Caillouet, Judge.

Duncan Williams was convicted of murder, and appeals. Affirmed.

John S. Billin, for appellant. M. J. Cunningham, Atty. Gen., and B. F. Winchester, Dist. Atty., for the State.

McENERY, J. The defendant was indicted for murder, tried, convicted, and sentenced to death. He appealed.

He relies upon one bill of exception reserved to the ruling of the trial judge. It is as follows: "The defendant offered to prove by a state witness the turbulent character of the deceased, when it was stated by said witness that the deceased, living on another place, came and sought the accused; that the overt act was complete from that fact." To this bill the court appended the following statement: "By the Court: There was no evidence of any overt act or hostile demonstration by the deceased towards the accused. The deceased went to the plantation where the accused was, and asked an explanation about something which deceased had said to his wife about what the deceased had told him (accused) about her. Deceased and accused had some discussion about the matter, when a mutual friend interposed, and advised them that the matter was too trifling to have any dispute about; whereupon the accused returned into the house, from which he had come when deceased first called him out. The deceased continued to talk on the gallery of his house with the said

mutual friend, and remarking that 'any man who repeated what another had told him about his wife is a son of a bitch.' The accused, who had walked out of the house and gone as far as the steps of the gallery, turned and asked the deceased, 'Do you call me a son of a bitch?' to which accused replied, 'Call you a son of a bitch?' Whereupon, without any movement or demonstration on the part of the deceased, the accused fired the fatal shot. Such was the state of the case as made out by the only eyewitness at the time the accused offered to prove the turbulent character of the deceased."

The mere fact of going to where the accused lived by the deceased, to seek an explanation from the accused, did not in itself constitute such an overt act of hostility as would justify the slaying of the deceased. In order to constitute the overt act that would justify the taking of human life, there must be some demonstration made by the deceased against the accused of such character as to impress upon him that he was in imminent danger of his life or some great bodily harm. In some instances, the extent of the overt act which would induce the accused to act in his self-defense is measured by the character of the deceased for a violent, quarrelsome, dangerous, and turbulent disposition, notorious in the community, or known to the accused. In the instant case there was no demonstration whatever, according to the trial judge's statement, of the deceased against the accused. Words of abuse alone are not demonstrations against the accused, but they may be important to show the character of the overt act. No overt act accompanied the offensive words addressed by the deceased to the accused.

The learned counsel for the accused urges that, had the testimony as to the turbulent character of the deceased been admitted, it would have had the effect of lessening the punishment. The jury had before them all the facts in the case, and, without the overt act, the turbulent disposition of the deceased could have no bearing upon the case. The accused seems to have acted from provocation, but not of such strength as to justify the taking of the life of the deceased. It was within the province of the jury to return a qualified verdict. But, as they did not do so, we are powerless to afford the defendant relief. Judgment affirmed.

(46 La. Ann. 704)

STATE v. CLARK. (No. 11,523.)

(Supreme Court of Louisiana. April 23, 1894.)

HOMICIDE—INSTRUCTION.

It is error for the trial judge, in a trial for murder, to refuse to charge the jury that they can, if the evidence justifies it, return a verdict of "Guilty of manslaughter."

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; Felix Voorhies, Judge.

Phil Clark was convicted of murder, and appeals. Reversed.

A. & Chas. Fontellieu, for appellant. M. J. Cunningham, Atty. Gen., and R. F. Broussard, Dist. Atty., for the State.

McENERY, J. The defendant was indicted for murder, tried, and a qualified verdict of "Guilty, without capital punishment," returned by the jury. He appealed.

Counsel for the accused requested the court to instruct the jury, in a special charge, that one of the verdicts they could return was "Guilty of manslaughter." This charge was refused by the judge on the grounds that the evidence in the case was entirely circumstantial; that the line of defense adopted by the defendant was not in mitigation of the offense for any of the causes, known to the law, which would have reduced the charge of murder to manslaughter. Section 785 of the Revised Statutes says that "on trials for murder the jury may find the prisoner guilty of manslaughter." It matters not, therefore, what is the nature of the evidence, or the line of defense adopted by the defendant. The law, absolutely and without qualification, gives the jury the right to return a verdict of manslaughter on a trial for murder. It was the duty of the judge to instruct and charge them that, if the evidence justified such a verdict, they could return it. The identical question presented in this case was passed upon by this court in the case of *State v. Brown*, 40 La. Ann. 725, 4 South. 897; and for the reasons assigned by the trial judge in the instant case the trial judge in that refused to instruct the jury that they could return a verdict of manslaughter. "The charge was refused by the judge on the ground, substantially, that the ruling invoked by the defense was inapplicable to the state of facts developed during the trial, which admitted of no mitigated verdict, but called, absolutely, for a verdict of 'Guilty' or 'Not guilty,' and that to have given the charge requested would have been simply the enunciation of an abstract legal proposition, which had no bearing upon the case on trial." *Id.* In commenting on the statement of the trial judge in the case referred to, we said: "The law's command is that the jury must be informed by the court that on trial for murder the jury may find the prisoner guilty of manslaughter, and the omission or the refusal to so inform them is a flagrant disobedience of the law, and is a fatal error." This case was remanded (41 La. Ann. 410, 6 South. 670), and on the second trial the same question was, without the probable intention of the judge, thrust upon the court by the charge of the trial judge, in which he said, "I refused to give the charge because it did not seem to me, under the facts disclosed on

that trial, that the crime of manslaughter was involved in the case," and then proceeded to give the jury the ruling of the court on the first appeal. In milder, but equally emphatic, language, in the opinion remanding the case, we pointed out what we conceived to be the duty of the judge on the trial of criminal cases in charging and informing the jury: "The judge's duty is very plain,—to give the law, and leave the jury to determine whether it is applicable to the facts, free from any opinion of his own on the facts." The language of section 785 of the Revised Statutes, and the opinions of this court interpreting the same, are plain and unambiguous; leaving no room for construction, or a departure from the text of the section or the opinions of the court. It is to be regretted that the trial judge should have placed a construction on the section 785 in direct opposition to its obvious meaning, and contrary to the rulings of this court. Such a course has served no useful purpose, but has been the occasion of unnecessary delay in the final disposition of an important criminal case. The judges of subordinate tribunals may not always concur in the rulings of the appellate court, but it is the jurisprudence of the state that they shall respect the rulings of the supreme tribunal, and obey the law as interpreted by it. After the law in a particular case has been announced by the appellate court, the individual opinions of judges of inferior tribunals are of little consequence, except so far as they may be advanced in the obstructing of the course of justice. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered that this case be remanded to be proceeded with according to law.

(46 La. Ann. 762)

GUMBLE et al. v. BOYER et al. (No. 11,531.)

BOYER v. CANNON, Sheriff.

(Supreme Court of Louisiana. April 9, 1894.)

CONCURRENT MORTGAGE NOTE — FORECLOSURE —
PRIORITIES—INTERVENTION BY THIRD OPPONENT
—PARTIES—PAYMENT BY AGENT.

1. The holder of a concurrent mortgage note has the right to assert his preference for payment on the proceeds of the sale of the mortgaged property over the transferrer, the payee of the note, by third opposition.

2. While it may not be necessary to make the mortgagor a party, it is not fatal to the proceedings if he is made a party defendant, and a personal judgment prayed for against him. These matters concern the mortgagor, and in no way affect the mortgagee, who is interested only so far as the opposition is concerned, with contesting the preference claim of the third opponent.

3. If the agent of the maker of a mortgage note has no funds of the principal in his possession, there is no reason why, on the request of the principal, he cannot buy for his own account the mortgage note, and hold it as security for the amount advanced for the principal. If the agent has money of the principal in his pos-

session, and purchases the note, and makes a payment thereon with the funds of the principal, this payment will be considered as having been made by the principal, and the mortgage will be extinguished by confusion to the amount of the payment.

4. A mere indorsement of the note carries with it the mortgage security. The offer of testimony to show in what manner the agent acquired the note is not a contradiction of the indorsement, when it is restricted as to whether the agent purchased the note for his own account, with his funds, or for his principal, with the latter's funds.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; Adolphe V. Coco, Judge.

Intervention by Ferdinand Gumble & Co. by way of third opposition in a suit by J. A. Boyer against Joseph V. Moreau to foreclose a mortgage and enforce vendor's privilege. From the judgment, Boyer took a devolutive appeal. Reversed.

William H. Peterman and Clegg & Thorpe, for appellant Boyer and others. G. H. Couvillon, for appellees.

McENERY, J. Ferdinand Gumble & Co., cotton factors and commission merchants in the city of New Orleans, alleging themselves to be the owners of a promissory note for the sum of \$3,300, secured by vendor's privilege and special mortgage on certain property situated in Avoyelles parish, dated 8th December, 1891, payable on demand, with 8 per cent. interest, intervened by way of third opposition in the suit of the vendor against the vendee, Joseph V. Moreau, to foreclose the mortgage and enforce the vendor's privilege, claiming a preference in the proceeds of sale over the vendor, the transferrer of the concurrent mortgage note held by third opponents. Exceptions were filed of no cause of action and misjoinder of parties. The theory upon which the exception of no cause of action is based is that the mortgage note held by Gumble & Co. is a separate special mortgage. But this is not a fact. It is a concurrent mortgage note, and the proceeding by third opposition to share in the proceeds was proper. The defendant Moreau was joined in the suit instituted by third opponents. This may not have been necessary, but it was not fatal. It in no way affected the defendant Boyer. Nor did the prayer for a personal judgment against Moreau, the mortgage debtor, concern him. Moreau is not complaining. The defendant Boyer is only interested in the proceedings against the property or its proceeds. So far as these are involved, he is properly before the court, and has no interest whatever in the personal judgment prayed for against Moreau. J. A. Boyer, the vendor, answered, denying that the third opponents had any privilege or mortgage on said property described in the petition entitling them to be paid in preference to the vendor and transferrer of the note. Boyer, with leave of the court, amended his answer, and denied that

the interveners and third opponents ever purchased said note from him, but paid the same for the mortgagor, thus extinguishing and destroying the mortgage. The third opponents objected to the filing of the amended answer, on the ground that it altered and changed the substance of the original answer. We do not perceive any alteration of the original answer. That denied that the opponents had any mortgage or privilege on the property, and the amended answer only set out the particular fact on which the general averment in the answer was based. Under these circumstances the amended answer was properly allowed to be filed.

The law applicable to the controversy herein is well settled. There is only a question of fact involved, and the sole question is whether Gumble & Co. acquired the note subject to a credit of \$1,500.70, which was paid out of funds in their hands, belonging to Moreau, the maker of the note. The transfer of the note and the indorsement thereon do not prevent this inquiry, as the transfer and ownership of the note are not questioned. Testimony was improperly rejected to show the fact stated above, the judge ruling that the indorsement on the note could not be contradicted. Boyer sold the property to Moreau for \$3,300, payable on demand, and on a credit for the balance of the price. The several payments were evidenced by promissory notes secured by vendor's privilege and special mortgage. The following letter was addressed to Gumble & Co. by Moreau: "Cottonport, La., Dec. 21, 1891. Messrs. F. Gumble & Co., New Orleans—Dear Sirs: I have bought Mr. J. A. Boyer's plantation at Moreauville, with sawmill and cotton gin. He will call on you in a day or two with a mortgage note of \$3,300; but I paid on said note \$300. Please pay the \$3,000 for me, and, should I not have that amount to my credit, hold the note against me until I ship all my cotton. I have 330 bales, and have shipped 300, and will ship the balance as soon as possible. * * * Yours, truly, J. V. Moreau." To this letter Gumble & Co. replied as follows: "New Orleans, December 22, 1891. Mr. J. V. Moreau, Cottonport, Louisiana—Dear Sir: In reply to your favor of the 21st instant, we will say we must decline in complying with your request, for two reasons: First of all, we will not pay the mortgage note of J. A. Boyer, drawn by you in his favor; and, secondly, we cannot recognize your letter of above date, as it is neither written nor signed by you. Now, if you will write us to buy the note in question, and write and sign the letter yourself, all will be satisfactory. We will buy the note, and hold it until you ship enough cotton to cover. Mr. J. A. Boyer understands the situation. Awaiting your reply, we remain, truly yours, Ferdinand Gumble & Co. P. S. Write your own letter." Moreau answered this letter as follows: "Cottonport, December 29th, 1891. F. Gumble & Co., N. O., La.

—Dear Sir: Please find inclosed B/L for 4 B/C; also please go and buy my note of J. A. Boyer, which is in Mr. Charles Hernandez's hand, and keep the said note until paid, and send me a receipt for the note, as you hold it for security, and I will ship enough to pay all due you if the roads don't get bad. * * * Yours, respectfully, J. V. Moreau." These letters, which were introduced by the plaintiff in executory process, showed that Gumble & Co. declined to pay the note for Moreau as his factor and agent, but consented to purchase it on their own account, and hold it as security for the money advanced as an accommodation to Moreau. In the admitted testimony, and even in that rejected, there is nothing to contradict the meaning of these letters, which undoubtedly show that, at the request of Moreau, Gumble & Co. purchased the note, and positively declined to pay it for account of Moreau. The indorsement on the note is as follows: "For value received, I hereby transfer the within note to Ferdinand Gumble & Co., with all the rights and interests I have in said note, without recourse against me." This indorsement added nothing to a simple indorsement, which carries with it all the securities of the note. The testimony which was rejected was introduced to show that the mortgage debtor, the maker of the note, notwithstanding the agreement in the letters, had paid with his own means, through Gumble & Co., his agents, the \$3,000, balance due on the note. This testimony would in no way contradict the indorsement, as its transfer to Gumble & Co. is not at issue. Their right to sue on the note is not questioned. They are, by the pleadings, recognized as the legal holders of the note. It is certain that if Gumble & Co. had no funds in their hands at the time they bought the note of the defendant Boyer, they had the right to purchase the same for their own account. And if they purchased the note, and paid the credit indorsed on it, out of the funds of their principal, he is to be considered as having made the payment, and the mortgage would be canceled to that amount. From the indorsement of payments on the note it appears that Moreau paid only \$1,500.70 on it after the first payment of \$300 before it went into the hands of Gumble & Co. Now if, in the check of Gumble & Co. to Hernandez, who held the note for collection for Boyer, this \$1,500.70 credit was included, and was paid out of the funds of Moreau in their hands, they could only, of course, buy the note subject to this credit, and would be entitled to share in the proceeds concurrently for the balance due, provided the note was purchased for their own account, and not solely for Moreau, as his agent, for whom they advanced the money, and to whom they charged the same in their account. These facts the defendant Boyer should have had an opportunity of presenting, if they existed, as alleged by him. We have not discussed each exception to testimony noted in the rec-

ord, as the objections all go to the same purpose, and under our ruling all of the rejected testimony should have been received in evidence.

Boyer, at the sale of the property, was the last and highest bidder. He tendered to the sheriff the costs and the balance on the second mortgage note. The sheriff declined to adjudicate the property to him because of his failure to comply with his bid by paying the entire amount demanded in the writ of seizure and sale, and also because he was ordered in the third opposition of Gumble & Co. to retain the entire proceeds in his hands for final distribution. The sheriff could not do otherwise than obey the mandate of the court, and the defendant Boyer's speediest remedy was for a rule against the sheriff to adjudicate the property to him, and to make him a deed to it. The relief prayed for by Boyer was denied, and he was ordered to comply with his bid, and, in default thereof, to again sell the mortgaged property. From this judgment Boyer took a devolutive appeal. The defendant Moreau has not appealed, and we cannot disturb the judgment as to him. It is therefore ordered, adjudged, and decreed that the judgment appealed from, so far as it involves the issues between third opponents and plaintiff Boyer in the executory process, be annulled, avoided, and reversed, and it is now ordered that the case be remanded, to be proceeded with according to law.

(46 La. Ann. 787)

BOYER v. CANNON, Sheriff (**GUMBLE et al.**, Interveners. No. 11,530).

(Supreme Court of Louisiana. April 9, 1894.)
JUDICIAL SALES—FAILURE TO COMPLY WITH BID.

A party who has been declared by a judgment of court, not suspensively appealed from, as having failed to comply with his bid, is without interest to enjoin the subsequent sale of the property under an order of court made in pursuance of said failure to comply with the terms of the sale.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; Adolphe V. Coco, Judge.

Bill by J. A. Boyer against Olifton Cannon, sheriff, to enjoin a judicial sale. Gumble & Co. intervene. From an order granting an injunction, the interveners appeal. Reversed.

G. H. Couvillon, for interveners and appellants. William H. Peterman and Clegg & Thorpe, for appellee.

McENERY, J. Many of the facts to the proper understanding of this case are stated in the case No. 11,531, of *Gumble v. Boyer* (just decided) 15 South. 84. The defendant in that case took a devolutive appeal. The defendant Boyer refusing to comply with his bid, the sheriff, in pursuance of the decree, advertised the property for sale. In doing so he advertised the property as being sold under a *fi. fa.*, instead of a writ of

seizure and sale issued in pursuance of an order of seizure and sale. For this reason the defendant Boyer enjoined the sale. *Gumble & Co.* intervened. Objections were made to their intervention. It was properly overruled, as they had an interest in the sale of the property, to realize the amount of the concurrent mortgage note which they held. There was no personal judgment rendered in this case under which a *fi. fa.* could issue. This is not denied, and it is admitted that the proceeding was irregular; but the defense is that it was the fault of the printer, and that the defendant has shown no irreparable injury, and was not the owner of the property, and had no interest in arresting the sale. The decree of the district court was that the defendant Boyer had not complied with his bid, and the property was ordered to be again offered for sale. This judgment was not suspensively appealed from, and there was nothing in the way of its execution. Boyer was therefore a stranger to the proceeding under the order of court, and was without interest to arrest the sale of the property. The said order to sell was, in effect, an interlocutory order, carrying into execution a judgment not arrested by a suspensive appeal. *Whan v. Irwin*, 27 La. Ann. 708; *State v. Judge*, 30 La. Ann. 229; *Boutte v. Executors, etc.*, Id. 177; *State v. Ellis*, 45 La. Ann. —, 14 South. 308; *Murphy v. Murphy*, 46 La. Ann. —, 14 South. 212. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the injunction issued herein be dissolved, at costs of plaintiff in injunction.

(46 La. Ann. 654)

STATE v. OLIVER. (No. 11,524.)

(Supreme Court of Louisiana. April 9, 1894.)
CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

The rule is well established in criminal cases, in matters of applications for new trials, that the affidavit, alone, of the applicant is not sufficient. It must be supported by the affidavits of others, and when possible by those of the newly-discovered witnesses.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

From a conviction, Nora Oliver appealed. Affirmed.

Robert Whetstone, for appellant. M. J. Cunningham, Atty. Gen., for the State.

NICHOLLS, C. J. The only question submitted to us in this case is the correctness or incorrectness of the action of the district judge in refusing defendant a new trial. It is well settled that applications for new trial in criminal cases are addressed to the sound judicial discretion of the presiding judge, whose conclusions will be sustained unless manifestly wrong. There is nothing in this

case calling for a reversal. The application rests entirely upon defendant's affidavit. In *State v. Washington*, 36 La. Ann. 341, we said: "Applications for new trials, in criminal cases, on the ground of newly-discovered evidence, must always be received with caution. The inducements to false swearing on the part of the person convicted are obvious, and therefore the rule is well established that his affidavit, alone, will not suffice. It must be supported by the affidavits of others, and when possible by those of the newly-discovered witnesses. The mere statement that the accused did not know of the testimony in time to have brought it forward is not sufficient." Expressions of similar import will be found in *State v. Cotten*, 36 La. Ann. 980, and in *State v. Hyland*, Id. 87. Judgment affirmed.

(46 La. Ann. 700)

STATE v. SARRADAT et al. (No. 11,391.)
(Supreme Court of Louisiana. April 9, 1894.)

ORDINANCES—REGULATION OF MARKETS—CONSTITUTIONAL LAW.

1. City Ordinance 4155, Council Series, is constitutional, legal, and valid.

2. The city council of New Orleans has the unquestioned authority to designate a place where perishable food may be sold, such as meats, fish, fruits, vegetables, etc., to regulate the police of the market places, to lease the same, not for the purpose of revenue solely, but in order to maintain the market buildings, and the police of the same; and for this purpose to authorize the lessee to charge a reasonable sum for stalls and space.

3. Because one raises his own produce, gives him no right to sell it in violation of a city ordinance.

4. The city ordinance regulating the markets must give free access to the markets, and afford proper facilities to persons who desire to sell goods which the ordinance requires to be exposed for sale there. The ordinance must be impartial, making no discriminations, and creating no monopolies, and offering no serious impediments to trade.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; August M. Aucoin, Judge.

John L. Sarradat and others were convicted of violation of an ordinance, and appeal. Affirmed.

Sambola & Ducros, for appellants. E. A. O'Sullivan, City Atty., and George W. Flynn, Asst. City Atty., for the State.

McENERY, J. The defendants were convicted and fined for violating sections 22, 26, 27, of City Ordinance 4155, Council Series, amended by Ordinance 4274, Council Series. They appealed, alleging the unconstitutionality and illegality of the ordinance. In detail the defense is that the provisions of said ordinance are oppressive, and contrary to the enlightened policy of the state, and, "inasmuch as section 27 aforesaid prohibits the sale of their vegetables in any other part of the market or vicinity, and during more than half the business portion of

the day,—i. e. between the hours of seven o'clock a. m. and two o'clock p. m., in violation of the first and the two hundred and sixth articles of the state constitution;" that the said sections of the ordinance are arbitrary, and in restraint of trade, and in contravention of common as well as private rights; that the provisions of section 22, if they apply to defendants' calling, exclude them from the markets, in violation of their constitutional rights to sell their produce; that the sale of the defendants' vegetables is not a nuisance, and injurious to the public health; that the police force of the city and the market lessees are convinced of the illegality of the ordinance, and have not heretofore attempted to enforce it, and permit the sale of vegetables from gardener's carts at the market on the payment of 25 cents per day. Article 206 of the constitution has no application to the case. Article 1 has reference to the origin of government from the people, and defines the legitimate objects of government, its legitimate end being "to protect the citizen in the enjoyment of life, liberty, and property." Its failure to protect the public health would be as great a violation of its "legitimate end" as to entirely depart from its object by the enactment of a law infringing upon the rights of the individual. We may assume, therefore, that the proper regulation of the market is a sanitary measure, being for the purpose of promoting the public health, and a legitimate exercise of the governmental power. In the exercise of this power the legislature has conferred ample and complete power on the city council to establish markets, and to provide for the cleanliness and salubrity of the city. In carrying out this conferred power, the city council has the power "to designate certain spots or places for the sale of certain articles of provisions. In doing so they facilitate the people in the purchase of provisions of first necessity by confining the sale of them to particular places and hours of the day, and they facilitate the inspection of provisions; and by the hire of stalls they raise money to defray the expenses of building market houses, and pay the salaries of officers they appoint to prevent the sale of unsound provisions; and they have an undoubted right to prevent the violation of ordinances they may pass in establishing markets." *Morano v. Mayor*, 2 La. 217. The doctrine enunciated in this case seems to be universal. *Dill. Mun. Corp.* § 313; *Parker & W. Pub. Health & Safety*, par. 305; *State v. Gisch*, 31 La. Ann. 544. The right to establish public markets is accompanied by the right to prevent the establishment of private markets within prescribed limits. *Parker & W. Pub. Health & Safety*, par. 307; *State v. Gisch*, 31 La. Ann. 544; *City of New Orleans v. Stafford*, 27 La. Ann. 417; *State v. Schmidt*, 41 La. Ann. 27, 6 South. 530; *State v. Barthe*, 41 La. Ann. 46, 6 South. 531; *State v. Natal*, 42 La. Ann. 612, 7 South.

781; *State v. Deffes*, 44 La. Ann. 164, 10 South. 597. And also to prohibit the peddling about the streets of the city of all perishable food articles. The city council therefore has the unquestioned authority to designate a place where perishable articles of food, such as meat, fish, fruits, and vegetables, may be sold; the market limits; to regulate the police management of the market places; to lease the same, not for the purpose of revenue alone, but in order to maintain the proper police of the markets; the building of market houses, and the repairs of the same; and for this purpose to authorize the lessee to charge a reasonable sum for stall and market room. *Morano v. Mayor*, 2 La. 217. The establishment of market places is for public convenience, as well as for the promotion of the cleanliness and health of the city. It is not a permit or license to sell particular articles there, and therefore no special license for selling at that particular place can be exacted. But this does not prohibit the payment for the use of stalls and market room or space, which is exacted for the purpose of keeping up the market places. The market places having for their double purpose the preservation of the public health and the general convenience of the public, all persons who resort to them for the sale of such articles as are required to be sold there must have access to them. The market regulations must be impartial, affording the same rights to all, avoiding the creation of monopolies in one or several persons, and the prohibition of trade in any article, or an undue restraint of trade. *Parker & W. Pub. Health & Safety*, par. 308; *Dill Mun. Corp.* § 380; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885; *State v. Mahner*, 43 La. Ann. 497, 9 South. 480. Section 22 of the ordinance prohibits the peddling of meats, fish, game, fowls, vegetables, and fruits in any of the public markets, or within six blocks of same. Section 26 gives the right to market wagons to back up to the banquettes along the markets, to deliver goods previously sold to occupants of stalls. It prohibits the owners of the wagons from selling their produce from said wagons between the hours of 7 a. m. and 2 p. m. No fees or dues are to be collected from said wagons. Section 27 prohibits the sale of any article on the sidewalk or the public walks in front or in the rear or around any of the markets. The offense of defendants was selling from their wagons while they were backed to the market banquette for the purpose of delivering goods sold to owners of stalls.

Under the terms of the law referred to above, we are unable to see where any of the rights of defendants were infringed. They were dealers in vegetables, which the ordinance required should be sold, if within mar-

ket limits, within market hours. They were not excluded from the sale of their produce in the markets. They could have rented stalls or space, and disposed of their goods within the market inclosure. There was no monopoly created in favor of one or more persons by the prohibition of the sale of certain articles immediately on the banquettes and approaches to the markets. This regulation did not prevent their sale elsewhere, either in the market or beyond the market limits. The market ordinance is not oppressive, as it interferes with no right of the defendants. It is not partial, and does not operate against them exclusively, but is applicable to the vendors of articles or goods required to be sold within certain limits and within certain hours. The conflict about the deficiency of room for the numerous carts or wagons at the market has nothing to do with the case. There is no prosecution for obstructing the approaches to the market by defendants' carts.

The testimony which was rejected also has no place in determining the question at issue. It is immaterial whether the defendants for a long time were permitted by the market lessees and the police to sell from their wagons while backed to the market sidewalks, or that they were required to pay 25 cents for selling from their wagons. The ordinance does not require the payment of such a fee, and the evidence was irrelevant.

Because the defendants raised the produce which they sold, in violation of the ordinance, gave them no special privilege of exemption from its operation. The case of *State v. Blaser*, 36 La. Ann. 363, relied upon by defendants, presents a different state of facts, and different issues were involved, and it therefore is inapplicable here. Judgment affirmed.

(46 La. Ann. 1418)

STATE v. FRIED et al. (No. 11,392.)

(Supreme Court of Louisiana. April 9, 1894.)

REGULATION OF MARKETS — VALIDITY OF ORDINANCE.

Same as the case of *State v. Sarradat*, 15 South. 87.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; August M. Aucoin, Judge.

Henry Fried and others were convicted of a violation of a city ordinance, and appeal. Affirmed.

Sambola & Ducros, for appellants. E. A. O'Sullivan, City Atty., and George W. Flynn, Asst. City Atty., for the State.

McENERY, J. The defendants in this case were prosecuted for the same offense as that charged in the case of *State v. Sarradat*, 15 South. 87. The two cases, presenting the same issues, were by consent submitted together. For the reasons assigned in case No. 11,391, *State v. Sarradat* (just decided), the judgment appealed from is affirmed.

(46 La. Ann. 715)

WITTLOW v. SUAREZ. (No. 11,380.)

(Supreme Court of Louisiana. April 9, 1894.)

RES JUDICATA.

Agreement of settlement or compromise of claims against a succession, pleaded and maintained as a bar against a suit on such claims, cannot be afterwards used as a defense against the suit on the agreement itself.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by Mary Ann Wittlow against Mrs. Louisa Suarez. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Tissot, for appellant. W. S. Benedict and H. C. Cage, for appellee.

MILLER, J. The plaintiff sues to enforce an agreement by which defendant, universal legatee of Joseph Llula, agreed, as soon as the litigation pending in the succession of the deceased was ended, to convey to plaintiff certain real estate. The defense was *res judicata*, based on the judgment in the suit between the same parties decided by this court in 44 La. Ann. 61, 10 South. 406, and estoppel arising, the answer alleges, from plaintiff's repudiation of the agreement sued on, and the repudiation is charged to consist in plaintiff's institution of the suit reported in 44 La. Ann. and 10 South. On these exceptions the suit was tried, and defendant appeals from the judgment in favor of plaintiff.

It appears that the plaintiff asserted the right to one-half of the property left by Llula; that with the view of averting litigation, and for other causes, as we gather from defendant's brief, plaintiff and defendant entered into the agreement on which plaintiff sues, for the conveyance to plaintiff of certain property. It is stated in defendant's brief this was not an agreement, but a compromise. Whether one or the other is, in our view, immaterial. Subsequent to the agreement the plaintiff brought the suit for one-half the property of the succession of Llula. The agreement now sued on was urged by defendant in the previous suit as an estoppel against plaintiff. The decision in 44 La. Ann. 61, 10 South. 406, maintained that estoppel. Plaintiff's present suit on the agreement is the sequel of her previous controversy. The decision in 44 La. Ann., 10 South., determined that plaintiff had no right to one-half the property of Llula; but, as to the agreement, the decision upheld it as an estoppel of plaintiff's demand in that suit. The expression of the court in that decision, it is said in defendant's brief, was obiter. But the agreement was part of the defense. It was therefore properly passed upon. If an estoppel in the previous case, it was because of the obligation of defendant to convey the property for which plaintiff now sues. Therefore the previous decision, in-

stead of forming *res judicata* against plaintiff, supports her present demand.

As to the exception that plaintiff is estopped from now suing on the agreement, because she repudiated it by bringing the previous suit, we think the decision in that suit in effect reserves her right under the agreement. The defendant affirmed the validity of the agreement when she pleaded it in that suit. If valid to conclude plaintiff's asserting a demand for half the property, it certainly ought to avail plaintiff to secure that which it stipulates she shall have. The defendant cannot, in our opinion, after successfully using the agreement as a shield against the demand of a different character in a previous suit, now deny the plaintiff's right to the property stipulated to be conveyed to her by the agreement. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

(46 La. Ann. 679)

LUCKEY et al. v. POLICE JURY OF BIENVILLE PARISH et al. (No. 11,377.)

(Supreme Court of Louisiana. April 9, 1894.)

CONSTITUTIONAL LAW—TITLE TO ACT—ELECTION—CONTESTS—PARTIES—SERVICE OF CITATION—REJECTION OF RETURNS—THROWING OUT ILLEGAL VOTES.

1. Act No. 106 of 1892, entitled "An act to provide for contesting elections held under articles 209, 242, and 250 of the constitution of 1879 and the laws to carry the same into effect," is not unconstitutional as violative of articles 29 and 30 of that instrument.

2. The police jury of Bienville parish was properly made a party defendant in the contest of an election held under Act No. 88 of 1892 by citation upon its president.

3. Where the court, from all the circumstances in a particular case, and from all the evidence in the record, can reach a conclusion as to what the actual legal vote cast at a particular precinct was, it is its duty to give effect to the vote, notwithstanding the election officers may have been guilty of misconduct in some particular respect. The rejection of the entire returns and the entire vote at a poll for misconduct of the election officials is not by way of penalty or punishment upon the commissioner, or the particular persons or interests to be benefited by their illegal action, but only because in the special case the truth is not deducible from the returns and the evidence. The political rights of the legal voters must be saved if it be possible to do so.

4. Where parties contesting an election place one of the commissioners upon the stand, and through him prove a particular illegal act by the commissioners which is susceptible of separation from their general conduct, and susceptible of special correction, and the same commissioner affirmatively proves (if his testimony is to be taken as trustworthy) that the act shown was the only one of which complaint could be made, and that otherwise the votes cast were legally cast, and the returns made otherwise correctly showed the vote as cast, the court should limit the remedy to throwing out the votes shown to have been illegally cast and returned. Whether or not the commissioner, under such circumstances, is to be believed, will depend upon all the facts and circumstances of the case and the whole evidence in the record. He is not necessarily to be disbelieved. Plaintiffs, in placing him upon the

stand as their witness, showed confidence themselves in his truthfulness. It is very questionable whether the official acts of election commissioners should be permitted to be impeached by the testimony of the commissioners themselves.

(Syllabus by the Court.)

Appeal from district court, parish of Bienville; J. T. Watkins, Judge.

Proceedings by L. J. Luckey and others against the police jury of Bienville parish and others to contest an election. From a judgment dismissing the suit, plaintiffs appeal. Affirmed.

Ben P. Edwards, W. M. Richardson, Wise & Herndon, and John A. Richardson, for appellants. L. K. Watkins, Frank P. Stubbs, J. A. Dorman, Drew & Stewart, and J. E. Reynolds, for appellees.

NICHOLLS, C. J. The controversy in this case arose from an election held on the 17th January, 1893, under the provisions of Act No. 88 of 1892, for the location of a new parish seat for Bienville parish, the towns contesting for the location being Arcadia and Bienville. Plaintiffs are voters and taxpayers in the parish, living at and near the town of Bienville. The defendants are the police jury of the parish, cited through its president, and the town of Arcadia, cited through its mayor. On the 19th January, 1893, the president of the police jury issued a proclamation declaring that Arcadia had, by a majority of 65 votes, been selected as the parish seat, and recognizing and announcing that fact. Plaintiffs contest the election, and pray for a judgment decreeing the town of Bienville to have received a majority of the legal votes, decreeing it to be the seat of the parish, and ordering the judicial records, which had, in the mean time, been taken to Arcadia, to be removed to Bienville. They recognize that 1,864 legal votes were cast at the election. They contend that of these Arcadia only received 606, while Bienville received 1,258,—a large majority. In their petition they furnish a list of the different polling places, and of the votes cast at the same in favor of each of the towns, according to their theory of the rights of parties. In so doing they exclude entirely the votes cast for Arcadia, as shown by the returns from the Arcadia precinct in Ward 1, and at Taylor in Ward 3, but they retain the votes for Bienville, as shown by the same returns. The Arcadia precinct returns showed a vote of 650 for Arcadia, and 3 for Bienville; those of Taylor 67 for Arcadia, and 12 for Bienville. They allege that frauds were practiced in favor of Arcadia at the Arcadia and Taylor precincts by the commissioners of election, or with their connivance, to such an extent that the results at those precincts cannot be ascertained; that the commissioners thereat made false and fraudulent returns of said election, and that false and fraudulent ballots in favor of Arcadia were deposited in the

ballot boxes at those precincts by the commissioners, or with their connivance and consent, all of which were counted and returned as legal votes in favor of Arcadia; that for these reasons the ballots and returns at those precincts should be rejected and disregarded, but, if they should not be entirely rejected, then petitioners alleged that at least 200 persons were permitted to, and did, vote at Arcadia at said election who were ineligible on account of some being nonresidents, some minors, others not being registered, and others not being present to cast their votes, and at the Taylor precinct there were at least 25 ballots put into the box for persons not present to cast their votes,—a sufficient number to change the result,—and the commissioners who received said votes acted wrongfully and fraudulently, well knowing they were not legal votes, and, had they been rejected, the result would have been in favor of Bienville; that said alleged ballots were wrongfully and fraudulently counted and returned for Arcadia. They further allege that Bienville received a large majority—at least 644—of the legal votes cast at the election, and is the choice of the electors of the parish, and should be so adjudged; that, acting alone on the face of the returns made by the commissioners of election to the police jury (which returns included the false, fraudulent, and illegal ballots returned from Arcadia and Taylor precincts), the president of the police jury issued, and caused to be published, a proclamation declaring that the parish seat of Bienville parish was removed to Arcadia; that this proclamation was issued and published without authority of law, but that none the less the clerk and sheriff had obeyed the proclamation, and had removed the records and property of the parish to Arcadia; and that the town of Arcadia claimed to be the parish seat under the said election,—a claim unfounded in law and equity. The president of the police jury filed exceptions to the petition, to the effect: First. That Act No. 106 of 1892, providing for contests of elections of this character, required the police jury to be the defendant, and service to be made on the police jury or other body or authority holding the election; that the police jury is a political corporation created under the laws of the state, and can only act in the mode prescribed by law, and that he, as president of the body, did not represent it, and could not stand in judgment for it without special authority, which had not been given him in this case. Second. That the suit should be dismissed, for the reason that there is no defendant in the case, the statute having declared that it should be brought against the police jury. In the event these exceptions should be overruled, he then excepted that it would be impossible to answer the petition under its general and indefinite allegations; that it charged fraud on the commissioners of two boxes, but did not state which of them had done so, nor the

act which constituted the fraud; that it charged that there were illegal votes cast at the Arcadia and Taylor precincts, but did not give their names; that the petition should have given the names of every person claimed to have illegally voted, and a statement of the facts which made them so; that without specification of names and of facts, and a statement of the nature of the fraud perpetrated by each commissioner and voter, the issues could not be fairly and properly tried. He prayed for the dismissal of the suit on the exceptions. The mayor of Arcadia excepted that the court was without jurisdiction, *ratione materiae*, to try the case, for the reason that Act No. 106 of 1892, under authority of which it was instituted, was unconstitutional and void (1) because more than one object is embraced in the act; (2) its objects are not expressed in its title; (3) it seeks to enact laws by reference only. The court allowed the plaintiffs to amend their pleadings "so as to state explicitly the acts of fraud, etc., complained of, and to make such other allegations, not exclusive of, or in conflict with, the original allegations, as might be necessary to authorize the introduction of their evidence, and make them as full as it is claimed is required by McCrary on Elections (pages 264, 265, §§ 400, 402, inclusive)," and overruled the other exceptions. In the amended petition which plaintiffs filed under this action of the court they charged that the three commissioners at the Arcadia precinct (naming them) illegally and fraudulently put into the ballot box at that precinct at the time, or with their connivance and consent, more ballots or tickets than there were names on the check list of persons named as voting, to the number of at least 52; that they allowed persons to vote who were not registered, and legally entitled to do so, or who were minors, or who were nonresidents, to the extent of 850 votes; that the list of the persons allowed to vote as above alleged is shown by the certified list of names of the persons claimed to have voted, annexed to their supplemental petition; that at the Taylor box the three commissioners (naming them), after the polls had been opened and the election proceeded with for more than one hour, permitted one A. J. Colbert to go inside the room with said commissioners, and to participate in and control and manage the said election; and that the said commissioners and Colbert did put into the box 67 ballots for persons who were not present to cast their votes, the list of the persons thus put into the box being shown by the certified list of names annexed. Defendants filed an original, and subsequently an amended, answer. After pleading the general issue, defendants attack the commissioners at the precincts of Driskell, Gibeland, Bulah, Bienville, Sparta, Lawhorn, Ringgold, Prothro, Castor, Liberty Hill, and Friendship, and many of the votes cast at those precincts, alleging fraud on the part of the commission-

ers, and minority, absence, want of registration, etc., on the part of the voters; also naming certain votes as having been cast for Arcadia, and not counted; also alleging that no tally was kept at Union Church and Lawhorn, and that a certain colored club of 22 members had been bribed to vote for Bienville. The town of Arcadia, through its mayor, excepted that it had been improperly made a party, and prayed that the suit, as to it, be dismissed. The district court rendered a judgment in favor of the defendants, rejecting plaintiffs' demand, and dismissing the suit at their costs. They have appealed.

We are of the opinion that the exceptions taken, asking the dismissal of the suit for the reason that there is no defendant in the case, as the statutes had declared that such a suit should be brought against the police jury, and it had not been so brought, as the president of the police jury, upon whom service was made, had no authority to represent the police jury without special authority to that effect, which authority he had not been given in this case, was correctly overruled. The suit brought is not to mandamus the police jury or its members to do some act, but to annul and undo what it has declared and pronounced well done under the powers granted it in the matter of the special election held. Under the law the suit had to be brought against the police jury, which body is called into court as a defendant through citation upon the president. The authority to represent the police jury, when sued in this class of cases, is found in the state law, and is not dependent upon any action to be taken by the body itself.

The exception taken to the jurisdiction of the district court on the ground that Act No. 106 is unconstitutional is not well founded. The title of the act is "An act to provide for contesting elections held under articles 200, 242, and 250 of the constitution of 1879 and the laws to carry the same into effect." The act in question was enacted by reason of the decisions of this court holding that the judiciary was without power to pass upon contests raised in regard to elections held under the articles of the constitution mentioned, in the absence of special legislation granting authority so to do. Its object was to provide for such contests through suits, and establish a uniform rule governing them all. The body of the act fairly conforms to the title, and the title discloses sufficiently fully its scope and purpose. The fact that several different kinds of special elections may fall under the operation of the statute does not break the unity or singleness of its object.

The district judge, in referring to the third branch of this exception, which was to the effect that the passage of the statute was an attempt to enact laws by reference to the title of other laws, correctly states that "when article 30 of the constitution provided that no law shall be revised or amended by reference to its title it was no doubt intended to

be restricted to the revision and amendment of laws already passed, and not to be extended to the passage of original laws making operative those articles of the constitution which were not self-operating." The judgment of the district court evidences great labor, patience, and industry. Annexed to it, as part of it, are original memoranda of the judge, contained in 64 pages, showing which of the contested votes were rejected and which not, and giving, in the first column, the registration numbers, the number of the voter, and showing who did not vote; in the second column, the names of the voters, arranged in alphabetical order; in the third column, the pages of the evidence in respect to each; in the fourth column, the names of the witnesses; in the fifth, the substance of their evidence; and, in the sixth, remarks. The correctness of the conclusions of the judge in respect to the individual voters does not seem to be questioned, the contest really turning upon those reached by him in respect to the actions of the commissioners at the Arcadia and Taylor boxes. Plaintiffs contend and maintain that the entire vote of both those precincts should be thrown out by reason of fraud on the part of the officials at the boxes. Relative to the Taylor box, the judgment makes the following statements: "The first witness introduced [by the plaintiffs] was Thomas Crow, one of the commissioners at the box. His evidence shows that four persons whom the commissioners considered to be qualified voters at the Taylor precinct had failed to come to the election, and just before the polls closed the commissioners put four ballots in the box for these four absentees. He and two other commissioners swear that they intended no fraud, but knew how the absentees wanted to vote, and put their ballots in for them, as was customary at primary elections. Of course, these ballots (being for Eugene Clayton, Bill Speck, Charlie Grimes, and Davis Richardson) are not legal. They were cast and counted for Arcadia, and will have to be deducted from Arcadia's vote. The more serious question to be determined is, shall the entire box be thrown out? Each of the witnesses Messrs. Crow, Colbert, and Nelson are so well and favorably known by the court, their standing is so high in the community as honorable men, that I should be loath to impute fraud to them. But the plaintiffs have placed Mr. Crow upon the witness stand, and thus vouch for his truthfulness. He says he intended no fraud, and the evidence shows that there was no effort at concealment. While their act was illegal and wrong, the other voters, who are shown by the witnesses to be legal voters, voting at that box, should not be deprived of their votes by casting out the entire box. All the votes cast at Taylor except those four are fully proven to be legal, and are counted." The Arcadia box is thus referred to: "It is sought to be thrown out on account of the

frauds claimed to have been committed by the commissioners. Without specific allegations, they were permitted under the liberal rules laid down by the courts on the trial of contested election cases, to introduce proof to show that one of the commissioners stuffed the ballot box; that persons were allowed to vote who lived in Winn, Lincoln, Claiborne, and Natchitoches parishes; that one at Minden, one at Gibsland, and others at other places voted by proxy; that men were allowed to vote more than once; that dead men voted, and that 52 more ballots were in the ballot box at the close of the election than there were names on the list of those voting. Having thrown the door wide open, all the evidence went in." The judgment then proceeds, after analysis of the testimony given in respect to each of the matters charged, to sustain some of the contests made, to dismiss others, and to explain various matters which are attacked as suspicious and fraudulent, and declares: "This makes a total of 39 votes cast out of the Arcadia box, which, with the 4 cast out at Taylor, makes a total of 42 votes for Arcadia to be taken from the 65 majority received, and leaves 23 majority for Arcadia, not taking into consideration the 11 illegal unregistered votes cast at Driskell, 6 at Gibsland, 1 at Bulah, 6 at Sparta, 13 at Lawhorn, 10 at Ringgold, 5 at Prothro, and 3 at Liberty Hill, at all of which places the larger proportion of the vote should be deducted from Bienville except at Ringgold. There were several illegal votes shown to have been cast for Bienville besides those above, which are designated on the memorandum as not registered; but it is useless to enumerate them, for, if the Arcadia box is to be discarded, the result will be in favor of Bienville, and, if the Arcadia box is to be counted, Arcadia will have the majority, whether the contention as to Union Church and Gibsland be sustained or not. There is only a difference of two votes claimed to be shown between the vote as cast, and as returned, at Union, and I cannot decide sufficient fraud to throw that box out. The indications are very strong that the club of 22 at Gibsland were bribed (so charged to be by defendants), but the evidence is not sufficiently strong. The same might be said as to the ballot-box stuffing at Arcadia. All the commissioners deny it, but, if it were true, the legal voters ought not to be deprived of their vote on this account. The 52 votes complained of were all thrown out; no one was prejudiced by them. It does not make any difference how they got in the box. Being in the middle or at the bottom of the box, it does not seem plausible that they were put in there late in the day. The over-zealous voters must have slipped them in there with their ballots, folded separately."

Plaintiffs rest their attack upon the integrity of the Taylor box precinct returns upon the testimony of Thomas Crow, one of the

commissioners at the box, whom they placed upon the stand, and examined as a witness, over the objections of the defendants that as a public officer who had made an official report he could not be permitted, as a witness, to impeach it. From this witness was elicited the fact, mentioned in the judgment of the district court, that four tickets had been improperly and illegally placed in the ballot box, and counted by the commissioners. The plaintiffs maintain in this, as they did in the lower court, that the consequence of this act was to necessarily carry with it the rejection of the return in toto, and the rejection of the entire vote at the precinct. It has undoubtedly been held in many cases where the managers of an election have been clearly shown to have committed a fraud in the conduct of the election or the counting of the votes, and the returns clearly shown to be willfully and corruptly false in any material part, that the whole of it becomes worthless as proof, and the entire poll must be rejected. McCrary on Elections (sections 184, 185, 302) cites authorities to that effect; but the same author, in section 368, says: "To set aside the returns of an election is one thing; to set aside the election itself is another and very different thing. The return from a given precinct being set aside, the duty still remains to let the election stand, and to ascertain from other evidence the true state of the vote. The return is only to be set aside, as we have seen, when it is so tainted with fraud or with the misconduct of the election officers that the truth cannot be deduced from it. The election is only to be set aside when it is impossible from any evidence within reach, to ascertain the true result,—when neither from the returns nor from other proof, nor from all together, can the truth be determined. It is important to keep this distinction in mind. * * * The question under what circumstances the entire poll of an election district may be rejected has been much discussed, and conflicting views have been expressed by the courts. The power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested election case, it should be exercised only in an extreme case; that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote. It must appear that the conduct of the election officers has been such as to destroy the integrity of their returns, and to avoid the prima facie character which they ought to bear, as evidence, before they can be set aside as evidence, and other proof demanded of the true state of the vote." Section 303. "Undoubtedly, the general rule is that if legal votes have been cast in good faith by honest electors it is the duty of the court or tribunal trying a contest to ascertain their number, and give them due effect, notwithstanding misconduct, or even fraud, on the part of the

election officers. Such fraud or misconduct may destroy the value of the officer's certificate, and may subject him to severe punishment; but the innocent voter should not suffer on that account if by any means his rights can be upheld." Section 304. "The general rule is that the ordinary rules of evidence apply as well to election contests as to other cases." Section 306. The difficulty in matters of election is not so much in the principles governing them as in the application of those principles to particular cases. In the one before us an unwarranted illegal act on the part of the commissioners at the Taylor precinct has unquestionably been established; established, however, by the commissioners themselves, as witnesses upon the stand. But, while the special fact referred to is brought out through the commissioners, these same commissioners establish affirmatively that in all other respects the election was fairly conducted, and that the returns evidence correctly the legal vote at the poll. We have reached, on this subject, the same conclusion which the district judge did. The rejection of the entire returns of a poll, and of the entire vote cast thereat, by reason of the misconduct of the commissioners, is not by way of penalty or punishment of the commissioners, or of the particular persons or interests to be benefited thereby, but because the court has reached the conclusion that the truth cannot be deducible from the returns, and the will of the voters cannot be ascertained. If the court reaches the conclusion that the actual vote can be ascertained, it is its duty to give effect to it, and save the innocent voters from the loss of their political right to be heard.

Plaintiffs contend that it is absolutely inconsistent in the court to give any weight whatever to the testimony of commissioners who have been shown to have been guilty officially of an illegal act, and yet throw out votes by reason of such illegal act; but in this they are mistaken. Whether or not the commissioners are to be believed under oath as witnesses when some particular act done by them is clearly illegal, and their return, by reason of this act, is attacked and thrown under suspicion, will be dependent upon the entire circumstances of the case, and the whole evidence in the record. The commissioners in this case acted utterly unjustifiably in drawing a distinction between a special election held for a particular purpose, and a general election held for selection of officers, in assimilating such an election to a party primary election, and in following at the poll the practice at that poll of depositing votes for absent legal voters whose views were known, and whose manner of voting if present had been ascertained. Such a practice is reprehensible at a primary election, even if sanctioned by consent, and wholly inadmissible in an official election held under the law. In *Thompson v. Ewing*, 1 Brewst. 107 (McCrary, Elect. § 303), it was said "that

the whole conduct of election officers may, though actual fraud be not apparent, amount to such gross and culpable negligence—such a disregard of their official duties—as to render their doings unintelligible or unworthy of credence, and their action entirely unreliable for any purpose.” But we do not find in this case, as a matter of fact, such a condition of things. We are satisfied that the only wrongful act done was the depositing of the four votes mentioned, and that the district judge, in his action, correctly limited the remedy to throwing out those four votes. The precinct was a small country precinct, where doubtless every voter, and the views of every voter, were well known. The pleadings make a direct general attack upon the whole conduct of the election, and yet no attempt was made to sustain these sweeping allegations. The poll books, the tally sheets, and the returns were all introduced in evidence. The commissioners were placed upon the stand, and proved up the exact vote, admitted freely and without hesitation what they had done, explained how and why they had done it, and, as we have said, showed affirmatively that the particular act was the only one which could be complained of. We do not think that they imagined that these four votes would have had the effect of altering the general result of the election, and we do not think that intentionally and willfully they committed a fraud. The district judge knows the parties, and thinks them incapable of it; and the plaintiffs themselves, in placing Mr. Crow upon the stand, show that they had confidence in his veracity. On the whole, we think the popular will at the Taylor precinct has found correct expression through the action taken in the district court.

The conclusions we have reached in the case, on the assumption that the testimony of the commissioners was legally taken, render it unnecessary to pass directly upon the important question raised by the defendants’ bill of exception as to the right of the plaintiffs to impeach the returns through the testimony of the commissioners themselves. The rule has been, in this state, to require official misconduct, which had been alleged as the basis for the setting aside of official action returned and certified to, to be established by parties other than the officers themselves. The decisions on the subject refer principally to sheriffs, notaries, and to members of the jury. We know of none, and have been referred to none, touching this particular class of officers. We know of no reasons which would go to the exclusion of the testimony of notaries, sheriffs, and jurymen for the purpose stated, which would not be equally applicable to commissioners of election, and do not see any good ground for making an exception as to them. Such is our present view of the matter, but we prefer to leave it as an open question.

So far as the Arcadia returns are concern-

ed, we adopt the conclusions of the district judge. The attack upon the integrity of one of the commissioners at the box of that precinct is utterly unsustained. It rests practically upon the testimony of one witness, whose testimony is negatived by that of a number of persons who were directly on the spot, who affirmatively swear to the nonexistence of the facts stated by this single witness. The commissioner himself, under oath, positively denies the facts sworn to. The other commissioners and the clerk of election (against the propriety of whose conduct in the particular matter there is not a scintilla of evidence) sustain the testimony of the commissioner who is charged with misconduct. Brown, who is claimed to have lent himself to the perpetration of the fraud by masking the ballot box temporarily from the view of outsiders, emphatically denies having done so, or of hearing any such words spoken by the commissioner as the witness mentioned states that he used. His testimony is supported by all the parties who were inside of the voting room. It is strange that, had the commissioner made use of the language attributed to him, only one person should have heard it, and still stranger that the language itself should have been so openly used. The failure of the witness to at once complain of the act which was afterwards set up as ground for a rejection of the returns, and his keeping silent as long as he did, are circumstances which we have had also to consider. In addition to the number of witnesses arrayed against the charge made,—witnesses whose credibility has not been impeached,—the plaintiffs are met by the presumption which the law itself attaches in favor of the correctness and honesty of official acts. We do not see how, under the testimony, as well as under this presumption, it was possible for the district judge to reach any other conclusion than he did on this particular point.

We have spoken of the charge being sustained by the testimony of only one witness. We mean by that to say that we attach no weight to the testimony of Bullard. His testimony, in the first place, differs materially from that of the person whose testimony he seeks to corroborate. His character for veracity was attacked, and, though supported by several witnesses, the fact is before us, in addition to other facts, that this witness voted illegally himself at the Arcadia precinct upon an affidavit which we find in the record. There were a number of illegal votes cast at the Arcadia box. The district judge has thrown them out. We have no reason to suppose the commissioners to be chargeable with the casting or the counting of those votes. There were 52 more ballots found in the box when the count was made than there were names of persons voting. These ballots resulted from the folding of several tickets together and the depositing of them in that way in the ballot box. They were not

in one particular place, but scattered throughout the box. They were at once rejected on being discovered, and not attempted to be counted. The explanation given of the presence of these ballots in the box is that the tickets were printed on thin paper, and were in bundles of some thickness, the tickets adhering more or less to each other, and that occasionally some voter, not noticing the fact, would take off two or more, fold them, and deposit them in the box as his vote. Two witnesses were produced who stated that they had themselves only accidentally discovered, just before voting, that the folded ticket which they were about to deposit contained not one but several tickets. The attention of one of these witnesses was drawn to the fact by the commissioner whose integrity is impugned. There was no objection made to the presence of others than the commissioners at the count. Two persons were present who were there specially for the purpose of seeing that it was fairly made in the interest of Bienville, and the votes were taken out and announced by Dr. Baker, in whose integrity both sides seem to have had, and still have, confidence. It could scarcely have been contemplated that a fraud could be successfully perpetrated through folded double ballots when an open count through disinterested parties was to be made. The fraud was bound to be discovered, and bound to avail nothing.

The record in this case is one containing between one and two thousand pages. The testimony as to particular facts and as to particular persons is necessarily scattered. We have bestowed upon it our best attention, and we feel satisfied that the judgment must stand. We do not think it necessary to enter more minutely than we have done into the details of testimony relative to the charge of stuffing the ballot box at Arcadia. There are reasons, other than those which we have mentioned, which influenced us in reaching our conclusions, but those, in our opinion, were sufficient. For the reasons herein stated, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(48 La. Ann. 441)

CYPRESS SHINGLE & LUMBER CO. v.
LORIO. (No. 11,470.)

(Supreme Court of Louisiana. March 28,
1894.)

PRIVILEGE FOR CUTTING TIMBER—SEQUESTRATION.

1. A person who has made advances of money and also supplies in kind in aid of the deadening of trees and the cutting and hauling of logs cannot claim a privilege for the whole advances on the logs and also on the special articles furnished. *McRae v. His Creditors*, 16 La. Ann. 306.

2. The affidavit made for the purpose of obtaining a writ of sequestration is prima facie evidence of the facts authorizing the writ.

(Syllabus by the Court.)

Appeal from district court, parish of Iberville; E. B. Talbot, Judge.

Action by the Cypress Shingle & Lumber Company against P. Leonce Lorio to enforce a privilege. Judgment for plaintiff. Defendant appeals. Modified.

Alexander Hebert, George Wallis, George L. Bright, and A. H. Leonard, for appellant. R. N. Sims and G. A. Gondran, for appellee.

NICHOLLS, C. J. On 27th September, 1892, the plaintiffs and defendant entered into a contract which recites that "the defendant is the owner of a certain tract of land with cypress lumber thereon to the amount of 5,000,000 feet, more or less, and of other tracts from which he also intends to get timber." The contract contains the following stipulations: "(1) Lorio agrees to deaden, cut, and haul on the bank of Bayou Maringouin, there to be measured and docked, then be rafted, and delivered at the mouth of the bayou to the company, length of timber of not less than a specified measurement. (2) The company are to measure the timber at the end of each month as it lays on the bank of Bayou Maringouin, ready to be rolled into the bayou. The timber, after being measured, is to be rolled into the bayou, rafted and run down to the mouth of the bayou. (3) Lorio agrees to deliver the timber as aforesaid at the mouth of the bayou, all necessary expenses incurred in delivering the timber at the month to be paid by him. (4) The timber is to be delivered at the mouth of the bayou for the sum of \$8 per 1,000 feet, B. M. The shingle company obligating themselves to furnish Lorio all money needed for current expenses in deadening and hauling, etc., and also to advance money on 2 timber wheels; also to advance feed for oxen. (5) As the timber is measured at the end of every thirty days, settlement is to be made at every time of measurement, $\frac{1}{2}$ cash, $\frac{1}{4}$ four months' note, $\frac{1}{4}$ eight months' note. (6) The money advanced on current expenses and feed and timber wheels is to be deducted from the first cash payment on the timber. In the event that the cash payment is less than the money advanced, then the balance of the money due on expenses is to be deducted from the second cash payment on the timber; and, if expenses still exceed the amount of cash due, the money still due for advances will then be deducted from the third cash payment. (7) Lorio agrees to commence work at once as to deadening and other preparations necessary in manipulating the timber. (8) The company agree to let Lorio have \$500 in the course of 8 or 10 days, to be deducted from the 2nd or 3rd cash payment, on which he is to pay interest at 8 per cent." In February, 1893, the plaintiffs brought the suit, in which they prayed for a judgment against the defendant for the sum of \$2,234.23, with interest, with recogni-

tion of a privilege to secure payment of the same upon certain logs and other movable property of the defendant. In the petition filed, after referring to this contract, plaintiffs declared that it was, understood and agreed that the money advanced for current expenses, for feed, and for the timber wheels was to extend no further than the third cash payment; claiming that under their construction of the contract the first cash payment was to have been on October 27, 1892, the second on the 27th of November, and the third on 27th December. That the advances were not to extend further than the date of the third cash payment, as it was the true intent and understanding of the parties that Lorio could then, by discount or otherwise, realize on his notes, and would be his own furnisher of supplies, and would then require but small advances, if any at all. Plaintiffs further averred that, believing defendant to be acting in good faith, they not only advanced him the money and materials mentioned in the contract, but made him advances, both in money and materials, far in excess of his obligations; that from the date of the contract to the 23d February, 1893, they advanced him in money \$1,762.73 in cash, and \$471.50 in materials; that, though defendant bound himself to haul with ox teams timber from his lands to the bank of the bayou, and to deliver same at the mouth of the bayou every 30 days, he had failed and refused to do so, in violation of his contract, notwithstanding the most favorable and exceptionally fine weather; that defendant had never exhibited to them an account of his current expenses; that, although he had drawn money for the purpose of paying his labor, he had failed to do so, and owed largely on that item for the same; that in violation of his contract, and in fraud of plaintiffs' rights, he had used the money advanced to under cut timber, and to prepare to float the same during the coming spring, in case of a sufficient flood so to do, when, by the calls of the contract, he was to haul the same; that to these and other purposes he had fraudulently diverted the advances made him to carry out his contract; that defendant had hauled 165,000 feet of timber, which had been measured and rolled in the bayou, and that he had on the banks 50,000 feet to be measured and rolled in said bayou; that it would cost about \$250 to roll, raft, and float all of said timber to the mouth of the bayou, at the point of delivery; that defendant insisted that the plaintiffs were bound, under the contract, to advance him money without limit, and declared that he would deliver timber when he was ready, and when it suited his convenience. Plaintiffs, claiming that they had a privilege on the timber then in and on the banks of the bayou and on the movables advanced to Lorio to the extent of \$2,234.23, and averring that they verily believed and feared that defendant would

part with and dispose of said movables in his possession, and upon which they have a lien, during the pendency of the suit, prayed for and obtained an order for the sequestration of the same. A claim for damages was set up by the plaintiffs, but no special reference to it is necessary, as it has been substantially abandoned in this court. The sequestration ordered having been executed by seizure of a number of logs and other materials belonging to defendant, it was released on bond furnished by the latter. Plaintiffs subsequently filed an amended petition, in which they prayed that the contract be set aside, annulled, and avoided on account of the wrongful, tortious, and illegal acts of defendant.

Defendant pleaded the general issue, but, further answering, admitted that he entered into the contract declared upon. He averred that soon after the same he went to work to carry out his part of the agreement; that he cut and hauled from his land to the banks of the bayou about 200,000 feet of timber, ready to be delivered at the mouth of the bayou as soon as the stage of water would permit of floating it; that in further compliance with his part of the agreement he caused to be deadened 3,000 cypress trees on his lands, for the purpose of having them cut and hauled to the bayou, to be delivered to the plaintiff as stipulated; that during the month of January and early part of February, 1893, in view of the fact that plaintiffs had ceased to make the necessary advances to enable him to carry out his contract, he made frequent demands on plaintiffs to make said advances, and to furnish him with the funds required for the prosecution of the work; that the officers of the company, when they entered into the contract, knew that the disbursement of large sums of money would be required to deaden, cut, and haul so vast a quantity of timber to the banks of the bayou, notwithstanding which the company ceased to make advances for that purpose, and persisted in their refusal to do so, ignoring and disregarding his demands; that on the 9th February, 1893, he caused to be served a written notice and demand, to the end of formally putting the company in default for noncompliance with and acting in violation of their obligations under the contract; that he had been at all times ready and willing to comply with all of his obligations under the contract, and that he had been prevented from continuing the prosecution of the work solely by the wrongful neglect and failure of plaintiffs to perform their obligations; that the active and wrongful violation of the contract had caused and will cause him great damage and injury; that the deadened trees on defendant's land, so deadened on the faith of plaintiffs' obligations, are subject to deterioration and decay and ultimate loss; that by plaintiffs' failure to comply with their obligations and repudiation of their contract he

will be deprived of the profits which would have accrued to him under the contract; that said profits, embracing the delivery of 5,000,000 feet of timber, to defendant would amount to \$2 per 1,000 feet, and to \$10,000 for the quantity of timber conveyed by said contract, which sum he is entitled to recover; that the deterioration and decay of the 3,000 deadened trees would involve a loss to him of \$4,000, which amount he is also entitled to recover. Defendant prayed that plaintiffs' demand be rejected, and, assuming the position of plaintiff in reconvention, he prayed that plaintiffs be adjudged to have wrongfully and actively violated their contract, and by their wrongful acts to have annulled the same, and that he have judgment for the sum of \$10,000 as damages for the loss of profits which would have accrued to him under said contract, and for the further sum of \$4,000 as damages for the loss occasioned and involved in the deterioration and decay of the deadened trees.

The district court rendered judgment in favor of the plaintiffs against the defendant for the sum of \$2,234.23 and interest, with privilege to secure the sum of \$1,734.23 and interest thereon, as being for moneys and materials furnished by the plaintiffs on 165,000 feet of cypress logs in Bayou Maringouin and 50,000 feet of cypress logs on the banks of said bayou, on 2 pairs of timber wheels, 3 oxen, and 297 chain dogs. The judgment annulled, avoided, and set aside the contract, and set aside and dissolved and avoided the sequestration, decreeing that all the costs incurred by virtue of the writ of sequestration and the seizure thereunder be paid by the plaintiffs. It further dismissed the claim of both parties for damages, reserving to defendant his right of action for any damages caused by the wrongful issuing of the writs and the seizure. The plaintiffs appealed. Defendant, in answer to the appeal, prayed that plaintiffs' entire demand be rejected; that the contract referred to in the pleadings be avoided and set aside on his (defendant's) demand, and not on that of plaintiffs; that he have judgment for damages as prayed for in reconvention, and that the costs of both courts be cast upon the plaintiffs.

Both sides having asked the setting aside of the contract, the judge's action in doing so was correct. The only question touching this action is as to the party at whose instance the avoidance must be properly held to have been made. Defendant contends, as we have just said, that the contract should have been set aside on his prayer. The avoidance of the contract finds the parties in this situation: Defendant has received from the plaintiffs a quantity of movables, which he still holds and owns. He has received from them over \$2,000. By common consent and understanding \$500 of this sum were applied by defendant to his household expenses. The balance was ex-

pendent by him deadening, cutting, and hauling timber on his land to the banks of the bayou. The number of trees deadened, cut, and hauled and now in his possession is represented by over 200,000 feet of timber in the bayou on his land and on the bayou banks. The number of deadened trees still standing on his lands is about 3,000. This is the defendant's position. Plaintiffs, on the other hand, have up to date paid out the money and furnished the supplies mentioned, and not only have not received anything by way of return, but are confronted with a large claim for damages. We have examined the record with great care, to see whether this unequal condition of affairs was brought about by the conduct of the plaintiffs themselves. It will serve no good purpose to enter minutely into the testimony. It suffices to say that, in our opinion, defendant's complaints are not only without weight, but, on the contrary, his course has been unjustifiable, and his demands unreasonable. There is nothing in the contract to warrant defendant in the pretension that plaintiffs were to continue to furnish him with money, and supplies either, until he should have deadened enough trees on his land to furnish 5,000,000 feet of timber, or until he should have done this, and should besides have cut and hauled the same to the bayou. With over 200,000 feet of timber on the banks of the bayou ready for measurement and shipment (the product of the advances made by the plaintiffs), defendant was not warranted in attempting to hold on to the same on the ground that plaintiffs had ceased to make advances under the contract. The contract is indefinite both as to the quantity of timber which defendant was to furnish and the money and supplies plaintiffs were to advance, but it was clearly in contemplation of the parties that the furnishing of the latter and the delivery of the timber were to go on, if not simultaneously at least with reasonable relation one to the other. While it might have suited the defendant to continue indefinitely to deaden trees without delivering timber, this certainly would not have suited the plaintiffs, whose outlays were made with reference to prompt returns. We think plaintiffs did all that they could have been expected to have done in the way of advances. The personal judgment in their favor, and that rejecting defendant's claim for damages under the contract, must stand.

Plaintiffs' object in taking the appeal was to obtain a reversal of that portion of the judgment dissolving the sequestration and reserving to defendant a right of action for damages caused by the wrongful issuance of the writ of sequestration, and to obtain a judgment in this court sustaining and maintaining the sequestration. We concur with the district court in its conclusions that plaintiffs' claim is to extent of \$1,734.23 secured by privilege upon the logs, but we do not think that the privilege strikes and cov-

ers the timber wheels, the oxen, or the chain dogs. These articles are themselves part of the supplies for the furnishing of which we have recognized a privilege on the logs. See *McRae v. His Creditors*, 16 La. Ann. 306. The district judge does not state upon what ground he dissolved the sequestration. There was no motion made to dissolve it. The affidavit seems to be in due form, and the allegations of the petition appear sufficient to justify the writ. *Johnston v. Johnston*, 13 La. Ann. 581. Defendant does not present to this court any reasons going to show error in the order for the sequestration, and we think it should have been maintained as to the logs, though not as to the other movables, which, as we have stated, were not struck by privilege. For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be reversed and set aside in so far as it dissolved the sequestration issued in this case and reserved to defendant a right of action for any damages caused by the wrongful issuance of the writ of sequestration. It is further ordered, adjudged, and decreed that the judgment be amended in so far as it recognizes a privilege upon the timber wheels, the oxen, and the chain dogs; the privilege claimed on the said movables being hereby denied. It is further ordered, adjudged, and decreed that the writ of sequestration which issued herein be, and the same is, sustained and maintained upon the property sequestered, except as to the timber wheels, the oxen, and the chain dogs, and the said sequestration is reinstated. It is further ordered, adjudged, and decreed that the judgment, except as to the particulars hereinabove amended and reversed, be, and the same is hereby, affirmed.

(46 La. Ann. 796)

STATE v. BARKER. (No. 11,508.)

(Supreme Court of Louisiana. April 23, 1894.)

COMPETENCY OF JURY—HOMICIDE—EVIDENCE OF THREATS.

1. Two of the jurors drawn for the term deposed, on their voir dire, that they would not convict on circumstantial evidence. They were properly ordered to stand aside.

2. The trial judge committed no error in excluding jurors from the panel who were unwilling to convict on legal evidence.

3. The trial judge ruled that the evidence did not prove that the deceased made a hostile demonstration against the accused. The required foundation not having been laid, proof of communicated threats by the deceased against the accused was not admissible to rebut malice, and reduce the grade of the offense. The *McNeely Case*, 34 La. Ann. 1022, and the *Cooper Case*, 32 La. Ann. 1085, cited as in point, were dependent upon particular facts and circumstances, not involved in this case.

4. Questions of law previously passed upon were reiterated in the motion for a new trial. The questions of law were decided. Those purely of fact are not reviewable on appeal.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; W. C. Perrault, Judge.

Lucius Barker was convicted of murder, and appeals. Affirmed.

John N. Ogden, for appellant. M. J. Cunningham, Atty. Gen., and E. B. Du Buisson, Dist. Atty., for the State.

BREAUX, J. The accused was indicted for murder. From a sentence of the court based on a verdict of a jury convicting him of the crime charged, without capital punishment, he has taken this appeal. He complains of error in the rulings of the trial judge.

Ordering Two of the Jurors to Stand Aside.

The first bill of exceptions contains the recital that, while impaneling the jury, two of the regular jurors were ordered by the court to stand aside because they stated, when examined on their voir dire, that they would not convict on circumstantial evidence: "that almost immediately after they were told to stand aside, and before they had left the courthouse, the accused, through his counsel, announced to the court that circumstantial evidence would cut no figure in the case, as accused admitted the killing and pleaded justification, and requested, as of right, that said two jurors be called back," and pronounced competent. The following are the grounds of refusal, forming part of the bill of exceptions: "(1) Because a juror who will not convict on circumstantial evidence, in a capital case, is incompetent. (2) Because no injury resulted to defendant in consequence of the juror being ordered to stand aside; his right being one of rejection, and not one of selection. (3) Because the discretion vested in the court in such matters is not reviewable, in the absence of injustice."

The court's ruling in ordering these jurors to stand aside had something about it of the final. Large discretion is necessarily intrusted to the trial judge, in selecting jurors. In entering the order discharging the jurors from service on the panel in this case, there was no violation of law. The number to select from was not thereby illegally reduced. "It is a settled rule of practice that some prejudice to the appellant, resulting from the rulings of the trial court in organizing the jury, or at least some infringement of statutory provisions relating thereto, must be shown, before an appellate court will review the proceedings of the court below." *Thomp. M. Jur.* p. 297. No prejudice to the appellant is shown. The trial court commits no error in excluding a juror, on his voir dire, who is unwilling to be governed by the rules of evidence adopted for the proper trial of cases, and the maintenance of public justice. There are very few cases in which all the evidence is purely positive. There should be a verdict of conviction whenever there is

legal evidence establishing the guilt of the accused. Circumstantial evidence is legal evidence, and a juror subjects himself to a discharge who will not convict on legal evidence.

Overt Act and Communicated Threats.

The second bill of exceptions was taken to the court's ruling on the following state of facts: During the progress of the trial a witness testified that, at the moment of the difficulty, he saw the deceased making a motion as if to draw a pistol on the accused. The accused, through his counsel, sought to sustain the credibility of his testimony by the evidence of a number of highly-reputable witnesses, of the neighborhood, who testified that his character for truth and veracity was good. A codefendant of the accused himself testified that they saw the deceased's motion as if to draw a pistol. The accused also sought to sustain his credibility by evidence of good character for truth, testified to by a number of witnesses of standing in the community. This evidence was followed by the offer to prove that, a short time before the homicide, threats had been made by the deceased against the accused; that these threats had been communicated, to the accused. The contention on the part of the defense was that the overt act had been proved; that the testimony of communicated threats was admissible to rebut the presumption of malice charged, and to reduce the grade of homicide. The trial judge excluded the testimony "because, in the opinion of the court, it was proved beyond a reasonable doubt (by a preponderance of evidence) that the deceased made no hostile demonstration or overt act towards the accused at the moment of the shooting, the evidence showing that the accused fired on the deceased, striking him in the back, whilst deceased was in conflict with the brother of the accused,—being on the ground, and the deceased holding him down."

The testimony of the witnesses is not before us. We have, for the purpose of the ruling, the statements forming part of the bills of exceptions. They are direct and positive that there was no overt act by the deceased against the accused. That method of bringing up the proof for review has been followed in a number of cases, and, in the absence of the testimony showing error on the part of the trial judge, it has been repeatedly held that his findings of the facts in this respect shall be taken as true. The questions are of fact and law. The point of law can arise for review only after all the facts upon which it is dependent have been submitted for our decision. Whenever the facts are incomplete, of the overt act, under well-established jurisprudence, we must give weight to the summary or conclusions of the trial judge. In the case at bar the accused urges that his testimony, that of a bystander during the difficulty, and of his codefendant,

are more than equivalent to the statement of the trial judge, based on the testimony of a number of witnesses who were also present at the difficulty. Until a feasible method is devised to bring up for review on appeal all the testimony,—that in behalf of the accused to prove, and that on the state to disprove the overt act,—this court must follow the well-established precedents. The principle was stated in the case of *State v. Harris*, 45 La. Ann. 842, 13 South. 199. In the case of *State v. Christian*, 44 La. Ann. 954, 11 South. 589, the doctrine announced previously in a number of cases was reaffirmed, "wherein it is declared that whether or not a proper foundation has been laid for the introduction of evidence of the dangerous character of the deceased is a matter to be decided by the trial court, whose rulings in such matters will not be reversed unless manifestly erroneous." In *State v. Wilson*, 43 La. Ann. 841, 9 South. 490, the same principle is announced. In *State v. Cosgrove*, 42 La. Ann. 754, 7 South. 714, the trial judge stated that "the only overt act proved against deceased at or about the time of the killing consisted in his having shaken his finger. * * * That statement does not disclose any overt act on the part of the deceased as, taken in connection with the prior threats, justifies the defendant in believing that the deceased was then and there about to carry the threats into execution, and that his life was in such apparently imminent danger as to justify him in taking his adversary's. To the same effect is *State v. Brooks*, 39 La. Ann. 821, 2 South. 498. In *State v. Spell*, 38 La. Ann. 22, the following emphatic language is employed: "We will not do the injury to the district judges of the state of supposing, with counsel for the accused, that any one of them can be found so devoid of all sense of duty as to secure conviction of an accused by designedly excluding testimony which might be favorable to him. If there be such a judge, his case should be dealt with in other proceedings, for which the constitution has made ample provision. * * * The rule laid down in the *Ford Case* [37 La. Ann. 443] was not without precedent, and it has been subsequently followed by this court," citing *State v. Labuzan*, 37 La. Ann. 490; *State v. Janvier*, Id. 644. The court, in all those cases, held that the question was exclusively within the discretion of the trial judge. In *State v. Kervin*, 37 La. Ann. 784, the court says, when passing upon the point: "The ruling of the judge was not arbitrary, but was the exercise of a sound legal discretion, based upon a careful review of the whole evidence; and, when that is the case, we are bound to take his ruling as conclusive." In *State v. Jackson*, 33 La. Ann. 1087, the court confined the consideration of the dangerous character of the deceased, as a ground of defense, to the facts as stated in the bills of exception. In passing from this point, we

desire to state that conclusions and statements will not prevail against testimony in behalf of defendant showing inconsiderate ruling. The proof of, and extracts from, the testimony of the witnesses relied upon as justifying a conclusion or statement should be incorporated by the trial judge in the bill of exceptions.

To Reduce the Grade of the Homicide.

If not admissible to show that the defendant had reason to believe that he was in imminent danger of bodily harm, and that a hostile demonstration on the part of the deceased justified him in the killing, the counsel for the defendant argues that it was admissible to rebut the presumption of malice sought to be proved against his client, in order to reduce the grade of the homicide. Having concluded that the testimony was not admissible to justify the killing, as contended, we will consider the next proposition,—that relating to reducing the crime charged from murder to manslaughter. As an independent proposition, the accused cannot, under the law, in order to rebut the presumption of malice, and to mitigate the offense charged, be permitted to introduce evidence, on a well-grounded objection that foundation had not been laid to enable him to prove communicated threats. The cases to which we are referred are exceptional in this respect. The state has been permitted to prove actions and declarations of the accused which had preceded the homicide, for the purpose of showing premeditation and malice. Thus, in the cited case of *State v. McNeely*, 34 La. Ann. 1022, the accused, in the morning,—a number of hours prior to the homicide,—had shot at the deceased. This, by the court, was permitted to be proved, to establish malice. The facts, in this respect, bear some similarity to those in *State v. Cooper*, 32 La. Ann. 1085. The court expressly states, in the *McNeely* Case, that the ruling was confined to the facts and circumstances of that case. The organ of the court in the latter case was the organ of the court in the *Spell* Case, in which the principle was announced that the question of overt act and proof of communicated threats was largely within the jurisdiction of the trial judge, thus emphasizing the fact that the decision in the *McNeely* Case was dependent upon the particular facts and circumstances of that case. In the case at bar, the record does not disclose that the state sought to prove prior acts or declarations of the accused, in order to show malice on his part. We are strictly confined to a consideration of the facts, as stated in the bills of exception signed by the judge. They establish that there was a fight, during which the accused killed the deceased. It is not shown that any testimony of acts or declarations prior to the difficulty which resulted in the killing was admitted. To rebut the malice charged, under these circumstances, the ac-

cused cannot be permitted to prove communicated threats from deceased, without having first laid the foundation requisite by proving an overt act of the deceased against the accused. The general rule upon that subject is established by a number of decisions. The case at bar falls entirely within the general rule.

Motion for a New Trial.

On the motion for a new trial it is urged that on the preliminary examination the court admitted the accused to bail, for the reason that malice had not been shown; that having, on preliminary examination, pronounced the offense manslaughter, he should not have refused to admit the evidence, which, in all probability, had caused the jury to reach the same conclusion. It is also stated on behalf of the accused, in the bill of exception to the overruling the motion for a new trial, that there were irregularities on the trial prejudicial to the accused. The trial judge incorporates the statement in the bill that the accused was admitted to bail, after preliminary examination, on a different state of facts from that proved on the trial, and that no irregularities came within the knowledge of the court. The question of law relates to the admissibility of testimony to prove communicated threats by the deceased against the accused. They were decided in passing on other bills in this case, before reaching the motion for a new trial. The questions of facts presented by his motion for a new trial are not reviewable by this court.

There were other grounds of defense brought up by bills of exceptions in the record. Counsel for the accused, in his carefully prepared brief, has not presented any argument in their support. We presume that they were abandoned by the defense. We have nevertheless given them consideration, and concluded that they, also, present no ground to reverse the action of the district court. Judgment affirmed.

(46 La. Ann. 714)

JOHNSON v. CITY OF NEW ORLEANS.

(No. 11,401.)

(Supreme Court of Louisiana. April 9, 1894.)

CLAIM AGAINST CITY—FORM OF JUDGMENT.

Holders of claims against the city of New Orleans, by the laws and ordinances under which the claims were created, entitled to payment only from and out of the funds appropriated to payment of such claims, are not entitled to an absolute judgment against the city. *City Charter*, Act 1882, § 64 (Sess. Acts, p. 35); Act No. 38 of 1879 (Sess. Acts, p. 57); *Creole Steam Fire-Engine Co. v. City of New Orleans*, 3 South. 177, 39 La. Ann. 981; *Fernandez v. City of New Orleans*, 7 South. 57, 42 La. Ann. 3; *Newgass v. City of New Orleans*, 7 South. 565, 42 La. Ann. 164.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by A. L. Johnson against the city of New Orleans. From a judgment for plaintiff, he appeals. Affirmed.

John Q. Flynn, for appellant. Lawrence O'Donnell, Asst. City Atty., and E. A. O'Sullivan, City Atty., for appellee.

MILLER, J. The plaintiff sues as the holder, by transfers, of certain claims against the city of New Orleans, created under various ordinances appropriating the funds to be derived from taxes to various objects of municipal expenditure. The relief sought is an absolute judgment against the city, bearing interest. The answer of the city is the general issue. The judgment of the lower court recognized the plaintiff as owner of the claims, and decreed the judgment claimed in the petition. From that judgment, plaintiff appeals.

The city of New Orleans is provided with a limited power of taxation. It is required, at the beginning of the fiscal year, to adopt a budget of the anticipated revenues and expenses of the coming year; and, as the revenues are collected, they are credited to the accounts conforming to the appropriations in the budget. The certificate or warrant creditors of the city, i. e. those that become creditors from the fact that the money is not on hand, derived from the revenues, to pay them when the debt is created, are apprised by the law and by the ordinances of the city that they are to be paid from, and only out of, the revenues appropriated for the payment of the claim held by the creditor; and the creditors are further apprised that the claims they hold are not payable until there are revenues realized, and placed to the credit of the account against which the claims are to be charged. In no sense is the holder of such claims a general creditor of the city. He is a creditor with his payment confined to a particular fund, when realized. Every ordinance produced in this case to fortify plaintiff's demand announces that the appropriations to pay the claims on which he sues are not payable until there is money in the city treasury, derived from the collections of the public revenues, to the credit of the appropriate fund, i. e. that from which the creditor is entitled to be paid. Whatever the character of the obligation,—whether warrant, certificate, or claim, original or transferred,—it has impressed upon it this specific and limited right of payment; and subject to that limitation the plaintiff acquired the claims on which he sues. 1 DILL Mun. Corp. § 457; *Creole Steam Fire-Engine Co. v. City of New Orleans*, 39 La. Ann. 981, 3 South. 177; *Mayor v. Ray*, 19 Wall. 477. It has occurred, and doubtless is the case now, that there is a large amount of unpaid claims against the city, payable out of appropriations of past years. This is due to the short-ages in the collections of taxes, and perhaps other causes. The plaintiff, it is presumed,

is the sufferer, with others, from the absence of funds in the treasury to pay him. Hence, his appeal to the court to change the character of his debt, and give him an absolute judgment against the city, with interest. It is manifest he is entitled to no such relief. Holders of claims against the city, of the character of those held by plaintiff, payable, as they are, when the funds applicable to their payment are in the treasury, are entitled to no interest,—at least, not unless there are such funds on hand. The question of interest cannot be deemed open. *Creole Steam Fire-Engine Co. v. City of New Orleans*, 39 La. Ann. 981, 3 South. 177; *Fernandez v. City of New Orleans*, 42 La. Ann. 3, 7 South. 57. We are not called on to determine whether there is any right of action on such claims unless there are funds to pay them, the appeal being by plaintiff only. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

(46 La. Ann. 750)

CAWTHON v. KIMBELL et al. (No. 11,374.)
(Supreme Court of Louisiana. Jan. 15, 1894.)

COLLATION OF HEIR—VOID DONATION—CONFIRMATION—AMENDMENT OF PLEADING.

1. An amended answer is permitted when it amplifies a general denial, and enumerates the reasons why plaintiff should not recover, and does not change the relief prayed for in the original answer, and is really in the furtherance of justice.

2. An heir to whom a slave has been donated is bound to collate the value of the slave, notwithstanding he was emancipated.

3. The heir who accepts a donation, and takes possession of the property, cannot repudiate the title under which he holds said property, retain the same, and claim exemption from the obligation of collating.

4. The donation may be null, as not being in conformity to law regulating the manner by which it should be executed, yet the informality, per se, of the act cannot be urged by the donee to the prejudice of the other heirs.

On Rehearing.

1. The grandson, it is claimed, owed, as a collation, to the succession of his grandfather, the value of a slave. The only evidence offered in support of the title by donation was a receipt, under private signature, signed by his mother, in 1881, who acknowledged receipt of the slave from her father, who was the grandfather of plaintiff. The donation was null for matters of form. The validity was not cured by the delivery of the slave.

2. A donation inter vivos of real property, null for want of form prescribed by law, cannot be confirmed by the donor, years after the death of the donee, and after the slave donated had been emancipated. The confirmative act consists of the donor's testimony in a suit, inter alia, to the effect that he had made the donation.

3. The grandfather's testimony was not given with the view of confirming the donation, or with the intention of charging his grandson with the value of the slave.

4. The grandson does not owe collation, as he (nor his mother) never had title to the slave.

5. The judgment of the district court is annulled, in order that settlement may be made

with plaintiff without deducting from his portion any amount claimed as collation for the value of the slave. The case is remanded.

(Syllabus by the Court.)

Appeal from district court, parish of Claiborne; Allen Barksdale, Judge.

Action by John R. Cawthon against William E. Kimbell and others. From a judgment for defendants, plaintiff appeals. Reversed.

John A. Richardson, for appellant. Joel W. Holbert, for appellees.

McENERY, J. John Kimbell was twice married. By the first marriage, there were five children; by the second, four. The first wife died in 1851, and the second marriage was celebrated in May, 1853. John Kimbell died in 1888, leaving the second wife surviving. Emily Kimbell, issue of the first marriage, married A. T. Cawthon. John R. Cawthon, the plaintiff, is the issue of this marriage. His mother died in 1861; and his father, in 1863. The plaintiff instituted this suit against the surviving widow and the heirs of the second marriage, alleging that John Kimbell, his grandfather, brought 2,800 acres of land, and some lots in the town of Homer, and some personal property, into the second community, which was his grandfather's separate property, and valued at \$13,450, and as heir of John Kimbell to one-eighth of all this property, and one-sixteenth of the personal property acquired during the second community, and in his succession at the time of his death. His one-eighth interest is valued at \$1,905. There was a partition of the property among the heirs of John Kimbell by the second marriage. This partition is attacked, and there is a prayer for it to be declared null and void, and that the land be restored to the succession of John Kimbell. This land, it is alleged, embraced 1,500 acres,—the balance remaining after having made donations to his children,—and which the second wife and the four children by the second marriage partitioned among themselves. He prays for a moneyed judgment for his interest in all the property, with 5 per cent interest from the death of John Kimbell, his grandfather, in default of returning the property to the succession. In answer the defendants admitted plaintiff is the heir of John Kimbell, and pleaded a general denial, and averred that he had no interest in the succession of John Kimbell, as he had received more than his share in the estate of his grandfather during his lifetime, and that his mother had been settled with for her share in the estate of Cynthia Kimbell, her mother, and prayed that plaintiff's demand be rejected. Before the case was set for trial the defendants filed a lengthy amended answer, amplifying their original answer. This amended answer in no way changes the substance of the original answer, but

enumerates the reasons why plaintiff should not recover by alleging that the land claimed by plaintiff was disposed of during John Kimbell's lifetime; that the personal property perished during his lifetime; that his mother had received an advance from the estate of John Kimbell, and was bound to collate the same. There is no allegation of any fact in the answer that could not be proved under the original answer. It does not in any way change the original answer, and, in the sound discretion of the court, it was permissible, in the furtherance of justice, as there was no injury to plaintiff, or prejudice to his rights. The amended answer contains allegations, also, that are only legal inferences from facts stated. There was judgment rejecting plaintiff's demand, and he has appealed.

The statement in the record shows that John Kimbell owned, in his lifetime, 2,000 acres of land. The deeds show that he disposed of 1,715 acres, but there was error as to 120 acres in the description; this amount not having been sold or parted with. This left 405 acres on hand at his death. The defendants, however, admit that there were 469 acres on hand at the time of his death, which was partitioned among the four heirs and widow. The movables amounted to \$450. He gave to his children, exclusive of amount given to plaintiff's mother, \$7,385. Add to this the amount given to the plaintiff's mother, the sum of \$1,500, and the value of the land and the personal property, the succession amount to be distributed would be the sum of \$11,392,—each heir's share being \$1,424,—which shows that the plaintiff has received more than his portion of his grandfather's succession.

The plaintiff attacks the donation made to his mother because it does not conform to article 1536, Rev. Civ. Code, which says that "an act shall be passed before a notary public and two witnesses of every donation inter vivos of immovable property or incorporeal things," etc. The real contention is in relation to the donation of the slave. The act of donation is as follows:

"Claiborne, La. Received of John Kimbell the sum of seven hundred dollars in full of my interest in the succession of my mother, Cynthia Kimbell, deceased, and the sum of three hundred dollars in full of my interest in the estate and succession of my brother John Randolph Kimbell, deceased, and the sum of fifteen hundred dollars, to wit, a boy, Billy, at thirteen hundred and fifty, and one hundred and fifty in money, to be charged to me from John Kimbell, as his property in his succession and estate. This 4th day of June, A. D. 1861. Emily Kimbell.

"I authorize my wife to sign the above, and bind herself. A. T. Cawthon."

The above receipt shows that the donation was executed, and therefore accepted by the donee. Rev. Civ. Code, art. 1541.

The plaintiff contends that as the donor, in his lifetime, never confirmed this donation, to supply the defects in the original act, it is null and void, and no title to the property ever passed from him. So far as the donee is concerned, he cannot retain the property, and attack the donation, escaping the obligation of accounting for the same. Having accepted the donation, and being in possession of the effects donated, as to him it is perfected. In the case of Gillespie v. Day, 19 La. 263, it was held that where the father made a verbal donation of a slave to his son, and at the death of the son, as one of the members of a family meeting, he advised that the property be sold as the property of the minor child of the deceased, he cannot claim back either the slave or the proceeds, although the donation, per se, did not divest him of title. In the instant case, in a judicial proceeding, the grandfather acknowledged the donation to his daughter to the property donated, in order to confirm title to the same to his grandson, in the matter of his tutorship. We think the principle enunciated in the case referred to appropriately applies to this. But, independent of this, the rule is universal in jurisprudence that a party cannot retain the thing, and repudiate the title by which he holds possession of it. Therefore, if the plaintiff wants to participate in the succession of his grandfather, he must account for what he has received as an advance in said succession. He cannot retain the advance, and come in and participate, and thus destroy that equality which the law says must exist among the heirs. The emancipation of the slave did not relieve the plaintiff from the obligation to collate that which his mother had received from his grandfather's estate. The property—the slave—was inherited by him from his mother, and was a part of his estate when she died. The donation of the slave was made in pursuance of articles 1361 and 1362 of the Code of 1825, which say: "Art. 1361. When slaves have been given, the donee is not permitted to collate them in kind; he is bound to collate for them by taking less, according to the value of the slaves at the time of the donation. Art. 1362. Therefore the donation of slaves contains an absolute transfer of the rights of the donor to the donee in the slaves thus given. They are at the risk of the donee, who is bound to support their loss or deterioration, at the same time he profits by the children born of them; and if the donee dispose in good faith of all or any of the slaves, the action of revendication for recovering the slaves on the part of his co-heirs for the collation due to them, will not lie against those who are the purchasers or holders of the slaves." The donation of the slave invested the donee, absolutely, with title to him. He was at his risk, and he must collate his value, no matter in what manner the donee lost him,—

whether by sale, death, by theft, or by emancipation. But this is not longer an open question. The jurisprudence on this point is firmly fixed. Slaves donated, and lost by emancipation while in the possession and ownership of the donee, do not relieve the donee from the obligation of collating their value. *Ventress v. Brown*, 34 La. Ann. 457; *Succession of Haile*, 40 La. Ann. 335, 3 South. 630; *Succession of Meyer*, 44 La. Ann. 871, 11 South. 532. We find no error in the judgment appealed from. Judgment affirmed.

On Rehearing.

(April 23, 1864.)

BREAUX, J. The careful attention heretofore given to this case relieves us from the necessity of restating all the facts. We will only restate those facts material to a decision of the question remaining,—an issue between the parties to the suit. Counsel for the plaintiff admits that all the points in the case heretofore decided were correctly decided, except one, he contends. The excepted and disputed point relates to the alleged donation of a negro. In the year 1861 the mother of plaintiff, authorized by her husband, executed a receipt for the slave, valued at \$1,350, and \$150 in money, as an advance upon her share, to be accounted for in the settlement of her father's succession. Her father, the alleged donor, was not a party to the receipt; and there is no evidence, other than this receipt, of an intended donation. The defendants plead ratification. This alleged ratification consisted of testimony by plaintiff's grandfather given in a suit brought by J. A. Cawthon et al. v. J. E. Cawthon, to which the witness John Kimbell, the said grandfather, was not a party, and in which none of the issues of the case at bar were involved. He deposed that he held the receipt in question, showing that his daughter had been placed in possession of the slave as stated in the receipt. The receipt was not in the form required to establish a donation inter vivos of property it is contended was donated. It is elementary that, in a donation, form is of the essence, and that, to have a binding force, the act shall be passed before a notary public and two witnesses; of immovable property, including slaves, under the laws at the date of the donation. We have said that donations inter vivos are solemn contracts, subjected to certain forms, without which they are in-existent. To form a particular importance is given, as it completes and gives life to the act,—"*forma dat esse rei*." The solemnity is established by the notarial act. The offer of the donor, and the acceptance of the donee, are valid after signing the act. The alleged donor was not at all a party to the receipt. As a donation, it was originally an absolute nullity. It was not translatif of title.

Whether there was a confirmative act—confirming, in effect, the donation alleged—is the next question at issue. If there was no confirmative act, there was no donation. We have already stated that the act of confirmation urged by counsel for the defendants is the deposition of the donor in a suit in which the plaintiff—the heir of the alleged donee—was not a party. The testimony of the alleged donor was not given, after it had become evident that he was aware of any defect of form, and that it was his intention, by testifying as he testified, to confirm a donation. In support of defendants' contention that there was confirmation of the receipt in question, giving it the effect of an act of donation, we are referred to a number of cases, as applying. The first case cited is that of *Gillespie v. Day*, 19 La. 263. The defendant, Day, claimed the price of a slave he alleges had been loaned, or given by verbal agreement, to his son. The court held that conceding the title to have been previously in him, and that the verbal donation, *per se*, was insufficient to divest him, yet the defendant, as a member of the family meeting, advised the sale of the property, and suffered the slave to be sold as the property of his son, and in the act of partition in the record, signed by the defendant, the price of the slave is set down as forming part of the estate which came into his hands as tutor of the minor. The slave, as donated property, was not involved. The contest related to the proceeds of the sale. It was so much cash in hand the father and tutor had judicially admitted—in the proceedings, in effect, contradictory—belonged to his son. The court held him bound by his declaration, without regard to any intended donation of a slave. There was virtually a manual gift of an amount in cash,—a delivery *de manu in manum*. In *Deschappelles v. Labarre*, 3 La. Ann. 522, a donation void in form, confirmed by the heirs, was held valid under the special provision of the Code authorizing the heirs to confirm a donation. Under that article, heirs may be held bound by their voluntary execution of the donation. From that decision we quote: "The title of the heirs of the donee to the property donated was rendered perfect by confirmation" by the heirs,—an entirely different question from that involved, on this point, in the case at bar, in which the heirs of the donee have never confirmed the contract of donation by any act or declaration whatever. In *Ventress v. Brown*, 34 La. Ann. 457, and in *Succession of Halle*, 40 La. Ann. 335, 3 South. 630, the form of the donation was not involved, as between the donor and donee. In the first case—that of *Ventress*—the confirmation had been made by the heirs of the donor under article 2274 of the Revised Civil Code. In the second case—that of the *Succession of Halle*—the right of the donee to the slave was not questioned at all.

She (the donee) contended that the emancipation of the slaves relieved her from the obligation of collating slaves donated to her, and rested her defense principally upon that ground. In the case under discussion the point is raised that the writing is not the writing of the donor; that it is only a receipt of the alleged donee. To sustain the plea of donation would add an obligation to be discharged by the heir of the alleged donee many years after the opening of the succession, and after the loss of the property not donated in compliance with the required form. The possession of the slave by plaintiff's mother, and the fact that the delivery dates about the time the receipt was executed, are not equivalents to confirming acts. The terms of the law are absolute, and the delivery of the property does not give validity to a contract of donation null for the want of form. 2 *Baudry Lacantinerie*, p. 872; 4 *Toullier*, p. 472. Judge Mathews, for the court, said in the case of *Williams v. Horton*, 4 Mart. (N. S.) 469: "But, according to our laws in relation to titles by which property is held, a written instrument is required in order to transfer slaves from one proprietor to another; and when the evidence offered in support of title to them is an act of donation, to give it validity, it must appear clothed with all the formalities required by law, and sanctioned by an authentic deed. Mere possession is not evidence of title. * * * In this species of contract, forms appear to assume the place of substance." In *Harlin v. Leglise*, 3 Rob. (La.) 194, this court reiterated that which had been decided in 4 Mart. (N. S.) 469,—that an omission of form is not cured by delivery of the slave. In *Packwood v. Dorsey*, 6 Rob. (La.) 331, the reasons for the judgment were given at some length. It is useless to repeat them. It will suffice to state the general propositions discussed: The donation of real property must be executed before a notary and two witnesses. A donation, null, cannot be ratified by any confirmative act on the part of the donor, and the voluntary execution of the donation by the donor will not prevent him from sustaining the plea of nullity. In the decision the court controverts the doctrine of *Toullier* that a void donation can be rendered valid by any ratification, whether express or implied, on the part of the donor. It leads, the court says, in that case, to an absurd conclusion,—that while, under the law, no express confirmation or ratification can render valid a donation under private signature, it can be made so by the act of ratification resulting from the voluntary execution of it by the donor. "It would, moreover, render completely inoperative the positive provision of our law that a donation, null for want of any of the requisite formalities, must be made anew in legal form. This provision, alone, surely excludes the

idea that a void donation can be rendered valid by any ratification, either express or tacit, on the part of the donor." A long list of names of French commentators expressing views different from those of Toullier is copied in the body of the opinion. The decision of this court just reviewed accords with the commentators who differ from Toullier. If we were to accept the doctrine of the latter, i. e. of Toullier, this case would not fall under its grasp, for there was no ratification, either expressed or implied, such as would cause the validity pleaded by plaintiff.

We have considered this question with great care, and have reached our conclusions despite our desire to affirm our previously expressed opinion upon this point. Our former decree remains unchanged, except in so far as may be necessary in order to carry out our views as herein expressed. Our learned brother of the district court, as usual with him, has carefully cast the account of the heirs, and made the following statement:

Value of lands.....	\$1,467
Value of movables.....	450
Amount paid Mrs. Key.....	1,000
" " L. J. Kimbell.....	1,000
" " Jones.....	1,000
" " W. E. Kimbell.....	800
" " Andrews.....	1,035
" " J. L. Kimbell.....	1,140
" " Mrs. Nelson.....	1,000
	<hr/>
	\$9,892

Counsel for the plaintiff and appellant, regarding these and other items involved, says in his brief: "There is only one question or point which we claim is error, in coming to its conclusion in this case. The other points decided are correct law, but the whole decision is based on the point in which we claim the error consists, in having accepted the donation, and being in possession of the effects donated, as to him, it is perfect. If the court is correct in this proposition, the decision is correct; if incorrect, then the case is with the plaintiff." We do not understand that the defendants and appellees dispute the correctness of these and other items of the account. The whole contest centered on the question of collating *vel non* a slave not donated in due form. In the present condition of the case, another judgment must be entered. In view of the admissions of correctness of certain items, presumably, it will be final before the court of the first instance. The debits and credits will now be established, and balance fixed, and the amount coming to each heir settled. We will not finally pass on any of the issues at this time, save these relating to collation, in so far as plaintiff is concerned. It is therefore ordered, adjudged, and decreed that our former judgment in this case be avoided and reversed; and it is further ordered, adjudged, and decreed that the judgment appealed from be reversed

and set aside; and it is now ordered, adjudged, and decreed that there be judgment for plaintiff, decreeing that he is not obliged to collate the \$1,350, value of the slave for which his late mother executed a receipt in 1861. It is further ordered, adjudged, and decreed that the case be remanded to be tried in accordance with the views herein expressed. The defendants and appellees are condemned to pay the costs of appeal. Those of the district court are to be paid by the party cast on final decision in that court.

(71 Mass. 944)

PINE GROVE LUMBER CO. v. INTERSTATE LUMBER CO.

(Supreme Court of Mississippi. March 19, 1894.)

CONTRACTS—CONSTRUCTION—MERGER OF PROPOSAL.

A written contract showed that A. sold to B. lumber according to B.'s orders, in quantity not to exceed the capacity of A.'s sawmill, at certain prices and dimensions; A. to manufacture at dimensions specified by B. so long as it did not interfere with his regular cut. *Held*, that a prior letter was inadmissible to show an intention to sell the entire output of the mill.

Appeal from circuit court, Lauderdale county; S. H. Terral, Judge.

"To be officially reported."

Action by the Pine Grove Lumber Company against the Interstate Lumber Company for damages for breach of contract. Demurrer to declaration sustained. Plaintiff appeals. Affirmed.

This is a suit by appellant against appellee upon a written contract containing the following stipulations, which are relied on by appellant as creating liability on defendant. "Parties of the first part [plaintiff] contract and sell to the party of the second part [defendant] yellow pine lumber according to the orders of the said party of the second part, in quantity not to exceed the capacity of the sawmill belonging to party of the first part, located at Richardson, Mississippi." The contract then fixes prices, and gives specifications and dimensions. A further stipulation of the contract is that "the parties of the first part will manufacture lumber, when desired, into lengths, widths, and thicknesses as specified by the party of the second part, so long as the same does not interfere with the regular and advantageous cut of said mill; the contract to take effect on the 2d day of Dec., 1892, and remain in full force and effect until Jan. 1st, 1894." The declaration alleges that plaintiff, on account of its obligation to saw alone for defendant under this contract, declined to take further orders from its old customers; that it deprived itself of divers profitable customers, and gave up and deprived itself of the entire outside market, and relied on

the good faith and fair treatment of defendant under said contract; that said contract had been fully complied with by plaintiff; that on the 5th day of June, 1893, defendant requested plaintiff to ship no more lumber, except on special orders from defendant, and that plaintiff, since said notice, has received no orders of any kind from defendant; and, being denied the right to saw under the general specifications of said contract, and its old customers, by reason of said contract, having been driven elsewhere, and into contracts with other mills, plaintiff has been forced to shut down its mill, discharge its trained force, and to suspend business. Damages to the amount of \$5,000 were claimed, and an itemized account of same was filed with the declaration. Defendant demurred to the declaration. The demurrer was sustained, and plaintiff appealed.

Walker & Hall, for appellant. Cochran & Bozeman, for appellee.

WOODS, J. The contract of December 2, 1892, is plain and unambiguous. It is, in many particulars, unlike the proposition contained in the letter of appellee to appellant, dated November 9, 1892. The intention and agreement of the parties fully appear in the contract itself, and there is no occasion to resort to extraneous sources of information to interpret the instrument, which clearly evidences the contract made between the parties. The letter was but a step in the negotiations, as we must suppose, which ripened into the final contract. There is no charge of fraud or overreaching or failure to insert in the contract all the terms of the agreement, and the meaning of the contract is not hidden or doubtful. Affirmed.

(71 Miss. 947)

CARROLL COUNTY v. JONES et al.
(Supreme Court of Mississippi. April 9, 1894.)
SCHOOL LANDS—REMOVING CLOUD ON TITLE—
BILL BY COUNTY.

Where a bill by the county to remove a cloud from its title to township school lands leased for a term of 99 years alleges that they are held and claimed by defendants in fee simple under conveyance and bond for title from the lessee, a demurrer on the ground that the bill shows no cloud on complainant's reversionary interest should be overruled; Code 1892, § 4147, expressly directing suits to be brought against any one claiming such lands in fee simple.

Appeal from chancery court, Carroll county; T. B. Graham, Chancellor.

Bill by Carroll county against Elisha Jones and others, under Code 1892, § 4147, to remove cloud from title. From a decree dis-

missing the bill, complainant appeals. Reversed.

Complainant seeks to have a deed of conveyance to said defendants canceled in so far as it conveys a fee simple to a part of a sixteenth section, or school land, in that county. The bill alleges that on December 22, 1855, the lands in controversy "were by the school trustees of said township duly and legally leased for the term of 99 years from said date to one H. S. Walker; that said lands are now held and claimed by defendants in fee simple under a conveyance dated February 5, 1877, and under bonds for title thereto to said Jones, dated November 7, 1885; and that same is a cloud on complainant's title." To this bill a demurrer was interposed, on the ground, among others, that the bill shows no cloud on the reversionary interest asserted. The deed to defendants does not affect complainant's interest, nor enlarge defendants' title. The demurrer was sustained, and the bill dismissed, and complainant appealed.

Southworth, Paxton & Stevens, for appellant. Somerville & McClurg, for appellees.

COOPER, J. Though it may be difficult to perceive what useful purpose is subserved by that provision in section 4147 of the Code of 1892 by which suit is directed to be brought against one claiming the school lands in fee simple in those cases in which the public records disclose that the lands were leased and not sold, as appears to have been the case with reference to the land involved in this suit, it is yet true that the averments of the bill in this case bring it within the precise terms of the law. The defendants, according to the averments of the bill, claim the lands in fee simple; and though it is affirmatively shown that this claim is not founded upon any conveyance from the county authorities, but by one from the lessee of the term, it is nevertheless clear that this is a claim within the letter and spirit of the law. The number of cases of this class which are appearing in this court, under the operation of the Code chapter, warrants the suggestion to the lower courts that when, upon the answer of the defendant, it clearly appears that no really adverse title is asserted against the county, and that the whole purpose and effect of the proceeding is to make certain the title of the public, costs should be awarded against the county. This will serve to restrain the public authorities from unnecessary resort to the courts. The decree is reversed, demurrer overruled, and cause remanded, with leave to answer in 30 days after mandate filed in the court below.

(71 Miss. 767)

**GRIFFIN et al. v. BOARD OF MISSISSIPPI
LEVEE COM'RS.**

(Supreme Court of Mississippi. March 26,
1894.)

**ABATEMENT—ANOTHER ACTION PENDING—COL-
LECTOR OF TAXES—ACTION ON BOND—DEFENSE
—DEPOSIT OF MONEY IN BANK.**

1. An action is not abated by the pendency of another suit between the same parties on the same cause of action, where no recovery can be had in the action first brought.

2. In an action against a tax collector and the sureties on his bond to recover taxes collected and unaccounted for, it is no defense that plaintiff provided no safe place for deposit of such money, that such collector deposited it in a bank which afterwards failed, and that he used diligence in the selection of such bank.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Action by the Board of Mississippi Levee Commissioners against John L. Griffin, tax collector of Washington county, Miss., and others, on the official bond of defendant Griffin, to recover money collected by him, and not accounted for. From a judgment for plaintiff, defendants appeal. Affirmed.

Defendants pleaded in abatement that another suit, brought by Wirt Adams, revenue collector, for the use of plaintiff, on the same cause of action, for the same breach, to recover the same debt sued for in this suit, was then pending in the chancery court of said Washington county. The court sustained a demurrer to this plea. Defendants then pleaded in bar that the money sued for was money collected for taxes for said board by said John L. Griffin, as sheriff and tax collector of Washington county, Miss., during the month of December, 1891; that said Griffin made his regular monthly settlement for said month, and paid over all taxes due by him; that between that date and December 22, 1891, he collected for the state of Mississippi, the county of Washington, and plaintiff, the sum of \$40,000; that the time of making his January, 1892, settlement had not arrived, and, as there was no safe provided by the board of supervisors of Washington county, or any one else, in which to keep said money where it would be safe, in order to safely keep it he deposited all of said money with different banks, to his credit as tax collector; that the money sued for was collected by said Griffin between the date of his December settlement and December 22, 1891; that he, in order to keep it safely, deposited same in the bank of Greenville; that he had no reason to doubt the security of said money, or to suspect that it would be used by said bank; that on December 22, 1891, said bank failed, having used said money without his consent; that he had never been able to recover any part of the same, though due diligence and efforts had been used therefor; and that he was guilty of no negligence. A demurrer to this plea was also sustained. Defendants

declined to plead further, and judgment final was entered against them.

J. H. Wynn, for appellants. Yerger & Percy, for appellee.

WOODS, J. The general rule that the pendency of another suit between the same parties on the same cause of action and for the same relief may be pleaded in abatement of a subsequent suit, is subject to many exceptions and limitations. The rule rests upon the right of every one to be protected from unnecessary and vexatious litigation. In the case at bar the second suit appears not to fall within the reason of the rule. It is clear that no recovery can be had on the former suit in chancery, whose pendency is pleaded in abatement of this suit at law. The bill filed in the prior suit does not aver that the state revenue agent had given to the delinquent tax collector 30 days' notice to pay over the amount shown to be delinquent by correct open account on the books of the proper accounting officer, and this condition precedent must have been complied with by the revenue agent before his right to sue and collect could arise; and this is the sure defense set up in the second paragraph of the sworn answer of the defendants to that bill. The suit at law, it will thus be seen, was neither vexatious nor unnecessary, and the demurrer to the plea in abatement was very properly sustained.

The demurrer to the plea in bar was also rightly sustained. The idea that the tax collector may make a general deposit of public money in bank, and thereby absolve himself from liability to pay over as he is by law required to do, is so utterly unreasonable as to need no combating. Like all others depositing funds in bank, the tax collector took the risks involved in so doing. The state looks to its officer, and the officer must look to his unreliable or unfaithful banker. Affirmed.

(71 Miss. 833)

BOLIVAR COUNTY v. COLEMAN et al.

(Supreme Court of Mississippi. March 12,
1894.)

SCHOOL LANDS—LEASE—ESTABLISHING TITLE.

1. Under Code 1892, § 4147, directing the board of supervisors to bring all necessary suits to establish the title to township school lands, suit may be brought to recover lands held under a lease to expire at a fixed date, with absolute reversion to the state, in trust, where such lease is void.

2. Code 1880, § 732, authorizing the board of supervisors to lease township school lands upon petition by a majority of the resident heads of families, confers only a limited jurisdiction, and a lease of such lands is void unless the records of the board show that such a petition was made.

Appeal from chancery court, Bolivar county; W. R. Trigg, Chancellor.

Bill by Bolivar county against M. W. Coleman and others, under Code 1892, § 4147, to recover township school lands. From a decree dismissing the bill, complainant appeals. Reversed.

This is a bill filed by Bolivar county, under section 4147 of the Code of 1892, against M. W. Coleman, J. L. Hickland, W. L. Pearman, S. T. Jones, Hattie Wells, L. Taylor, Z. L. Smith, Lucy Griswold, Eliza Coatsworth, A. J. Collins, W. Dockery & Co., Caldwell & Judah, Fader, Frank & Co., R. S. Skilbeck, Yorkshire Security Corporation, and a Dutch loan company. The bill alleges that a petition was presented to the board of supervisors of Bolivar county, asking for the leasing of section 16, township 22, range 5 W., in said county; that an order of the board was passed August 3, 1885, appointing appraisers to appraise said land; that an order was passed by the board ordering said land to be sold in September thereafter, and that the board of supervisors, in January, 1886, made an order of lease to be made to M. W. Coleman and others; and that W. E. Ringo, president of board of supervisors, executed deeds of lease to the lands January 4, 1894. The bill states that the appraisers' report, the report of the commissioners to make the lease, and the proof of publication of notice of leasing, cannot be found, and that it nowhere appears from the record of the board of supervisors, or in the orders of said record, or in the leases from the president of the board of supervisors, or anywhere else in said proceedings, that a majority of the resident heads of families (minors and females not excepted) in said township ever signed any petition for the leasing of said lands, and avers, for that reason, that all of said proceedings in the leasing of said section are null and void, and that defendants acquired no title thereunder. The prayer of the bill is that the title of defendants be decreed to be null and void, and that the deeds from the president of the board of supervisors, and all orders of said board in relation thereto, be declared void, and ordered to be canceled, and that a writ of habere facias possessionem, to put complainant in possession, be awarded. Decrees pro confesso were taken against all the defendants except M. W. Coleman, W. Dockery & Co., and Skilbeck, trustee, who demurred to the bill on the following grounds. "(1) The bill fails to make out a case within section 4147 of the Code of 1892, because it contains no allegation that defendants claim any part of said section 16 in fee simple, or upon any other terms than for a lease to expire at fixed date, with absolute reversion to the state, in trust, or that the title to said land rests in parol, by destruction of records, or otherwise. (2) The bill shows on its face that the title to said lands is held under a lease, the date of expiration of which is fixed. The bill shows on its face that said leases are valid, and that

all the requirements of section 732 et seq. of the Code of 1880 were complied with. (3) The bill shows on its face that the sum of \$2,400 was received by complainant as a consideration for said leases, which it now seeks to annul and set aside, and complainant does not tender, or offer to refund, said sum, or any part of the money which the bill shows was received. (4) There is no equity on the face of the bill." This demurrer was sustained, and complainant appealed.

O. G. McGuire and N. B. Scott, for appellant. Fred Clark, for appellees.

WOODS, J. 1. The construction placed by counsel for appellees upon section 4147, Code 1892, is unsound. The statute makes it the duty of the board of supervisors to institute all necessary suits to establish and confirm the title to the sixteenth section lands, and to fix the date of the expiration of any lease of the same, and then, in addition, directs certain classes of these necessary suits to be instituted immediately. The necessary suits are not to be confined to cases in which persons claim any of said lands in fee simple, or upon any other terms than that of a lease to expire at a fixed date, with absolute reversion to the state, in trust, or, where the title to said lands rests in parol, by destruction of records or otherwise; but suits, in these cases, must be begun at once. The view contended for by appellees would make unassailable the most flagrantly fraudulent claim, if it only appeared to rest on a lease to expire at a fixed time, and this would largely frustrate the very object sought to be attained by the statute.

2. The bill charges the invalidity of the leases in this case by reason of the failure of the records of the board of supervisors to show the jurisdictional facts necessary to have existed as a prerequisite to the action of the board in leasing the lands. The substantial averment of the bill is that the record of the board of supervisors nowhere shows that a majority of the resident heads of families (minors and females not excepted) ever petitioned the board to lease the lands involved in this litigation, as required by section 732, Code 1880, and that the absence from the record of the proceedings and judgments of the board of supervisors of this jurisdictional fact renders the action complained of nugatory. It was not in the exercise of its general jurisdiction that the board of supervisors acted when the leases were made, whose cancellation is now sought, but of a limited and special jurisdiction, to be exercised in a particular manner, as prescribed by section 732. Being a court of record, the requisite facts to show this special jurisdiction, and its lawful exercise, must appear of record. The judgments of courts of limited and special jurisdiction, exercised

ble in a particular manner, are not, in and of themselves, evidence of jurisdiction, and its lawful exercise. In cases of this character the jurisdictional facts must be shown on the face of the record. The rule is so universally recognized that any discussion of the topic is needless. Nor do we, at all, understand counsel for appellees to dissent from its correctness. His contention is that the jurisdictional fact of a petition by a majority of the resident heads of families is not denied by complainant's bill, and that it may be inferred or presumed. But this begs the question. The very point involved is that no presumption in favor of jurisdiction, and its rightful exercise, can be entertained, in considering the proceedings of courts of limited and special jurisdiction. The presumption does arise in favor of judgments of courts of general jurisdiction proceeding within the general scope of their powers; but there is no such presumption in favor of judgments of inferior courts, exercising a special jurisdiction in a particular manner, prescribed by the authority from which the power to act is derived.

3. There is not the slightest intimation in the bill of complaint as to the payment of the money stipulated to be paid for the lease of the lands, nor does the written lease made by Ringo, the president of the board of supervisors, to respondent Coleman, which the bill refers to as "Exhibit E," show anything as to payment of money made. It was this lease from Ringo to Coleman, and not the notation made by the clerk of the board on the records of his office, which was made an exhibit. The question sought to be raised by the third cause of demurrer is therefore not yet really before us. Decree reversed, demurrer overruled, and cause remanded, with leave to plead or answer within 30 days after mandate filed in court below.

(71 Miss. 613)

BOARD OF SUP'RS OF MADISON COUNTY v. POWELL.

(Supreme Court of Mississippi. March 12, 1894.)

SCHOOL LANDS—VENDOR'S LIEN—LIMITATION.

Code 1892, § 2733, barring suits in equity to enforce liens for debts barred at law; and section 2762, applying the legal bar to equity when the jurisdiction is concurrent,—apply to the enforcement of the county's vendor's lien on the leasehold of a sixteenth section.

Appeal from chancery court, Madison county; H. C. Conn, Chancellor,

Bill by the board of supervisors of Madison county against Mrs. S. C. Powell. Demurrer to bill sustained. Complainant appeals. Affirmed.

This is a bill filed in the chancery court of Madison county, by the board of supervisors of Madison county against Mrs. S. C.

Powell, alleging that in June, 1853, the board of trustees of township 9, range 1 west, in Madison county, leased to one W. G. Kearney, for 99 years, the sixteenth section of that township; that a deed of lease for 99 years was executed to said Kearney in March, 1859, reciting, a cash payment in full of the purchase money for said land; that said deed was properly recorded, and that in course of time, by a number of mesne conveyances, all of which were referred to in the bill, the land came into the possession of defendant, Mrs. S. C. Powell, for a valuable consideration paid in cash. The bill charges that Kearney did not at the time of the purchase of the land pay anything at all, but executed his four promissory notes to the trustees, payable annually thereafter, with 10 per cent. interest; that said notes were never fully paid, but that on January 1, 1860, there was due and owing on these notes a balance of \$2,235.70. The bill avers that Mrs. S. C. Powell, and those through whom she claims, have been in open, continuous, and notorious adverse possession of the land since 1859, and that she is a purchaser for value without notice except such notice as she is chargeable with by law. The bill charges that the balance of the purchase money has never been paid, and that no interest has been paid on same since 1861, and that a judgment was recovered on the notes against said Kearney in 1867 for the amount then due. The bill states that no execution has ever been issued on this judgment, and that it has never been revived against said Kearney. The bill seeks to have a lien declared on the land for the purchase money, and to have it sold to satisfy same. Defendant demurred to the bill, setting up the statute of limitation, bona fide purchaser, and want of equity. The demurrer was sustained, and complainant appealed.

H. B. Greaves and Frank Johnston, Atty. Gen., for appellant. W. H. Powell, for appellee.

CAMPBELL, C. J. The debt was long since barred, and the lien given by law to secure it was lost upon the completion of the bar of the debt. Code 1892, §§ 2733, 2762.¹ The fact that the debt was to the sixteenth section fund makes no difference. Time ran against trustees, county officials, and counties until the bar was complete. *Money v. Miller*, 13 Smedes & M. 531; *Brown v. Supervisors*, 54 Miss. 230. This has long been settled in this state, and we will not unsettle it. Affirmed.

¹ Code 1892, § 2733, bars suits in equity to enforce mortgages and liens when the action at law on the debt secured is barred. Section 2762 provides that, when there is concurrent jurisdiction at law and in equity, the bar at law shall apply in equity.

(71 Miss. 928)

LONDON ASSUR. CORP. v. COWAN.

(Supreme Court of Mississippi. March 19, 1894.)

INSURANCE CONTRACT—CONSTRUCTION.

Where an insurance company, having insured all a broker's cotton, instructs him to insure such cotton in other companies, in his own name, for \$50,000, charging the premiums to it, he is not entitled to credit for premiums paid on policies providing that they shall not apply to cotton covered by any other insurance.

Appeal from circuit court, Warren county; John D. Gilland, Judge.

Action by the London Assurance Corporation against J. J. Cowan. From a judgment for defendant, plaintiff appeals. Reversed.

Appellant, a marine insurance company, issued to appellee an open policy of insurance on cotton, which, by its terms, was to cover all such cotton as he might have, from time to time, during the season of 1890-91, at eight cents per bale; appellee being a cotton broker of Vicksburg, Miss. In November, 1890, appellant wrote and wired appellee: "Please insure \$50,000.00 on cotton in presses against fire, in your name, and charge expenses to our account." No directions were given as to how to take out the policies, or what kind of policies, or as to any conditions they were to contain, and no inquiries were ever made as to the nature of the policies. Cowan undertook to comply with the request, and obtained fire policies, in his own name, on cotton in the presses, to amount specified, and paid premiums on same to the amount of \$1,199.50, and charged same to appellant. On the face of each of the policies so taken out by Cowan was a clause providing that the policy "shall not apply to, or cover, any cotton which may, at the time of loss, be covered, in whole or in part, or under the protection of any river or marine insurance, or policy of any marine company." Some time after a settlement was had between appellant and appellee, appellant discovered the provisions in the policies which exempted said insurance companies from loss on any cotton covered by any marine insurance. Appellant notified appellee at once of the fact that, by reason of such exemption in said policies, no insurance ever attached thereunder, and demanded the payment of the premiums paid on same. Appellee declined to pay, and this suit was instituted to recover same. There was a condition in plaintiff's policy to defendant making it liable for the full amount of the policy, without reference to other insurance, and there was no modification as to this until late in the season. To plaintiff's declaration, defendant pleaded the general issue, and gave notice that he would offer evidence to prove the following affirmative matter: That, as plaintiff was an insurance company, it knew, or ought to have known, all usual provisions and conditions; that it requested the insurance on

the cotton, and no instructions were given to defendant as to special conditions to be contained in the policies, nor was defendant cautioned as to special conditions to be contained in the policies, nor was defendant cautioned at all,—wherein plaintiff was negligent; that defendant possessed no special knowledge of insurance, and is not engaged in that business; that the services were gratuitous, and that defendant literally obeyed his instructions, and that it was plaintiff's negligence that the policies were not valid and good; and that plaintiff had not suffered loss. On the trial, plaintiff asked the court to give a peremptory instruction to find for plaintiff. This instruction was refused, and the court gave a peremptory instruction to find for the defendant. Judgment and verdict accordingly, and plaintiff appealed.

Booth & Anderson, for appellant. Dabney & McCabe, for appellee.

COOPER, J. This is a hard case, and we regret that, under the law, the defendant cannot be relieved. It is well settled by authority that the appellee would have been liable to the appellant, as insurer, if there had been a loss of the property he had assumed the duty of insuring, and if he was guilty of neglect in not procuring valid insurance. But this liability on his part would have sprung, not from contract, but from tort. And though, in admeasuring the damages, the amount of premium which the appellant would have paid for the insurance, if the same had been insured, would have been deducted from the value of the property lost, this would have been done only to find the true loss, and not because of the appellee's right to such sum, as a premium. The radical and insuperable difficulty in appellee's defense is that his right to charge against appellant the premiums must rest upon the fact that he secured insurance according to the directions of appellant. We are unable to distinguish this case from that of *Storer v. Eaton*, 50 Me. 219, the reasoning in which meets our approval. If the appellee could not have recovered the premiums in an action against the appellant, we can perceive no principle upon which he can reach that end by charging up the premiums in a current account. The judgment is reversed.

On Suggestion of Error.

CAMPBELL, C. J. It is not true, as stated by the argument in support of the suggestion in this case, that "the court is impatient at the sight of one," and there is nothing in the action of the court in dealing with them to justify such a notion. It is true that rarely has a suggestion of error availed anything, except to show the indisputable correctness of the decision assailed; and the reason is, plainly, because the court, having had the benefit of argument by learned counsel en-

gaged in the case, and the three judges having considered and discussed the case afterwards in the consultation room, in all its aspects, as presented by counsel, and as may occur to either of them, know more of the case than the counsel do, and have the great advantage of perfect impartiality in their investigation, with the sole desire to reach the truth. This case is a fair illustration. It is a very plain case, when analyzed, and yet the zeal and ingenuity of learned counsel have completely deceived them, and by considering what might have been, and what would, in that contingency, be, the legal result, they have convinced themselves that the like result should follow now. We dealt with the case actually existing, and presented by the record, which is simply this: Cowan, with perfect honesty, but carelessly and negligently, supposing he was entitled to do so, withheld from the corporation money he had no legal right to retain; and when this discovery was made he was called on to pay, and, refusing, was sued. That he could not recover his unwarranted disbursements, if he was plaintiff, is clear, and there is no escape from that test in determining the validity of his defense; and that is the whole case, and we do not concern ourselves with what might be the law in a different state of case. The decision will stand as made.

(71 Miss. 774)

SPEARS v. ROBINSON.

(Supreme Court of Mississippi. April 9, 1894.)

CROPS—DEED OF TRUST—LANDLORD'S ATTACHMENT.

1. A deed of trust of "the crop of cotton, except four bales, which is reserved and agreed upon" (the land being described), is not uncertain as to the cotton conveyed.

2. The trustee of a deed of trust of crops has such title in them when gathered as to support his claim in his own name against the landlord's attachment of them.

3. Code 1892, § 2531, providing that on an issue between the landlord and the claimant of property seized for rent the latter should have the burden to prove ownership, merely declared the existing law.

4. Though Code 1890, § 2200, requires a special deputy to deliver the property seized forthwith to the regular officer, a claimant who has gained possession from such deputy by giving a delivery bond, cannot deny liability thereon because the deputy had no right to take it.

Appeal from circuit court, Lafayette county; Eugene Johnson, Judge.

Replevin by W. E. Spears against C. L. Robinson. Judgment for defendant. Plaintiff appeals. Reversed.

On the 22d day of December, 1890, C. L. Robinson sued out an attachment for rent against J. T. and W. M. Reeves for 1,000 pounds of cotton for rent and \$45 for supplies furnished for the year 1890 by virtue of a contract of a sale of land to the Reeveses, or, on failure to pay the purchase money, to pay rent. J. D. Williams was appointed,

by the justice of the peace, special deputy constable, and he levied on two bales of cotton and 1,500 pounds of seed cotton and some corn, which he released on bond, without making any return of the papers or property to the regular officer of the county, as required by section 2200 of the Code of 1880. All the property was levied on as the property of J. T. Reeves. W. E. Spears, appellant, made affidavit, and claimed the property as trustee in deeds of trust executed by J. T. and W. M. Reeves to P. W. Spears. On this claim Robinson recovered a judgment in the justice of the peace court, and Spears appealed. In the courts below plaintiff contended that Robinson was vendor of the premises, and claimed the property by virtue of the trust deeds. Robinson's contention was that he, in 1889, sold the land to the Reeveses, but afterwards made an oral contract by which he was to receive six bales of cotton per year as rent, and took their rent notes for same, he at the same time executing and delivering to them a written contract to take the six bales of cotton as payment. Four bales of cotton had been paid to Robinson when he sued out this attachment. The plaintiff offered in evidence the deed of trust from J. T. Reeves to him on his crop for that year, in the usual form of such trusts, but containing, after describing other property, the following: "Also the crop of cotton, except four bales, which is reserved and agreed upon, corn and produce which may be raised during the present year." Defendant objected to the introduction of this deed, on the ground of the uncertainty in the description of the cotton, and it was excluded in so far as the cotton therein mentioned is concerned.

The following instructions were asked by plaintiff, and refused by the court: "(2) A special deputy can only act by appointment of a justice of the peace in the execution of process issued by him in cases of emergency, and when there is no constable or sheriff to be had in time; and the law requires such special deputy, immediately after the execution of the process, to deliver the property to the constable of the district or the sheriff of the county; and, if the jury believe that Williams failed to do this, then, in law, there was no levy on the cotton or corn, as the law directs, and they will find for the plaintiff. (3) The court instructs the jury that if they believe from the evidence that J. D. Williams was not an officer of the county, but only specially deputized to make the levy in this case, then the law requires him to immediately deliver the property to the constable of the district or the sheriff of the county, and he had no right to accept or approve a bond for the forthcoming of the property; and they will find for the plaintiff." For the defendant the court gave the following charges, complained

of: "(2) The court charges the jury that if they believe from the evidence that the two bales of cotton and the 1,500 pounds of seed cotton levied on was raised by Tom Reeves, and if the jury further believe from the evidence that the two bales of cotton and the 1,500 pounds of seed cotton levied on was delivered to P. W. Spears by Tom Reeves on a debt due to him, then the court instructs the jury that this suit in the name of W. E. Spears for said two bales of cotton and 1,500 pounds of seed cotton cannot be maintained as to such two bales of cotton and 1,500 pounds of seed cotton, and they must find for the defendant, O. L. Robinson, regardless of whether any rent was due him or not." "(4) The court charges the jury that the burden of proof in this case is upon the plaintiff, W. E. Spears. He must show by the proof that he, and not some one else, at the time this suit was instituted, was entitled to recover the property in question."

From a verdict and judgment for defendant, plaintiff appealed, and assigned as error, among other things, the following: "(1) The court erred in excluding the trust deed executed by J. T. Reeves to plaintiff as trustee for P. W. Spears; (2) the court erred in allowing the defendant to prove a verbal contract for the sale of the land in the alternative; (3) the court erred in allowing proof of a verbal contract in this case after it was shown that the contract was in writing."

J. W. T. Falkner and R. F. Kimmons, for appellant. W. S. Chapman, for appellee.

WOODS, J. The deed of trust was not void for uncertainty in the description of the property conveyed, and should not have been excluded from the jury. There is no uncertainty in the description of the property conveyed. The uncertainty, if there be any (as to which we express no opinion), is as to the portion of the cotton sought to be excepted from the conveyance of the "entire crop" of the grantor. *McAllister v. Honea* (Miss.) 14 South. 284. The contract, in the alternative, for sale or rent, was, it is true, a verbal one, but this suit originated in the attachment for rent, which was only an effort to enforce appellee's rights,

according to his theory, under the verbal contract of rent; and there was no error in allowing evidence to show fully what the real agreement between appellee and the Reeveses was. The subsequent writings, said by appellee to have been executed by them, were, on the part of the Reeveses, an agreement to pay rent, and on appellee's part a modification of the original contract, by which Robinson stipulated to receive six instead of eight bales as first installment of the purchase price, under the sale contract, in consideration of the Reeveses paying interest on the value of the two bales which they might not be able to deliver in pursuance of the contract to buy. The second and third assignments of error are, therefore, not well taken.

The second instruction of defendant was erroneous, and we are at a loss to conjecture on what ground it was thought proper. The counsel for defendant below make no comment on this point, and thus seem to decline to support this ruling of the court below.

The fourth charge given for defendant was not error. Section 2531, Code 1892, introduces no new rule as to the burden of proof in the cases therein spoken of. The section is merely declaratory of what was already the law in this state.

The second and third instructions asked by plaintiff below were properly refused. Though the specially-deputized constable's dealing with the attached property was irregular, and though the bond which he took from the claimant was also irregular, yet this irregular bond has had the effect in the proceedings which a bond properly given would have had, and it must be held binding on the parties executing it. It would be a scandalous reproach upon the administration of justice if the appellant could execute an irregular bond, under which he had the property delivered to him, and, after obtaining possession of it, by virtue of such bond, convert it to his own use, and then be heard to assert successfully that he was not to be held liable on his bond because of some irregularity in it. *Forbes v. Navra*, 63 Miss. 1; *State v. Depeder*, 65 Miss. 26, 8 South. 80.

Reversed and remanded.

(71 Miss. 359)

MEMPHIS GROCERY CO. et al. v. LEACH.

(Supreme Court of Mississippi. April 9, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—STIPULATION FOR ATTORNEY'S FEES—VALIDITY—SUFFICIENCY OF SCHEDULES—PREFERENCES.

1. Since the statute requires the assignee immediately on taking possession to file a petition and inventory, for which he is entitled to allowance for reasonable attorney's fees, to be paid out of the estate, a provision in the assignment for the payment of attorney's fees for drawing the deed of assignment and the necessary schedules, and for preparing the assignee's petition and inventory of assets, does not render the assignment void.

2. It is sufficient that the assignment and schedules together indicate the assets and liabilities so as to give full information as to both, and the omission to state everything connected with a liability, not especially required by statute, will not avoid preferences.

Appeal from chancery court, Marshall county; B. T. Kimbrough, Chancellor.

In the matter of the assignment of J. W. Moore, J. G. Leach, assignee, filed his petition, and the Memphis Grocery Company and others filed cross petitions assailing the assignment. From a decree sustaining the assignment, cross petitioners appeal. Affirmed.

December 1, 1892, J. W. Moore, a merchant, made a general assignment of all his property to J. G. Leach, assignee, for the benefit of his creditors. The assignee filed his petition in the chancery court of Marshall county, and gave bond, as required by chapter 8 of the Code of 1892. There were two preferences made in the assignment,—one in favor of Miss Lida Moore, sister of the assignor; the other in favor of the attorneys who drew the deed of assignment. A number of the assignor's creditors filed cross petitions, under section 121, Code 1892, assailing the assignment on various grounds. The preferences are alleged to be fraudulent, and the debts so preferred are charged to be simulated and without consideration. The deed of assignment, after directing the assignee to first pay the taxes due on the property, and the expenses, simply directs the payment to Smith & Totten, attorneys, of the sum of \$500. The schedule showing the indebtedness recites: "The indebtedness due Smith & Totten is evidenced by open account for legal services and advice in and about this assignment, and for the execution of this trust." This provision, and the insufficiency of schedules filed, are relied on by appellants as making the assignment fraudulent and void. On the trial in the court below, Messrs. Smith and Totten were both examined as witnesses, and testified that the fee to them was for drawing the assignment and getting the case in court, as required by the Code of 1892. Mr. Moore, the assignor, also testified to the same. From a decree sustaining the assignment

and dismissing the cross petitions, the cross petitioners appealed.

R. T. Faut and J. T. Faut, for appellants.
J. H. Watson and R. H. Taylor, for appellee.

CAMPBELL, C. J. The assignment is assailed as void, because of a provision for the payment of \$500 to Smith & Totten, attorneys, upon a stipulation that they should draw the deed of assignment and the necessary schedules to accompany it, "and for the execution of this trust," which is shown to have embraced the qualification of the assignee as required by law, and preparing his petition and inventory of assets. This provision does not come within the condemnation of any of our cases. In view of the statute requiring the assignee, immediately after taking possession of the property assigned, to file a petition in chancery, accompanied by a bond, and speedily thereafter to file an inventory, for which he is entitled to allowance by the court for reasonable expenditures for the services of counsel in the performance of the duties required, to be paid out of the estate in his hands as receiver, it may be justly considered that the law devotes that much of the property assigned for this purpose; and it is not ground of just complaint by creditors that express provision is made for this known service by the assignment. The schedules in connection with the assignment, and part of it, are sufficient to save the preferences contained in the assignment from condemnation. They seem to be full and complete, so as to accomplish the purpose of the statute requiring them, and evince an honest effort to give full and precise information as to assets and liabilities, so as to disarm the criticism "that fraud lurks in generalities." Upon the testimony as to the transaction between Crook and Moore about the lots in Red Banks, the court rightly directed the proceeds of sale to be paid to Crook, who was mortgagee, and, as such, entitled to claim against Moore or his assignee for creditors.

We concur in the view of the importance of sufficient schedules, as required, to save preferences, but substantial conformity to the statute will suffice. If the conveyance and schedules, taken together, sufficiently indicate the assets and liabilities to give full information of both, the object of the law is met. The omission to state everything connected with a liability, not specifically required by statute, as in case of the debt to the Bank of Holly Springs mentioned, or the failure to mention some circumstance about land other than describing it, so as to convey it, and give its location and value, and give reasonable information concerning it, will not avoid preferences. Affirmed.

JAMISON et al. v. TOWN OF HOUSTON
et al.

(Supreme Court of Mississippi. March 5,
1894.

SCHOOLS AND SCHOOL DISTRICTS—TAXATION.

A bill to enjoin the collection of taxes to pay bonds issued in purchase of school property from one A., alleging that the property had previously been conveyed to defendant town for school purposes; that defendant's council, without authority, conveyed it to A.; that the bonds were issued to purchase such property from A.; that there were sufficient school buildings to accommodate the children of the town; and that A., before the purchase from him, owed money to members of the board, and paid them in the bonds,—shows no ground for injunction, as the purchase of school property is in the discretion of the municipal authorities, and cannot be controlled.

Appeal from chancery court, Chickasaw county; Baxter McFarland, Chancellor. .

Bill by A. J. Jamison and others against the town of Houston and another to enjoin defendants from collecting certain taxes. From a judgment for defendants, plaintiffs appeal. Affirmed.

In 1893 the town of Houston, Miss., by its town council, issued and negotiated \$4,500 6 per cent. 15-year bonds in the purchase of certain school property located within its limits, basing its action on the authority vested in it by the amendment to its charter of February, 1890 (Laws 1890, p. 239), as provided for in section 3039 of the Code of 1892, basing its action in the premises on the power and authority to do so on sections 3014-3017 of said amendments. The property was purchased from the defendant H. B. Abernethy and one Sherwood. This is a bill filed by appellant A. J. Jamison and other taxpayers and citizens of the town of Houston, alleging that certain school property, including that purchased from defendants Abernethy and Sherwood, and paid for by the issue of the \$4,500 town bonds, was purchased by Chickasaw county in 1872; that, pursuant to an act of the legislature of March 13, 1884, the board of supervisors of Chickasaw county was authorized to convey said property to defendant town, upon certain conditions, for school purposes; that on the 27th of May, 1884, defendant town council, by resolution, accepted said property on the terms prescribed in said act; that on the 2d of June, 1884, said board in open session attempted to convey to defendant town the property known as the "Male Academy" in said town; that on the 10th of April, 1889, the board of supervisors authorized its president to execute a deed to the corporate authorities of defendant town to said Male Academy, together with the lots of land on which said academy was situated; that on June 1, 1889, the president of said board made a deed to the corporate authorities of said town to said academy and lots of land; that on June 7, 1889, the town coun-

cil examined, approved, and ordered the deed from the president of the board of supervisors to be received, and also "agreed that we make a like deed to Prof. Abernethy of the piece of ground on which the new college hall now stands;" that July 12, 1891, W. M. McAllister, mayor of Houston, made a deed in fee to H. B. Abernethy to fractional square 32, with covenants of warranty, without right or authority so to do; that on the 21st of January, 1893, a meeting of the council of defendant town was called to consider the proposition to purchase the school building known as the "College Hall," or school property located therein; that said college hall is situated on the lot conveyed by McAllister to Abernethy; and also to consider the proposition of paying for said property by issuing bonds to the amount of \$4,500; that said bonds were issued, and, complainants are informed and believe, were issued to purchase from said Abernethy the aforesaid property, which in fact at the time belonged to defendant town; that at the time of said purchase the town owned school buildings whose capacity was ample to accommodate all the educable children of said town; that the purchase of said property from said Abernethy was a vain and useless act, and without shadow of authority in law, and imposes a heavy burden upon the taxpayers of said town; that complainants are informed and believe that defendant Abernethy, before the purchase, owed large sums of money to several of the members of the town council, and paid them in these bonds; that complainants pay a large part of defendant town's taxes; that the town council has, for the purpose of paying said bonds as they mature, levied a tax on the property of complainants, and are about to proceed to cause the same to be collected by process of law. The bill prays for an injunction restraining the collection of the taxes, and for the cancellation of the following deeds: The deed from the president of the board of supervisors to the town of Houston; the deed from McAllister, mayor, to H. B. Abernethy; and the deed from Abernethy to the defendant town. Defendants answered this bill in part and demurred to that part asking for the cancellation of the deeds. The demurrer was sustained, and on motion of defendants the injunction was dissolved, from which decree of the court complainants asked an appeal, which was granted by the court.

W. J. Lacey, for appellants. T. J. Buchanan, Jr., and W. S. Bates, for appellees.

PER CURIAM. There is nothing in the bill to sustain the injunction, if every allegation was admitted to be true. The whole matter was by law in the discretion of the municipal authorities, which the courts are powerless to control. Affirmed.

**AARON v. SUPREME LODGE OF
KNIGHTS OF HONOR et al.**

(Supreme Court of Mississippi. Jan. 22, 1894.)

DEMURRER—OBJECTIONS NOT APPARENT IN BILL.

A bill in a suit against a mutual benefit order is not demurrable as attempting to enforce an agreement in violation of its charter, granted by the laws of another state, where the bill does not disclose the character and powers of such corporation under its charter.

Appeal from chancery court, Leflore county; W. R. Trigg, Chancellor.

Bill by Albert Aaron against the Supreme Lodge of Knights of Honor and others. From a judgment sustaining defendants' demurrer to the bill, plaintiff appeals. Reversed.

J. L. McCall, a citizen of Leflore county, Miss., in the year 1888 was indebted to the firm of Baskett & Aaron, a mercantile firm of Greenwood, Miss., in the sum of \$1,079.88, when the said McCall proposed to Baskett & Aaron that he would join the Knights of Honor, and take out a policy for \$2,000 in said order, with his brother, Randall McCall, one of the defendants in this cause, as beneficiary, if the said Baskett & Aaron would pay all the costs and charges of his joining the order, and pay all dues and expenses after he joined until he should pay said indebtedness; and, in the event that he should die before the payment of this debt, then said Randall McCall, who had consented in writing to carry out this agreement, should pay from the proceeds of said policy the debt due Baskett & Aaron, together with any other indebtedness which J. L. McCall might owe Baskett & Aaron. This proposition was accepted, and J. L. McCall joined said order, and a certificate of insurance in said order was issued in favor of Randall McCall. Baskett & Aaron then closed the account with J. L. McCall by taking his four promissory notes for said sum, and they paid all the expenses of McCall's initiation, and paid all the assessments and dues of said McCall. J. L. McCall died in 1890, before he paid the indebtedness to Baskett & Aaron. The indebtedness to Baskett & Aaron was transferred to Albert Aaron, this complainant. Proof of the death of J. L. McCall was furnished to said order, which was accepted by it. After the death of J. L. McCall, Randall McCall refused to carry out the contract, and instituted suit in some court in North Carolina, where he lived, against said order and complainant, but which he afterwards dismissed. Albert Aaron then filed his bill in the chancery court of Leflore county against the Supreme Lodge Knights of Honor, a corporation under the laws of Missouri, and Randall McCall, a citizen of North Carolina, setting up the above-stated facts. The Knights of Honor answered, and paid the money into court, with an interpleader, and afterwards, on motion, withdrew their answer and interpleader, and demurred

to the complainant's bill. McCall also demurred. Both demurrers were sustained. When, by leave of court complainant amended his bill, defendants then demurred to the amended bill. The Supreme Lodge Knights of Honor demurred to complainant's bill on the following grounds, among others: "(2) The benefit certificate named in the bill was never surrendered by the member, J. L. McCall, in accordance with the laws of the order of Knights of Honor as set out in said benefit certificate. (3) The bill set out an agreement between the member, J. L. McCall, and complainant and Randall McCall, which is a fraud upon the Supreme Lodge of Knights of Honor, and an attempt to fraudulently divert the widows' and benefit fund of the order to creditors, in violation of the charter of said order. (4) That said agreement and promise is fraudulent and void under the charter and laws of the order of Knights of Honor and of the laws of the land, and could not affect said order." "(7) Said bill seeks the payment of a debt out of the widows' and orphans' fund of the Knights of Honor, when the same is contrary to the law and public policy, and the charter, constitution, and laws of said order." This demurrer was sustained, and the bill dismissed, and from that decree complainant appealed.

Rush & Gardner, for appellant. Anderson, Haden & Davis, for appellees.

WOODS, J. The demurrers should have been overruled, since the substantial grounds relied on were not predicable of matters appearing on the face of the amended bill. The character of the corporation sued is not fully disclosed by the bill, it being simply referred to as created under the laws of the state of Missouri. The speaking demurrer of the appellees seeks to raise the question of the powers of the corporation under its charter, derived from certain particular statutes of the state of Missouri. If these furnished a bar to complainant's demand, they should have been presented by a proper plea, and not by demurrer, for this last is confined to what appears on the face of the pleading, which is supposed to be insufficient. Reversed and remanded.

(71 Miss. 653)

CAIN v. MOYSE et al.

(Supreme Court of Mississippi. Jan. 22, 1894.)

REPLEVIN—EVIDENCE—BURDEN OF PROOF.

1. In replevin for property rented by plaintiffs to defendant, defendant cannot show that plaintiffs bought in the property on foreclosure of defendant's trust deed to them, under an agreement with him to buy at a much reduced price, and sue his vendees of some of the mortgaged property on the deficiency, and, when they had collected from these, to reconvey to defendant, and that they had recovered such judgment against the vendees. Such evidence could only serve in equity, in a marshaling of

the assets. *Johnson v. Moyse* (Miss.) 12 South. 483, followed.

2. When defendant sets up in bar of plaintiff's recovery a deed to him, purporting to be plaintiff's, and plaintiff swears it is a forgery, the burden is on defendant to prove it genuine.

Appeal from circuit court, Amite county; W. P. Cassedy, Judge.

Replevin by I. Moyse & Sons against E. A. Cain. Judgment for plaintiffs. Defendant appeals. Affirmed.

This is an action of replevin by appellees against appellant. To appellees' declaration the general issue was pleaded, with notice of damages. On the trial, plaintiffs introduced the affidavit and writ of replevin, with the sheriff's return thereon, in evidence. Julius Moyse was then put on the stand, who testified that the property levied on under the writ was the property of plaintiffs, and had been rented by plaintiffs to defendant for the year 1892, as evidenced by a rent note, which was identified by witness, and introduced in evidence. On cross-examination, defendant offered to show by this witness that at a trustee's sale, made under a deed of trust held by plaintiffs against defendant, and under which plaintiffs claim title to the property, it was agreed between plaintiffs and defendant that plaintiffs should buy in the property at a reduced price, so that a balance would remain from defendant to plaintiffs, and, for this balance, plaintiffs would sue Barney, Johns & Co., who had purchased a portion of the mortgaged property contained in the deed of trust under which the sale was made, and, after plaintiffs had collected from Barney, Johns & Co., they would reconvey the property to defendant; that, in pursuance of this agreement, plaintiffs did buy the property in at a greatly reduced price, and did sue Barney, Johns & Co., and had obtained a judgment against them for the value of the mortgaged property they had bought. Plaintiffs objected to this testimony, and the court sustained the objection, to which defendant excepted. The defendant then introduced a deed from plaintiffs to him to all the property in controversy, dated December 1, 1892. Plaintiffs then introduced J. Moyse in rebuttal, who testified that the deed offered in evidence by defendant was a forgery, and had never been executed or delivered by plaintiffs. Defendant then introduced other evidence showing the circumstances of the execution of the deed, and its delivery, with some correspondence in reference to the transaction. Other evidence for plaintiffs disputed that offered by defendant, and denied any knowledge of the correspondence. Defendant asked the court to give the following instruction, which was refused: "(2) The court instructs the jury, for the defendant, that the burden of showing their rights to recover the property sued for is on the plaintiffs, J. Moyse & Co., and that, the defendant having produced a deed of conveyance

to himself from plaintiffs to the property, it devolves on the plaintiffs to show, by a preponderance of the evidence, not only that said deed was not written or signed or acknowledged by plaintiffs, or the acknowledgment signed by S. A. Mathews, but they must show, by a preponderance of the evidence, that they did not deliver to the defendant said deed; and unless they do this, to the satisfaction of the jury, by a preponderance of the evidence, the jury should find for defendant, and this, too, whether they believe the deed was signed or written by, or acknowledged by, them before Mathews, or not,—the question before the jury for determination being whether or not plaintiffs delivered the deed in question to defendant; and unless plaintiffs show, to the satisfaction of the jury, by a preponderance of the evidence, that they did not so deliver said deed, they should find for the defendant, Cain." There was a verdict and judgment for plaintiffs. Motion for new trial overruled. Defendant appealed.

E. H. Ratcliff, for appellant. Chas. E. Williams, for appellees.

WOODS, J. The offered evidence of the alleged agreement between Julius Moyse and the appellant should have been excluded. See *Johnson v. Moyse* (Miss.; not officially reported) 12 South. 483. The reasons given in that case for the exclusion of this testimony apply with even greater force in the present case. In fact, however, the appellant was permitted to cross-examine Julius Moyse, and make such proof as he could, and he was permitted to do precisely what he avers was denied him.

There was no error in refusing the second instruction asked by the appellant. Having set up in bar of the right of recovery by plaintiff a deed to the property, which purported to have been executed by his adversary, and the genuineness of the deed having been denied by its reputed maker, and denounced as a forgery, the burden of showing its authenticity was upon him who offered it. Affirmed.

(71 Miss. 800)

WRIGHT et al. v. LAUDERDALE COUNTY.
(Supreme Court of Mississippi. March 19, 1894.)

TOWNSHIP SCHOOL LANDS — SUIT BY COUNTY TO ESTABLISH TITLE — AVERMENTS OF BILL — MISJOINDER OF PARTIES.

1. A bill by a county under Code 1892, § 4147, to establish the title to township school lands, need not set out the investigations as to title, and the abstracts thereof, required by sections 4144 and 4145; such investigation and abstract not being conditions precedent to suit.

2. The bill sufficiently deraigns title when it avers the reservation of title by the United States to such lands for school purposes, and charges that the legal title remains therein, and that there is a public trust in such lands for the support of schools in the township in which the land is situated.

3. Complainant need not make derangement of defendants' claim of title, but it is sufficient to aver that defendants are in possession, and claim title in fee simple, and that such possession and claim cast a cloud on the title to the land, and render it unavailable for carrying out the trust.

4. Where the suit is against several persons, and the bill charges that defendants are in possession of the entire section of land in controversy, and that they claim title thereto in fee simple, there is no misjoinder of parties.

Appeal from chancery court, Lauderdale county; W. T. Houston, Chancellor.

Action by the board of supervisors of Lauderdale county, Miss., against J. H. Wright and others, to establish title to section 16, township 6, range 16 east, in such county. From a judgment overruling demurrers to the bill, defendants appeal. Affirmed.

This is a suit in the chancery court of Lauderdale county by the said county against the East Mississippi Mills, M. T. Murfree and his wife, Mrs. J. Jackson, D. A. Ray and wife, James McLemore and wife, M. E. McLemore, Kate H. Snell, J. S. Solomon, Sallie Allen, W. F. Brown, N. L. Potter, J. H. Wright, J. P. Morgan, Robert Snell, Meridian Road Company, Mrs. Sallie Green, and People's B. & L. Association. The bill charges that on March 3, 1893, the congress of the United States reserved all sixteenth sections south of the Tennessee line for school purposes; that the title remained in the United States; that among lands so reserved is section 16, township 6, range 16 east, in said county,—the section in controversy; that no valid sale or lease of said land had ever been made; that the legal title to same still remains in the United States, and that the inhabitants of said township are entitled to it in trust for school purposes, or that the legal title is still in the state of Mississippi, and that the state holds same in trust for school purposes in said township; that chapter 123 of the Code of 1892¹ requires title to such lands to be investigated, and the true condition of title to be ascertained, and all necessary suits to be brought to confirm title and to fix the date of the expiration of any lease thereof; that the defendants are in possession and claim title in fee simple to said section of land; and that such possession and claim cast a cloud and doubt upon the title, and render such section valueless for the trust intended. The prayer of the bill is that defendants be required to disclose and state by their answers what title they and each of them have or claim, and to fully set out

their titles, that said titles may be inquired into and passed upon, and the true titles established. Part of the defendants demurred as follows: (1) No equity on the face of the bill. (2) The bill fails to show facts to justify suit. (3) The bill calls on defendants to disclose facts which are as accessible to complainants as defendants. (4) The bill fails to show that complainants have performed the first duty under chapter 123 of the Code of 1892. (5) The bill does not show that the lands so claimed jointly are under common title, or claimed in fee simple, or under lease for an indefinite term, or that title rests in parol, or that the records have been destroyed. (6) The bill does not show that conditions precedent to lease or sale were not complied with. (7) The state had a right to provide for disposition of said land. The other defendants demurred as follows: (1) No equity on face of the bill. (2) The bill is multifarious, and there is no community of interest in defendants. (3) The bill alleges title in the United States or state of Mississippi. (4) The bill must show clearly and unequivocally in whom title rests. If true, as alleged, that title is in one or the other, that fact negatives title in Lauderdale county. (5) The bill alleges title retained by the United States government, and that no sale or disposition has ever been authorized, except as thereafter set forth. The exception is that in 1852 congress ratified all sales that had been made by the state, and authorized the state to make further sales with the consent of the inhabitants of the township. Complainant then alleges that no valid sale or lease had ever been made of the land, and that legal title remains in the United States, yet fails to allege any authority from the United States government to complainant or the state of Mississippi to institute suit. (6) Chapter 123 of the Code of 1892 does not confer power on the board of supervisors to bring suits in its own name; and, if it did, such provision is nugatory. These demurrers were overruled.

Walker & Hall and S. B. Watts, for appellants. Woods & Woods and Fewell & Branhan, for appellee.

WOODS, J. Sections 4144, 4145, and 4146 are quite independent of and distinct from section 4147, under which this bill was exhibited.² We must assume that the board of supervisors in each county wherein is situated a sixteenth section of land, or a part of such section, or another section or part of another section taken in lieu of any sixteenth or part thereof, reserved for the support of township schools, has complied with the re-

¹ Code 1892, c. 123, §§ 4144-4146, provide that the board of supervisors of each county shall employ competent persons to take such action as shall be necessary to ascertain the true condition of the title to each parcel of township school land in its county, and to establish and confirm the same; that a complete abstract of title shall be made of each parcel of said land; and that such board shall determine whether there are township funds in the county treasury.

² Section 4147 makes it the duty of the board of supervisors to institute and prosecute to effect in the chancery court of the county where the land lies all necessary suits to establish and confirm the title to each parcel of township school land.

quirements of the three first-named sections; but we do not believe that the fruits of such compliance are to be fully averred in the bills filed to establish and confirm the title to such lands. We do not think it requisite that the abstract contemplated in section 4145, in whole or in part, must be set out in the suits that may be thought by the board of supervisors to be necessary to be brought under section 4147. The making of the investigations to ascertain the true condition of the title to sixteenth section lands, and of abstracts of title thereto, is not a condition precedent to suit, but such investigations and abstracts are for the information of the people at large, as well as for the board of supervisors, as to the condition of the titles to such lands. The bill adequately derails the title of complainant when it avers the reservation of title by the government of the United States to such lands for school purposes, and charges that the legal title remains in the United States, and that there is a public trust in said lands for the support of schools in the township in which the lands are to be found. That the state, and the agencies of its creation to that end, may manage such lands, and execute the public trust therein, is not disputable, and this suit is merely an attempt by an agency of the state to more effectually manage the school lands, and carry out the trust created. It was not necessary for complainant, in its bill, to make deraignment of respondents' claim of title. The bill does aver that the defendants are in possession of and claim title in fee simple to the land, and that such possession and claim cast a cloud upon the title to the lands, and render them unavailable for the carrying out of the trust, and this is sufficient averment. Indeed, it may readily be conceived that this is all that complainant could aver, for the investigations as to the condition of the title, as disclosed by the examination of the deed records, may have shown nothing more. It is manifestly not true that the complainant is in position to state the particulars of the claim of title made by defendants equally as readily and as fully as could the defendants themselves. There is no misjoinder of parties in the case as now presented by the bill. It is charged that the defendants are in possession of the entire section of land, and that they are claiming title in fee simple thereto. Misjoinder is not predicable of the bill on this averment, and this is the only question, on this point, now before us. Affirmed.

WHEELER et al. v. BIGGS et al.

(Supreme Court of Mississippi. Jan. 22, 1894.)
FRAUDULENT CONVEYANCE—PURCHASE IN WIFE'S NAME.

1. Creditors have no right to their debtor's services; and where he buys a mill for his wife in her name and on her credit, and by his management makes profits which he applies on

his wife's notes, the property is not liable for his debts.

2. If a husband uses his own money to pay his wife's debt on her property, his creditors might charge her property with the amount paid, but could not, therefore, treat the property as his, and subject it to his debts.

Appeal from chancery court, Copiah county; H. C. Conn, Chancellor.

Bill by W. G. Wheeler & Co. and others against W. J. Biggs and others to subject certain property to their demands against said Biggs. From the decree entered, complainants appeal. Affirmed.

W. G. Wheeler & Co. and others filed a bill in the chancery court of Copiah county against W. J. Biggs and his wife, N. A. Biggs, and George Parker, alleging that they were creditors of said W. J. Biggs in various amounts on November 24, 1890, and that said Biggs was at that time insolvent, and desirous of so arranging his business as to defeat and defraud his creditors in any effort they might subsequently make to collect their debts; that, with this end in view, he purchased from one George Ferguson a valuable sawmill, boiler, and fixtures, executing therefor his wife's promissory notes, and taking the title in her name, with the view of concealing his ownership of said property; that this was done with his wife's knowledge and consent; that W. J. Biggs took possession of the property, and put his individual means into the operation of said property, and gave the business his undivided personal attention, and out of the proceeds of the business thus carried on paid about \$800 of the purchase money of said property. The bill further charged that Mrs. N. A. Biggs never invested a dollar in said property, nor gave a moment's attention to its operation; that, soon after said Biggs purchased the property, one J. Connelly, who had done some work on the mill while it belonged to Ferguson, brought suit to enforce his lien, and recovered a judgment and sold said mill, and Connelly purchased it, but prior to the sale Connelly had agreed with Biggs to convey the same to him upon his payment of the judgment and costs; that, when Connelly was ready to consummate this arrangement, the defendant George Parker insisted that he had a lien on the property for the unpaid purchase price; that Biggs allowed Connelly to make a deed of the mill to said Parker for the purpose of protecting his supposed lien, but that he in fact had no lien; and that there was nothing due Parker for the purchase money; and that W. J. Biggs paid every cent which was paid to Connelly for the mill, and the title should have been made to him instead of to Parker. The bill avers that, while Parker held the legal title, the equitable title was in W. J. Biggs, and was subject to his debts. The complainants asked for a cancellation of the title held by Parker, and that the property might be treated as that of W. J. Biggs, and that they might be ad-

judged to have a lien on the same from the time of the filing of their bill. Decrees pro confesso were taken against defendants W. J. and N. A. Biggs. Defendant George Parker answered the bill, admitting the sale of the mill by Ferguson, but denied that he sold it to W. J. Biggs, but alleged that he sold it to N. A. Biggs, who executed her promissory notes to Parker and one Tillman for same. He denied that W. J. Biggs took possession of the mill, or paid any part of the purchase money. Disclaimed any knowledge of any fraudulent purpose on the part of Biggs and his wife. Admitted the Connelly judgment, the sale thereunder, and that Connelly made a deed to him. He denied that the equitable title to the mill was in W. J. Biggs, and set up affirmatively in a cross bill that, prior to the sale from Ferguson to Biggs, he was the owner of the property, and sold it to Ferguson, taking his notes therefor, and reserving a vendor's lien; that said Ferguson paid a part of the purchase money, but, being desirous of disposing of same, an arrangement was agreed upon by which he (Parker) accepted N. A. Biggs as his debtor instead of Ferguson, and Ferguson sold the mill to N. A. Biggs, and N. A. Biggs executed her notes to said Parker for the purchase money. Parker further alleged in his cross bill that Biggs still owed him the purchase money, and asked that a commissioner be appointed to ascertain the amount, and that a decree be rendered, condemning the property to be sold to pay same, and that complainants and G. Ferguson be made defendants. Ferguson answered the cross bill, denying all the material allegations, and reaffirming the allegations in complainants' bill. On the bill, amended bill, answer, cross bill, answers to the cross bill, and the evidence the case was heard in the court below, upon which the court decreed that complainants were entitled to relief sought, in so far as to set aside the title of the property to N. A. Biggs, and treat it as the property of W. J. Biggs, but that Parker & Tillman had a superior lien; and it was ordered that N. A. Biggs' title to the property be set aside, and said property be adjudged to be the property of W. J. Biggs, and that N. A. Biggs pay to Parker & Tillman the amount due them, and that W. J. Biggs pay to complainants the amounts found to be due them, within 30 days, and, in default of said payment, the property to be sold, and out of the proceeds Parker & Tillman to be paid their debt in full, and then complainants to receive a pro rata share of what remained, if not enough to pay them in full. From the decree, complainants appealed.

J. S. Sexton, for appellants. Geo. S. Dodds, for appellees.

COOPER, J. The appeal in this case being by the complainants only, we are not called on to express any opinion as to the

correctness of the decree as against the appellee Mrs. Biggs. But we cannot see in what measure the creditors of W. J. Biggs were injured by the purchase in Mrs. Biggs' name, and on her credit, of the property in controversy in this cause. If she had not bought the property, it would not have been liable to complainants' demand, and so nothing was withdrawn from the estate of their debtor, Biggs, by the purchase. It was clearly not prejudicial to them that Mrs. Biggs' notes were given for the property, for they had no interest in that transaction unless some property of their debtor which by law should be appropriated to their demands would be thereby withdrawn from subjection thereto, and that was not done. The creditors of Biggs had no right to his future services; and if the property was bought by the wife, or by the husband acting for her, and her notes were received by the seller, the mere fact that the husband, by his supervision of the property, made the business profitable, and out of such profits the notes given by the wife were paid, would not render the property subject to the claims of the husband's creditors. *Buckley v. Dunn*, 67 Miss. 710, 7 South. 550. The arrangement made between Mr. Ferguson, the seller of the property, and Mr. Parker, his creditor, and Mrs. Biggs, by which she was to pay Parker & Tillman for the property, and thereby discharge Ferguson, was not prejudicial to the creditors of Mr. Biggs; they could not possibly suffer injury thereby. If Biggs afterwards used his money in paying the debt Mrs. Biggs owed, the extent of the right of the creditors would be to charge her property with the amounts so paid. Such payment could not divest her title, or subject the property to the debts of the husband as his. In proceedings in equity to subject property alleged to have been fraudulently conveyed, the court does not administer relief by any unvarying rule, but by the flexibility of its decrees executes justice according to the circumstances and facts of the particular case, and thereby preserves unimpaired the rights and equities of all parties. *Hester v. Thomson*, 58 Miss. 103. To subject the property in controversy to complainants' demands against Biggs, leaving Ferguson or Mrs. Biggs bound to Parker & Tillman for its unpaid price, would be a donation to the creditors at their expense. By its decree the court has given to the complainants the full measure of relief to which they are entitled. Decree affirmed.

(71 Miss. 453)

CARLISLE v. GOODE.

(Supreme Court of Mississippi. Jan. 22, 1894.)
TAXATION — FILING ASSESSMENT ROLL—VALIDATING ACTS.

1. Under Code 1880, § 490, requiring the assessor to complete, certify, and deliver to the clerk of the board of supervisors, his land assessment roll, by the first Monday in July, his

failure to file it till after that invalidates it, so that it will not support a tax sale.

2. Acts 1892, c. 36, validating the assessment rolls of 1889 and 1890, will not be held to apply in case of tax sales already made thereunder, but only to those thereafter made.

Appeal from chancery court, Jackson county; W. T. Houston, Chancellor.

Suit by Burton Goode against George W. Carlisle. Decree for complainant. Defendant appeals. Affirmed.

This is an appeal from a decree of the chancery court of Jackson county, Miss., canceling the tax title of appellant to the land set out in appellee's bill. Appellant's title rests on a tax sale of the lands in controversy to the state by the tax collector in March, 1891, and a deed to appellant by the auditor in March, 1892. The points of objection raised by appellee's bill to the tax title are: (1) The land assessment roll of Jackson county was filed on the 19th of July, 1889, when the law required it to be filed on the first Monday in July, 1889. (2) In February, 1893, the appellee tendered to the auditor, in redemption of the lands, the full amount of the taxes for the years 1891 and 1892, with the damages and costs. And complainant offered and tendered with his bill the taxes, damages, and costs. Appellant demurred to the bill (1) because the assessment roll was not void for the reason stated; (2) because it was approved by the supervisors without objection; (3) because it was validated by the act of the legislature approved March 5, 1892; (4) because complainant was not entitled to the relief sought, or to any relief. The court overruled the demurrer, and, defendant declining to plead further, a decree canceling the tax title was awarded. Defendant then appealed.

Nugent & McWille, for appellant. C. H. Wood, for appellee.

WOODS, J. The failure of the assessor to file his land assessment roll until the 19th day of July, 1889, was fatal to its validity. The verbal refinements which may be employed in an attempt to distinguish the delivery to the clerk of the board of supervisors of a completed and certified assessment roll, verified by the prescribed affidavit, by the assessor, on the day appointed by law, from the filing of such roll by the proper officer on the appointed day, cannot be permitted to prevail. The filing of the roll is simply the evidence of the completion, certification, and delivery by the assessor to the clerk as required by section 499, Code 1880. See *Griffin v. Ellis*, 63 Miss. 348, and cases there cited. Chapter 36, Acts 1892, must be construed to validate the assessment rolls of 1889 and 1890, in so far as future sales under them might be supposed to be affected. We cannot impute to the lawmaking department a purpose to wrest from the citizen his title to lands by a mere legislative declaration, after an attempt to do so under a

void assessment, and a failure in such attempt. In *Dingey v. Paxton*, 60 Miss. 1038, the effort was to validate a void assessment, and divest the title of the landowner, by legislative declaration, after expiration of a short period of limitation for redemption. In the case at bar the contention of appellant's counsel would wrest title absolutely, and on the instant, from the landowner, and vest it in the state, by a void sale under a void assessment. *Dingey v. Paxton* might be overturned, and the merits of the present controversy would not be materially affected thereby, but we have no purpose to overturn the rule established in that celebrated case. Affirmed.

(71 Miss. 393)

THREEFOOT et al. v. WHITTLE (LIVERPOOL, L. & G. INS. CO., Garnishee).

(Supreme Court of Mississippi. Jan. 22, 1894.)
GARNISHMENT—JUDGMENT FOR WANT OF ANSWER.

Judgment should not be rendered against a garnishee for want of answer, where it has appeared, and filed an answer which has not been objected to.

Appeal from circuit court, Clarke county; S. H. Terral, Judge.

"To be officially reported."

Action by Threefoot Bros. & Co. against W. H. Whittle, defendant, and the Liverpool, London & Globe Insurance Company, garnishee. From a judgment against the garnishee, it appeals. Reversed.

On December 7, 1891, Threefoot Bros. & Co. sued out a writ of attachment against W. H. Whittle, a resident of Quitman county, Miss. The writ was executed by levying on a lot of goods, wares, and merchandise belonging to the defendant in attachment. A. R. Wright and W. T. Scott filed their claimants' affidavit and bond, and took possession of the goods. Plaintiffs filed their declaration and account when defendant filed his plea in abatement. An alias attachment writ was issued directed to the sheriff of Lauderdale county, Miss., commanding him, among other things, to summon the appellant company, of which J. C. Lloyd & Co., of Meridian, Lauderdale county, Miss., are agents, to appear on the return day of the attachment, and answer, as garnishees, as to whether they owed defendant or had any effects of defendant in their hands, or knew of any other person so indebted, etc. Lloyd & Co. filed a sworn answer or certificate that said company did issue a policy (No. 2,546) to Messrs. Wright & Scott for \$1,000, covering their stock of general merchandise mentioned in the policy for one year,—from March 7, 1892, to March 7, 1893; that on March 26, 1892, a fire occurred, but that upon examination they found they owed the assured nothing under said policy, the same having been voided,—and prayed to be discharged. Plaintiffs in attachment recovered a judgment sustaining the attachment and condemning the property

seized, and a judgment for their debt, directing the sale of the goods levied on. Plaintiffs moved the court for a judgment against appellant company as garnishee, because it, having been properly served with process, failed to answer. The motion was sustained, and a judgment was rendered against said company for \$1,064.92. From this judgment appellant company prosecuted this appeal, and assigned error as follows: "The court erred in awarding judgment condemning the goods seized without disposing of the claimant's issue, and against it as garnishee, for want of answer, when there was such answer filed which had not been objected to."

Nugent & McWille, for appellant. Miller & Baskin, for appellee.

CAMPBELL, C. J. The judgment against the garnishee was unauthorized, in view of the appearance, and attempt to comply with the summons of garnishment. *Little v. Nelson*, 61 Miss. 672; *Insurance & Banking Co. v. Hirsh*, Id. 74. Reversed and remanded to the circuit court.

(71 Miss. 694)

TAYLOR et al. v. ALLIANCE TRUST CO.
(Supreme Court of Mississippi. Jan. 15, 1894.)

JUDGMENT—PAYMENT BY SURETY—SUBROGATION—
MORTGAGE—FORECLOSURE BEFORE MATURITY—
FOREIGN CORPORATIONS.

1. Where a surety, on paying a judgment against her principal, has noted on the record that it was paid by her, and "fully satisfied," she cannot assert the judgment lien, as against a bona fide purchaser of the debtor's land, on the ground that it was assigned to her by operation of Code 1880, § 998, providing for such assignment on payment of a judgment by the debtor's surety.

2. Where a mortgage given to secure a note authorizes the mortgagee to declare the debt due on default in any of the provisions of the mortgage, the mortgage may be foreclosed, in case of such default, though the note secured by it is not due, according to its terms.

3. There is no distinction between the rights of domestic and foreign corporations as to the ownership of real estate, and the right to do business, in Mississippi.

Appeal from chancery court, Lee county;
E. H. Bristow, Special Chancellor.

Action by the Alliance Trust Company against E. B. K. Taylor and C. D. and W. F. Clark to cancel a sheriff's deed to defendant Taylor and a deed from Taylor to defendants Clark; to quiet title; for a receiver, an injunction, and possession. From a decree for plaintiff, defendants appeal. Affirmed.

After her purchase at the execution sale in August, 1890, as shown by the statement of facts contained in the opinion of the court, defendant Mrs. E. B. K. Taylor and C. D. and W. F. Clark, her vendees, went into the possession of the land in controversy. In March, 1892, the Alliance Trust Company filed its bill in the chancery court of Lee

county against Mrs. Taylor and her vendees, setting up the facts as stated in the opinion of the court. The prayer of the bill was for the cancellation of the sheriff's deed to Mrs. Taylor under the judgment mentioned, and the deed from Mrs. Taylor to Clark and Clark, as clouds upon its title, which it claimed by virtue of the trustee's sale under the deed of trust from S. H. Taylor to the Lombard Investment Company; for a receiver to take charge of the property; for an injunction restraining the cutting and disposing of timber, and to restrain the Nettleton Hardware Company from paying over to defendant Taylor about \$50 due her for timber; for a decree awarding plaintiff possession of the lands; and for rents and profits. An injunction was granted, and a receiver appointed. Plaintiff filed an amended bill setting out the objects of its incorporation in the state of its domicile, Missouri, with a copy of its charter, showing its purpose to be buying, owning, selling, and exchanging real estate, etc. Defendants demurred to the amended bill, but the demurrer was overruled. Defendants then answered, denying all the material allegations of the bill. By leave of the court, they filed a cross bill, in which they ask that, if the court should hold that they did not get a good title at the execution sale, they at least got the equitable title to the judgment, and that it be enforced against the lands. Plaintiff demurred to the cross bill on the ground that it was defective, because all the judgment defendants were necessary parties thereto, and the demurrer was sustained. The case was then tried on the bill, amended bill, exhibits, answers, exhibits to answers, proof, exceptions, etc. The court rendered a final decree for plaintiff, establishing its title under the trustee's sale; cancelling the execution deed to defendant Taylor, and her deed to C. D. and W. F. Clarke; awarding a writ of assistance to put appellee in possession of the land; awarding plaintiff judgment for the rents and profits of the land, and the proceeds of timber in the hands of the Nettleton Hardware Company; and making the injunction perpetual. From this decree, defendants appealed.

Clarke & Clarke and Clayton & Anderson, for appellants. Gilleylen & Leftwich, for appellee.

COOPER, J. It is not suggested by the evidence in the record, nor in argument of counsel, that the appellee has at any time acquired or owned lands in this state in excess of the quantity which it might have owned, had it been a corporation organized under the laws of this state. But, if that fact appeared, it would confer no right upon appellant to make the objection. The state alone can apply the corrective. *Quitman Co. v. Stritze*, 70 Miss. 320, 13 South. 36.

Nor is it true that there existed any public policy of the state, evidenced by legislation, by reason of which the appellee was precluded from acquiring real estate in this state. Chapter 38 of the Code of 1880 contained general provisions for the organization of incorporations for certain purposes. By the act of March 7, 1882 (Acts 1882, p. 50), it was provided that "all corporations, except cities and towns, and express, telegraph and railroad companies may be created in the mode and manner, and with all the rights, powers and privileges and immunities, as provided in chapter 38 of the Code of 1880." By the same act the right was conferred upon any company so organized to "hold and own real and personal property to any amount and to sell exchange and encumber the same." It is idle to talk of the existence of a public policy against ownership of lands by corporations, in the light of this legislation, by which such ownership was permitted to an unlimited extent, and was in fact invited and encouraged by the simplicity of the statutes under which corporations might be formed. We fail to appreciate the distinction sought to be drawn by counsel between domestic corporations and those created by other states. It cannot be said that it is against the policy of this state to permit corporations of other states to do business here, especially where the business they are organized to do is directly encouraged to be done by domestic corporations. On the contrary, the rule of comity may be said to be almost universal that corporations created by one state may transact its business in any other state in which, if the corporation was a domestic one, the business might then be lawfully conducted.

We have not found the authority relied on by counsel (*White v. Miller* [Sup. Ct. Minn.; filed Jan. 1893] 54 N. W. 736), in which it is said to have been decided that "a negotiable promissory note, due and payable in the future, according to its terms, cannot be brought to immediate maturity through a clause in a mortgage given to secure it, authorizing the mortgagee to declare the debt due in default in any of the provisions of the mortgage." If the suit in that case was upon the note, it may be that the decision was correct. But if the decision was that the mortgagee could not, though authorized so to do by the terms of the deed, proceed to subject the security to the satisfaction of the debt, we should not follow it, for a contrary practice has always prevailed in this state, and such provisions have been approved. *Dunton v. Sharp*, 70 Miss. 850, 12 South. 800. We see nothing unlawful in such stipulations, and so long as parties, and not the courts, are to make contracts, we know no reason why contracts, when made, should not be enforced according to their terms.

We find nothing to invalidate the title of complainant to the lands in controversy, unless it be true that appellant, by her purchase at the execution sale against S. H. Taylor, acquired title to the land superior to that of complainant's. To that inquiry we now proceed:

The facts upon which the controversy in this particular rests are these: Prior to the year 1888, one R. W. Freeman, as guardian of Dozier Taylor, loaned to the firm of Freeman Bros. a sum of money, and received therefor the note of said firm, upon which L. T. Freeman, Jane K. Freeman, C. W. Taylor, and S. H. Taylor were sureties. Whether the note showed upon its face that the other makers were sureties for Freeman Bros. does not appear, but we assume that it does not, but was in the usual form, and that all the subscribers thereto appear as comakers. In the year 1888, R. D. Freeman, for the use of C. W. Troy, brought suit on this note against L. T. Freeman, Jane K. Freeman, C. W. Taylor, and S. H. Taylor, and recovered judgment against them for the sum of \$2,308, which judgment was duly enrolled in Lee county. Afterwards, Mrs. L. T. Freeman paid to the plaintiff in the judgment the sum of \$1,500 in full satisfaction thereof, and an entry thereof was made on the judgment roll in these words: "Received of Mrs. L. T. Freeman fifteen hundred dollars (\$1,500) in full payment of this judgment, and the same is fully satisfied, and she is authorized to do therewith as she sees proper. I. C. Robins, Atty. for Plff." When this entry was made, does not appear; but, some time afterwards, S. H. Taylor, who owned the lands in controversy, executed two certain deeds of trust upon the same to John I. Dunn, trustee for the Lombard Investment Company, to secure the payment of about the sum of \$3,000 which he then borrowed from said company. These incumbrances were duly recorded, and upon breach of condition a sale thereunder was made by the trustee, at which the complainant became the purchaser. After the execution and recording of these deeds of trust, but before the sale thereunder, Mrs. L. T. Freeman, who had paid off the judgment at law, as above stated, assigned the same to the appellant E. B. K. Taylor, who, on the 14th day of July, 1891, made and filed with the clerk of the court in which the judgment had been rendered an affidavit setting forth the facts that said judgment had been rendered, that the defendants were jointly and severally liable thereto, and that it had been paid by the defendant L. T. Freeman, who afterwards assigned the same to affiant, and prayed the issuance of an execution thereunder for her use and benefit. Upon the filing of this affidavit, an execution was issued, as prayed, which was levied upon the lands in controversy as the property of S. H. Taylor, and a sale thereof was made; and at

the sale the appellant E. B. K. Taylor became the purchaser thereof, at the price of \$210. E. B. K. Taylor conveyed a part of the land so bought to appellants Clark and Clark.

The execution sale was made in the year 1891, and its effect is determinable by the provisions of the Code of 1880, in which no express provision is made for the protection of the rights of bona fide purchasers, as is done by Code 1892, § 3280. By Code 1880, § 998, it was provided that: "When any judgment shall be rendered, or shall have been rendered, against a principal debtor and his sureties, or against the sureties only, and any one or more of such sureties shall pay and satisfy the same, such judgment shall by operation of this act be transferred and assigned to the surety or sureties so paying off and satisfying the same, who shall have all the liens and equities which the judgment creditor may have had by virtue of such judgment, or of the debt or claim on which it is founded; and such surety, on making affidavit of his suretyship, and of the payment of such judgment, and filing the same, together with the evidence of such payment, with the clerk of the circuit court, in which the judgment was rendered, shall be entitled to have execution issued on such judgment, in the name of the plaintiff, against the defendants on the record, in the same manner as if the judgment had not been satisfied, and the clerk shall endorse thereon that the same is issued for the use of the surety so having paid such judgment, and the sheriff shall proceed to collect the same from the principal debtor therein, for the use of such surety, if the principal debtor be not a party to such judgment, or, if being a party, no property can be found to satisfy the execution then he shall collect a ratable proportion of the money from each of the co-sureties, for the use aforesaid." The chancellor held that this statute, being in derogation of the common law, was to be strictly construed, and since the affidavit for the execution was not made by the surety by whom the judgment was paid, but by her assignee, the execution was not authorized by the statute, and the sale thereunder was void. The view we take of the rights of the parties makes it unnecessary for us to explain the perplexing field of inquiry in reference to the distinction between void and voidable proceedings. We are of opinion that no sale of the land could have been made under the execution, if it had been issued in strict conformity to the statute, which would have affected the right of the Lombard Investment Company under the deed of trust it secured from S. H. Taylor, and that the complainant who purchased at a sale under such deed is equally protected. The purpose and effect of the statute were to preserve to the surety the right to secure at law, and by the execution of the judg-

ment, the same relief which, in the absence of the statute, he might have had by resort to a court of equity. The mere payment of the judgment by the surety would not, under the statute, operate to discharge the lien of the judgment, either upon the property of the principal or of the co-sureties, parties thereto; and if nothing but payment had occurred the judgment itself, together with the right to execution thereof, would have been preserved. But more than this was done, for there was a formal and express notation made upon the record of the judgment that it had been paid and discharged. This entry, the answer of the defendants admits, was procured to be made by Mrs. Freeman, the party by whom the payment was made. In *Yates v. Mead*, 68 Miss. 787, 10 South. 75, an entry was made upon the judgment roll that the same had been "settled;" but, since it did not appear that this had been done by the indorser paying the judgment, it was held that he was not affected thereby. But in the present case the party paying the judgment caused satisfaction thereof to be certified; and neither she, nor those claiming under her, can assert, as against a bona fide purchaser, that the judgment lien on the lands bound by it was not discharged. The judgment is affirmed.

(101 Ala. 532)

SOUTHERN BLDG. & LOAN ASS'N v. ANNISTON LOAN & TRUST CO. et al.

(Supreme Court of Alabama. Jan. 10, 1894.)
BUILDING AND LOAN ASSOCIATIONS — FORFEITURE OF STOCK.

A shareholder of a building and loan association organized under Code, pt. 2, tit. 1, c. 4, pp. 378, 379, and authorized to make needful by-laws, and compel compliance by forfeiture, to secure a loan, executed to it a mortgage, and assigned to the association, as collateral security, his stock, and stipulated that upon default in payment of his installments, interest, premiums, or fines, the bond should become due, and authorized the association to forfeit his stock under the by-laws to that effect, which were made a part of his contract. *Held* that, upon his failure to comply with the conditions of his contract in the payment of dues, the association might forfeit the amount paid on the stock without crediting his indebtedness therewith.

Appeal from Anniston city court.

Action by the Southern Building & Loan Association against the Anniston Loan & Trust Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

The provisions of the Code touching the organization and powers of building and loan associations (part 2, tit. 1, c. 4, pp. 378, 379), necessary for one consideration in the decision of the cause are, that the association may (4) "make all needful rules and regulations and by-laws for the transaction of its business, and the management and control of its affairs;" (6) "to compel pay-

ment and compliance with all lawful orders, by fines and forfeitures;" (11) "to prescribe uniform sales of monthly installments, in which the loans made are to be repaid according to the terms agreed on;" (12) "to secure the payment of installments and loans, and a compliance with all the terms on which loans are purchased, by mortgages with power of sale on real estate, and the same to foreclose on default," etc. Code, § 1556. The appellant, the Southern Building & Loan Association, was duly organized under the general statutes of the state enacted for that purpose, referred to above. After its organization it proceeded in accordance with statutory authority to adopt a system of by-laws, for the transaction of its business. In these it is provided, that the "object of this association is, to afford its shareholders safe and profitable investments;" that "each shareholder is entitled to one vote for each share of stock named in his certificate, at any regular or called meeting of the stockholders, either in person or by proxy;" that "all shareholders for every share named in their certificate shall be entitled to a loan of \$50, if the loan fund in the treasury shall warrant it, and if there is no prior application;" that "shares must be in force six months, or six monthly installments must be paid thereon, before a shareholder will be entitled to a loan;" that "the certificate, terms and conditions of the shares of this association, and the by-laws form the contract with the shareholder; the application for a loan shall form a part of the contract with the borrower, and all contracts and securities executed by the borrower shall be construed with reference to and in accordance with the laws of Alabama;" that "persons desiring to become shareholders must make application according to the form provided for that purpose, said application forming a part and parcel of such applicant's contract with the association;" "that any person may become a shareholder by signing the required application, and paying the necessary admission fee as follows:—On ten shares, \$1.00 per share; over ten and under twenty-five, 75c. per share; twenty shares, 50c. per share of \$50 in cash;" instance that "all loans made by the association must be secured by satisfactory note and first mortgage * * * but in no case shall any loan exceed 40 per cent. of the cash value of the real estate. On all loans * * * the borrower shall pay interest at the rate of 5 per cent. per annum * * * and a premium of five per cent. per annum to be paid on or before the 5th day of each and every month during the continuance of the loan;" that "should a shareholder whose property is mortgaged to the association, desire to release the same by repayment of his indebtedness, he may, on application to the association, be allowed to do so upon giving sixty days' notice of such intention;" that

if any shareholder shall neglect to pay the interest or premium on his loan, or his regular monthly installments, or other fees, for three months, or in any way fails to comply with his contract, the association may compel payment of principal and interest and premiums, fines and dues, by proceeding on his note, and foreclosing the mortgage or other security, which shall at once become due and payable, and the association may cancel and treat as forfeited, the said shareholder's shares, whether deposited as collateral security or not, and all payments made thereon shall be forfeited to the association. Time, punctuality, and strict performance on the part of all shareholders, in the payment of premiums, fines, installments, interests and loans is made the essence of the contract;" that "members in good standing, may withdraw the amount paid by them in monthly installments of shares, into the loan fund, together with interest at the rate of six per cent. per annum, after giving sixty days notice in writing, and such notice to be given after two years."

Isaac Linsky, being the owner of 40 shares of stock in said association, applied in regular form, and according to the rules of the association, for a loan of \$2,000, in which applications (there being two covering the \$2,000) he states among other things, "I will also comply with all the rules and regulations of the association." His applications were duly considered and granted. The \$2,000 was loaned to him, and he executed his note therefor, and his mortgage on real estate to secure the same. The note was dated 10th of June, 1890, was payable to the association six years after date, in which it was specified that it was for a loan made to him under his application, bearing date the 11th of November, 1889, on 40 shares of stock in the capital of the association, with the interest thereon and the premium bid in his said application, and payable according to the by-laws, and he therein transferred, assigned and set over, as collateral security to said association, for the payment of said sum so loaned to him, and for the payment of the monthly installments required of him, said 40 shares of stock in said association. The note concludes with this further agreement,—"and it is stipulated that in the event I make default in the payment of said installments, interest, premiums or fines to said association for a period of three months, then this bond shall become due and payable, and I hereby authorize said association to cancel my said shares, and the same shall thereby be forfeited." On the same day the said Linsky and wife executed their mortgage on real estate in the city of Anniston, to secure the payment of said note. The defeasance in said mortgage is, "If the said Isaac Linsky shall well and truly pay said sum of \$2,000, so borrowed as aforesaid, as evidenced by said bond, at the maturity thereof

as herein stipulated, and shall also, promptly, on the 5th day of each month [pay] the installments due on his shares, until the amount of the loan fund to the credit of his shares, from monthly payments and profits, equal \$50 for each share, on which said loan is made, and shall also promptly pay the interest on said loan, and the premiums so bid by him monthly, and shall comply with the laws of said association, then this conveyance shall be null and void, etc."—Upon default the whole debt became, by the terms of the mortgage, due and payable, and the association was authorized to foreclose on the terms specified. On the 22d of May, 1891, as was shown, said Linsky negotiated a loan with Anniston Loan & Trust Company, the complainant in the original bill, for \$2,300.11, for which he executed two promissory notes, payable six months after date, and to secure the payment of them, gave complainant a second mortgage on the real estate which he had already mortgaged to the said association. By the agreed state of facts on which the case was tried, it was shown, that Linsky had paid on one of his applications, ending with October, 1891, 29 monthly installments of 35 cents per share, making a total of \$304.50, and on the other, 30 monthly payments ending with April, 1892 (35 cents per share per month), making a total of \$105; that on the 1st of October, 1891, he ceased to pay the interest and premium on said loan, and has not paid any since that time, but prior to October 1, 1891, he had paid as interest on said loan the sum of \$129.10 (being at the rate of 5 per cent. per annum), and the same amount of premium, at the same rate; that on the 15th of September, 1892, the said Linsky having made default in the payment of the installments on his stock, interest, premiums and fines for more than three months, the said association declared his 40 shares of stock, held as collateral security by said association, forfeited to the remaining stockholders, and the same was passed to the credit of said association; that of the monthly payment of 35 cents per share, 5 cents is credited to the expense fund of the association, and is used to pay its expenses, and the remaining 30 cents per share is placed to the credit of the loan fund and is loaned to the shareholders of the association. It was further shown that O. H. Parker, defendant in the original and complainant in the cross bill, is the assignee of said Linsky for the benefit of creditors, and is invested by the deed of assignment to him, with all the rights which said Linsky had in the premises; that he, as such assignee, and the Anniston Loan & Trust Company, the second mortgagee of said real estate, prior to the commencement of this suit, offered to pay to said association, the amount due on its mortgage, provided it would allow a credit for the amount paid for stock, as a payment on account of said loan,

which said association refused to do, claiming that said stock was forfeited to it by the failure of said Linsky to pay his monthly installments for a period of more than three months prior to the filing of said bill. On the 21st of September, 1892, the Anniston Loan & Trust Company filed this bill against said association, Isaac Linsky and O. H. Parker, as such assignee, the object of which is to redeem said lands from the mortgage of said association, by paying the amount ascertained to be remaining due thereon, and have said 40 shares of stock sold and the proceeds applied also towards the payment of said loan, and to have the premiums paid on said stock credited as a payment on said loan. Said Linsky and Parker, as assignee, answered, admitting the allegations of the bill. The association answered, admitting the main averments, setting up its transaction with said Linsky and controverting the claim of complainant. Said Parker, as assignee, afterwards, on the 25th day of May, 1893, filed his cross bill against said Anniston Loan & Trust Company, said association and said Linsky, setting up the assignment of said Linsky to him, his offer to redeem from said association by offering to pay to it the full amount of said loan, praying for an account, and that he be allowed to redeem from said mortgage by paying the amount due thereon, and also to be allowed to redeem from the mortgage to said Anniston Loan & Trust Company. Said answers were filed to the cross bill by the trust company and Linsky admitting the facts set up and the right of said Parker, as assignee, to redeem. The association denied each and every allegation thereof, and refers to its answer to the original bill as its answer to the cross bill.

The chancellor rendered a decree in the original and cross bill, establishing the right of the trust company, the junior mortgagee, to redeem from the mortgage of said Linsky to said association, and the right of the complainant in the cross bill to redeem from the mortgages of the association and the trust company, holding that the claim of said association, that its debt was not liable to the payments made by said Linsky on account of his subscriptions to the stock of said association, and that it might hold and retain the same without crediting them in the debt for which the stock was pledged was inequitable. It was further ascertained and decreed by the court, that the value of said stock so taken was \$409.50, the aggregate amount paid by said Linsky thereon (without allowing him interest), and that this was the amount to be credited on said debt. The decree further ascertained the sums due the association and the trust company, on their respective mortgages, and ordered that said Parker, as assignee, be allowed to redeem from the association and the trust company, by pay-

ing to them, respectively, within five days, the sums ascertained to be due and owing to them on said mortgages; and ordering also, that said trust company, be allowed to redeem from said association, by paying to it the amount so ascertained to be due to it, provided said Parker, as assignee, did not, within five days, pay to the clerk of court, the amounts due on said mortgages as ascertained by the decree.

Lawrence Cooper, John M. McKleroy, and A. P. Agee, for appellant. Knox, Bowie & Pelham, for appellee.

HARALSON, J. The main question in this case, as stated by the appellant, is the right and power of the Southern Building & Loan Association to declare forfeited the shares of a borrowing member. Or, as stated by counsel for appellees,—"The cause was submitted in the court below, upon an agreed state of facts, and the single point of dispute turns upon the question of the right of the Southern Building & Loan Association, to forfeit the shares of stock held by it as collateral, and the refusal of said association to credit its mortgage with the value of the stock, or the aggregate amount of the payments made by Isaac Linsky on account of said stock or on account of said loan. There is no dispute as to what payments were made, but the Southern Building & Loan Association, plants itself upon the proposition, that it is entitled to recover the full amount of the original loan with interest, without any abatement for the value of the stock, or the aggregate amount of payments made by Isaac Linsky during the life of the loan. The learned court below held that this construction was inequitable and not within the contemplation of the parties at the time the contract was made, and that the junior mortgagee, and the assignee for the benefit of creditors, were entitled to redeem upon paying the amount of the mortgage loan, after deducting the value of the stock, or the aggregate amount of the payments made by said Isaac Linsky prior to making default." We thus have the issue plainly and sharply defined and the parties treat the value of the stock, as merely the aggregate of all the payments which have been made upon it, thus following the rule which is laid down in the books for the ascertainment of its value. *End. Bldg. Ass'n's*, §§ 455, 457, and authorities there cited.

This question has given rise to some confusion in the decision of courts. In North Carolina, the transaction has been treated upon the basis of an actual loan of money, and the aggregate amount of payments upon stock, as partial payments on the loan by the borrower. *Overby v. Association*, 81 N. C. 56; *Hoskins v. Association*, 84 N. C. 838. And the earlier Pennsylvania cases, previously to that of *Building Ass'n v. Sutton*,

35 Pa. St. 463, maintain the same view of the question. Commenting upon these decisions, Mr. Endlich says, that the supreme court of Pennsylvania in *Sutton's Case*, supra, for the first time approached an understanding of the nature and dealings between the building association and its members; that under the rulings in the former cases in that court, upon the theory of partial payments, it followed that each stock payment made by the borrowing member was a pro tanto reduction of his mortgage debt, to be deducted with interest, from the date of payment; and he adds, "The fallacy of this doctrine is obvious, from the fact, that the borrower's standing as a member is not merged in his superadded character of debtor, and that, as a member, he is not entitled to an account of profits made by the society upon his contributions, before the period of its termination (or that of the series to which his stock belongs), whilst the settlement of his liabilities as a borrower is also referred to the winding up of the mutual scheme. It has, therefore, become a well-recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, ipso facto, work an extinguishment of so much of the mortgage. The fact that the borrower has assigned his shares to the society as collateral security for his debt makes no difference; for, this is a recognition of the distinct standing of the member as a member and as a debtor." *End. Bldg. Ass'n's*, § 452. And it is a correct principle, as has been held, that there is no connection established between the stock held by the stockholder and the bond held by the company, such as that payments made on stock are to be treated as payments on the bond, so that one is steadily offset against the other, or the one merges in the other,—a fallacy sometimes indulged, arising from a failure to observe the separate existence of the stock on the one hand and the bond on the other,—the separate relation borne to the company on the one side, by its stockholder, and on the other, by its borrower. The payment on the one, is not necessarily, a payment on the other. *State v. Hornbacker*, 42 N. J. Law, 635; *End. Bldg. Ass'n's*, § 452, note. Mr. Freeman, in an extended note to *Robertson v. Association*, 69 Am. Dec. 163, gives approval to the same principle, citing a long list of cases in support thereof; and the learned annotator adds, as a conclusion from the very many authorities he cites, as to the amount that the borrower ought justly to pay, when he wishes to withdraw, or is in default, and his mortgage is sought to be enforced, that, "It must be remembered, that when a member obtains a loan or advance he anticipates the amount he is to receive upon the termination of the association, or of the series to which it belongs. His obligation does not look to a repayment before that time. If he desires to

withdraw, or it becomes necessary to enforce his mortgage against him before that period arrives, the question is, what amount ought he equitably to pay? In ascertaining this amount, the only difference between the two cases seems to be, that when he voluntarily withdraws he is entitled to receive the bonus or share of profits allowed him under the laws of the associations, and when he is in default, no such allowance is to be made him." The justness of this conclusion is vindicated on the ground that the defaulting member's action is an injury to the association arising out of a breach of his obligations, for if he continue from time to time, for purposes of his own convenience, to withhold his contributions to the common fund, when they become payable, it is clear he is thereby depriving the association of just that much money which ought to be invested for the common good; and if this be allowed till the end, it is also plain he will have derived, from his own violation of duty, an unjust advantage, in sharing with the other members notwithstanding his defaults, an equal participation in the profits. In principle there can be no difference in the rule as to the prompt payment of premiums on a policy in a life insurance company, and the premiums and other dues on a building and loan contract, and this court, speaking of the former, said, "It is too late at this day to raise any question as to the legal validity of such a contract. To one who understands anything of the principles upon which the business of life insurance is conducted, it is obvious that the punctual payment of premiums is of the very essence of the contract. The calculations of insurance actuaries fixing the rates of insurance, are based on the theory of prompt payment, so as to afford opportunity for such reinvestment as to reap the fruits of compound interest upon the company's moneyed capital. Laxity in the enforcement of punctual payments might, and no doubt would, frequently lead to ultimate, if not speedy, financial ruin. Stipulations, therefore, incorporated in insurance policies, making such payments conditions precedent to the continued liability of the insurer, are generally maintained as valid by the courts." *Insurance Co. v. Thomas*, 74 Ala. 582. Forfeitures for the nonpayment of premiums are a necessary means, for insurance, or building and loan companies, of protecting themselves from embarrassment, and delinquency cannot be allowed except at the option of the companies. *Insurance Co. v. Statham*, 93 U. S. 24; *Klein v. Insurance Co.*, 104 U. S. 88. In keeping with this doctrine, Mr. Pomeroy lays it down, that a forfeiture of shares of stock in a corporation, duly incurred by the stockholders, for failure to pay the calls, or installments thereon, as provided by the charter or by-laws of the company, will not be set aside or relieved against by a court

of equity. 1 Pom. Eq. Jur. §§ 457, 458; 2 Story, Eq. Jur. §§ 1325, 1326.

With these principles in view, let us inquire into the particulars of the case we have before us. This association was chartered under the provisions of the Code (part 2, tit. 1, c. 4). Section 1556 confers upon building and loan associations chartered thereunder, the power, (4) "to make all needful rules and regulations and by-laws, for the transaction of its business, and the management and control of its affairs;" (8) "to compel payment and compliance with all lawful orders, by fines and forfeitures;" and (12) "to secure the payment of installments and loans, and a compliance with all the terms on which loans are purchased, by mortgages with power of sale on real estate, and the same to foreclose on default," etc. The association adopted a code of by-laws clearly within the statutory powers conferred, by which it was provided, among other things, that the certificate, terms and conditions of the shares of the association, and the by-laws, form the contract with the shareholder; that persons desiring to become shareholders must make application according to forms provided for that purpose, the application forming a part and parcel of the applicant's contract with the association (and in these applications there is an agreement, by the applicant, that he will comply with all the rules and regulations of the association); that all loans must be secured by note and first mortgage on real estate, the borrower to pay interest and a premium, at the rate of five per cent. per annum, each, the same to be paid on or before the 5th day of each month during the continuance of the loan; that all shareholders are to pay a monthly installment, each, of 35 cents on each share (of \$50) named in the certificate, on or before the 5th of each month, without notice, 5 cents of which shall be placed to the expense account; that members in good standing may withdraw the amount paid by them, in monthly installments of shares, into the loan fund, together with interest at the rate of 6 per cent. per annum, after giving 60 days' notice in writing, such notice to be given after the expiration of two years; and that, if any shareholder shall neglect to pay the interest or premium on his loan, or his regular monthly installments, or other fees, for three months, or in any way fails to comply with his contract, the association may compel payment of principal and interest, and premiums, fines and dues, by proceeding on his note, and foreclosing the mortgage or other security, which shall at once become due and payable, and the association may cancel and treat as forfeited the said shareholder's shares, whether deposited as collateral security or not, and all payments made thereon shall be forfeited to the association; that time,

punctuality and strict performance on the part of all shareholders, in the payment of premiums, fines, installments, interests and loans, is made the essence of the contract. Linsky signed his applications for the loan he received, and in them he agreed, "I will also comply with all the rules and regulations of the association." They were approved, and under them he received a loan from the association for \$2,000, on the 16th of June, 1890, for which he executed and delivered his note or bond, payable six years after date, with interest thereon, and the premiums bid in his applications and payable according to the by-laws, and assigning in said note as collateral security to the association, for the sum loaned to him, and for the payment of the monthly installments required of him, his 40 shares of stock in the association. In the conclusion of the note is the provision:—"And it is stipulated, that in the event I make default in the payment of said installments, interests, premiums or fines to said association, for a period of three months, then this bond shall mature and become payable, and I hereby authorize said association to cancel my said shares, and the same shall be thereby forfeited." At the same time, he executed the mortgage, a copy of which is attached to the answer of the association, conditioned, that "If the said Isaac Linsky shall well and truly pay said sum of \$2,000, as evidenced by said note, at the maturity thereof, * * * and shall also promptly [pay] on the 5th day of each month the installments due on his shares, until the amount in the loan fund to the credit of his shares, from monthly payments and profits, equals fifty dollars for each share, on which said loan is made, and shall also promptly pay the monthly interest on said loan and the premiums so bid by him monthly, and shall comply with the laws of said association, then this conveyance shall be null and void, otherwise to remain in full force and effect," subject to foreclosure as provided therein. On the 15th day of September, 1892, said Linsky having made default in the payment of the installments on his stock, interest, premium and fines, for more than three months, and never having filed an application for the withdrawal of his shares of stock, after he had been paying thereon, two years or at any other time, the association, by resolution duly adopted, declared the said 40 shares of stock of said Linsky forfeited to the remaining stockholders of said association, and the same was passed to the credit of the loan fund of the association.

From what has been said, it appears, then, that the association was duly organized, under a charter obtained under the general law of the state for that purpose; that the statute under which it was organized authorized it to

make all needful by-laws for the transaction of its business, and to compel payment and compliance with the by-laws by fines and forfeitures; that the association adopted by-laws which provided for the forfeiture of the stock of its shareholders, if they failed for three months to pay the stipulated contributions to the association, as provided by the by-laws and the contract of the borrower; that Linsky agreed to abide by these rules and regulations, and agreed that they should be a part of his contract of loan; that he executed his note and mortgage, and agreed therein, that if he failed to comply with the terms of his contract, his stock should be forfeited to the association; that he did make default; and that the association, in accordance with its by-laws, declared his stock forfeited. The policy of the law favored the forfeiture, the statute authorized it, the rules of the association and the contract of the parties provided for it, and the association declared it, in accordance with the terms of the contract and by-laws. We find thus erected, against our declaring this forfeiture unconscionable and inequitable, as we are asked to do in this bill, a barrier so high, we are unable to surmount it. The appellant is entitled to the full amount of its said loan, principal and interest, according to the terms of the contract, from the time said Linsky ceased to pay the same thereon, without any abatement for the value of the stock forfeited; and if the same is not promptly paid, in redemption of its said mortgage by the complainant in the cross bill, or by the complainant in the original bill,—the complainant having submitted itself to the authority of the court to that end,—it is entitled to a decree of foreclosure of its said mortgage, and to a sale of the real property therein described, for the payment of its said debt and interest. The complainant in the cross bill is entitled to redeem the mortgages of the appellant, and of the Anniston Loan & Trust Company, by paying the amounts that may be ascertained to be due thereon, respectively, within a short time to be specified by the court; and, in default of such a redemption by him, then, the complainant in the original bill, the Anniston Loan & Trust Company, is entitled to redeem the mortgage of the defendant,—the Southern Building & Loan Association—by paying the full amount due thereon, principal and interest, without abatement for alleged payments thereon, and in that case, to the decree of the court foreclosing its own mortgage, and that of said association, so redeemed by it, and to a sale of the real estate in said mortgages mentioned, for the payment of its own debt and that of said association which it has paid. The decree of the court below is reversed and the cause remanded for further proceedings in conformity with the above directions. Reversed and remanded.

(71 Miss. 512)

STATE v. VICE.

(Supreme Court of Mississippi. May 7, 1894.)

HIGHWAYS—CONTRACTS FOR WORKING—VALIDITY.

1. Code 1892, § 3929, permits the board of supervisors to work the roads, or part of them, by contract let, "each road or division under a separate contract." *Held*, that the "division" intended was a part of a road, not of the county, nor of the roads thereof.

2. The provision of Code 1892, § 3929, that in letting road contracts the supervisors shall let each road or division under a separate contract, is mandatory, in view of section 344, declaring void all supervisors' contracts made in violation of any of the provisions of law.

Appeal from circuit court, Jackson county; S. H. Terral, Judge.

"To be officially reported."

Action by the state against Lesel Vice. Judgment for defendant. The state appeals. Affirmed.

Atty. Gen. Frank Johnston, Evans & Evans, and Nugent & McWillie, for the State. Ford & Ford and C. H. Wood, for appellee.

WOODS, J. Section 3929, Code 1892, is in these words: "The board of supervisors may determine to work the public roads, or some part thereof, by contract, and may thereafter so work the same, letting the contracts in such cases as other contracts are let by the board of supervisors, each road or division under a separate contract. But a contract to work and keep in repair a public road shall not be made for a shorter time than two years," etc. The statute confers authority to work by contract all the public roads, or some part of all the public roads less than the whole number, and requires each road or division to be let under a separate contract. The controversy in the present case arises over the meaning of the word "division," as used in the section quoted. The natural and obvious construction of the language is this: The supervisors may elect to work by contract all the public roads in the county; or the supervisors may, in their discretion, work some part of the public roads,—a part of the public roads less than the whole number; but each road or division of a road shall be let under a separate contract. The language is not that the supervisors shall let the public roads,—all of them, or a division; a part of the public roads less than the whole number,—but that each road (employing the singular number, or "division") is to be let under a separate contract. Division of what? Not a civil division of the territory of the county, clearly. To so hold would be to violently interpolate words embodying an idea nowhere hinted at in the statute. We repeat, then, division of what? Not of all the public roads in the county, for when provision was made for working all the roads, or some part less than the whole number of roads, appropriate words are employed to convey that thought. We must not violate the plainest canon of syntactical arrangement

and legal construction, and import terms not found in the statute, in order to uphold the contract made by the board under an honest and commendable, though mistaken, effort to promote the public welfare by improving the main highways of the country. We must give to the words their plain and natural construction, unless this appears to be impracticable; and this plain and natural construction will require us to hold that it is an entire road, or a division,—a part of the entire road less than the whole,—which must be let under a separate contract. We see from this record that there are many independent roads in beat 3 of Jackson county, and we see that there are divisions of these roads into parts. For example, we find a road called the "River Road," and this is divided into parts styled "No. 36," from a certain point to another point, and "No. 37," from one designated spot to another. The entire, independent road, or any division of the road less than the whole,—one link or more,—must be let under a separate contract. The entire, independent road may, in the discretion of the board of supervisors, be worked by contract, or it may appear that the public interests will be best promoted by working by contract a part—a division—of the entire road, and this division may embrace one or more links of the road, as they are denominated by section 3914; but in either case, whether the entire road or a part or division of an entire road, there must be a letting under a separate contract. It is insisted by counsel for the state, however, that, if this construction which we have placed upon the language of the statute is the correct one, still the judgment of the court below is erroneous, for the reason, as is said, that the provision requiring separate lettings of each road or division of a road is directory merely. The all-sufficient answer to this proposition will be found in section 344 of the Code of 1892. By this section all contracts made by the board of supervisors "in violation of any of the provisions of law shall be void." It is not for us to limit or modify, by judicial interpretation, this unambiguous, all-embracing, and wholesome restraint upon the action of the boards of supervisors. Affirmed.

(71 Miss. 734)

JOBE v. MEMPHIS & C. R. CO.

(Supreme Court of Mississippi. May 7, 1894.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE.

Where one was familiar with the crossing where he was injured; knew of the obstructions that hindered seeing and hearing an approaching train; knew that the train was about due, and, after halting and looking and listening for an instant about 40 feet from the track, drove thereon, without again stopping or looking in the direction from which he knew the train then about due would come,—he cannot recover, though the railroad company was negligent.

Appeal from circuit court, Alcorn county; Newnau Cayce, Judge.

Action by M. J. Jobe against the Memphis & Charleston Railroad Company to recover for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

J. M. Boone and Pitts & Meeks, for appellant. Mayes & Harris and Inge & Burge, for appellee.

WOODS, J. The peremptory instruction to the jury to find for the railroad company was not erroneous. From the evidence offered by the appellant it clearly appears that he was perfectly familiar with the surroundings of the crossing where he received his injuries. He knew of the obstructions that hindered the seeing and hearing an approaching train. He knew the train was about due; and, after halting and looking and listening for an instant at a point 30 to 40 feet from the track, he drove directly on and into the place of known peril, without ever again stopping or looking in the direction from which he knew the train, then about due, would come. He utterly failed to use any care or caution after halting once at a spot 30 or 40 feet from the track. With the view east obstructed by houses, shrubbery, embankments, and box cars, it was his imperative duty to vigilantly observe from every available point the approaching train. At a point 36 feet from the track he had reached a position where he could see a man 1,000 feet away, near the track, and in the direction from which the train came. His brother actually saw the train approaching in ample time to save himself, and to try to save the appellant. The attentive exercise of sight and hearing would have warned the victim of his own folly of the approaching train, and would have averted the calamity which befell him, if he had heeded the warning of his senses. The railroad company was negligent,—palpably, grossly negligent,—but, negligent as was the company, no hurt would have come to appellant if he himself had not also been palpably, grossly negligent. His failure to use that care and caution which his dangerous situation demanded,—that greater care and most watchful circumspection which the greater perils of an obstructed view of the track required of him,—was the efficient cause of his lamentable injury. If men will go heedlessly on railroad tracks, not using care and caution commensurate with the apparent danger, and disaster shall overtake, the consequences must fall upon their own heads. Affirmed.

BUTT v. WILLIAMS.

(Supreme Court of Mississippi. April 2, 1894.)

CONTRACT FOR SERVICES—RECOVERY FOR PART PERFORMANCE.

One who contracts to do certain work for a fixed sum cannot abandon it before com-

pletion, and recover for the work done by him. *Timberlake v. Thayer* (Miss.) 14 South. 446, followed.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Action by Jordan Williams against John T. Butt to recover for services performed for defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Butt & Butt, for appellant. Cook & Anderson, for appellee.

COOPER, J. While there is controversy between the parties as to whether the plaintiff was to be paid as the work he contracted to do progressed, or only upon its completion, there is none in reference to the character of the contract as an entire and indivisible one to do certain work at and for a fixed sum. The testimony for the defendant tended to prove that the plaintiff without cause abandoned the work, and refused to carry out his contract. The plaintiff, to meet the contingency of an acceptance by the jury of the truth of the defendant's evidence, asked and obtained two instructions (Nos. 2 and 3), by which the jury was instructed that, though it might believe that the plaintiff abandoned the contract without cause, yet he was entitled to recover the reasonable price of the work done for and accepted and enjoyed by the defendant. These instructions were erroneous. One who contracts to do certain labor for a fixed sum cannot abandon the work and recover for the work done by him. He cannot recover on the contract, because he himself has not performed it; nor can he recover on the common counts, because of the existence of the unexecuted special agreement. *Wooten v. Read*, 2 Smedes & M. 585; *Timberlake v. Thayer* (Miss.) 14 South. 446.

Reversed and remanded.

WILKERSON et al. v. SUMMERS.

(Supreme Court of Mississippi. April 9, 1894.)

Appeal from circuit court, Tallahatchie county; R. W. Williamson, Judge.

Action by W. N. Wilkerson & Co. against M. E. Summers on an account. Judgment for defendant. Plaintiffs appeal. Reversed.

Eskridge & McCorkle, for appellants. Stone & Lowrey, for appellee.

CAMPBELL, C. J. It seems to have escaped attention in the court below that a considerable portion of the account sued on was made within three years next before the institution of this action, and of course that was not barred, and for this reason the judgment must be reversed. On return of the case to the circuit court, the parties may shape their pleadings so as to present questions not now presented by the record, although mentioned in argument.

(71 Miss. 223)

KOHLMAN v. FIRST NAT. BANK OF MERIDIAN.

(Supreme Court of Mississippi. March 19, 1894.)

EXECUTION—CLAIMS BY THIRD PERSONS—AFFIDAVIT.

1. In an action against a sheriff for the proceeds of a sale, in his hands, defendant is properly allowed to withdraw his pleas, and make affidavit that a third person claims the property, and is the real party in interest. Code 1892, §§ 714, 715.

2. Claimant alleged that his attachment was duly levied, judgment obtained, and order of sale made, the constable being all the while in exclusive possession of the goods; that the sheriff attempted to levy on them for plaintiff, but did not do so; that, before the sale, it was agreed with the sheriff and plaintiff's attorney that the goods should not be sold until the rights of the parties were determined in court; that, thereafter, plaintiff recovered judgment against the debtor, erroneously condemning these goods; that plaintiff, knowing claimant's rights, and in breach of the agreement, obtained execution, and asked the sheriff to advertise a sale; that claimant protested in writing, and notified the sheriff not to sell, or, if he sold, to hold the proceeds subject to the court's order; that the sheriff nevertheless forcibly ousted the constable from possession, sold the goods, and holds the proceeds (\$150); that claimant, not plaintiff, is entitled thereto. Held a good claim.

Appeal from circuit court, Lauderdale county; S. H. Terral, Judge.

Claim of S. Kohlman against the First National Bank of Meridian, Miss., to the proceeds of goods sold on execution in favor of the bank. Demurrer to claim sustained, and claimant appeals. Reversed.

Cochran & Bozeman, for appellant. Hamm, Witherspoon & Witherspoon, for appellee.

WOODS, J. The action of the court in permitting the sheriff to withdraw his pleas, and file the proper affidavit required by our statute (sections 714, 715, Code 1892), was so manifestly correct that any remark seems unnecessary. Indeed, any other action would have been in disregard of the spirit and the letter of our law, which confers on courts "full power to allow all amendments to be made in any pleading or proceeding, at any time before verdict, so as to bring the merits of the controversy between the parties fairly to trial, and may allow all errors and mistakes in the name of the party or in the form of the action to be corrected." Section 717, Id. The course of judicial procedure, in this enlightened age of law, has ceased to be a pathway beset with springs and traps to trip and ensnare the ignorant and the unwary; and now the humblest and least learned may safely appeal to the courts of justice for the hearing and determination of their complaints and defenses, seeing it is the duty of such courts to lend all their powers to bring the merits of every controversy fairly to trial. In this case, Kohlman was the real defendant, and the court correctly permitted the nominal de-

fendant, the sheriff (a mere stakeholder), to make affidavit as to the claim of the real party in interest.

The contention of appellee's counsel that Kohlman was not a proper party to be substituted involves a total misconception of the design and meaning of the statutes referred to. Their proper construction lies upon their face, and they exactly meet the necessities of this controversy. They were designed for just such cases. The facts set up in Kohlman's written claim to a part of the fund in the sheriff's hands entitled him to judgment to the amount of such fund derived from the sale of the property levied on under his attachment writ. It appears from the written statement of Kohlman's claim that his attachment writ was sued out October 28, 1892, and levied upon the goods whose subsequent sale created the fund in dispute; that the constable who made the levy took possession of the property so levied upon, and returned said writ, with the indorsement of his levy and action, to the justice's court from which it issued; that November 15, 1892, Kohlman recovered judgment in said magistrate's court sustaining his attachment, and also judgment against the defendants in that suit for \$150, and condemning the property so levied on to be sold to satisfy the judgment; that at and after the date of said levy the constable was and remained in the exclusive possession and control of the property so levied on, and though, subsequent to the levy, the sheriff attempted to make a levy of an attachment writ sued out by the bank, the appellee, yet in fact no levy was made by him; that after the recovery of judgment, in November, 1892, as already stated, the constable properly advertised the property for sale, but, before the day of sale arrived, it was agreed by and between the constable and Kohlman's attorney, on the one part, and the sheriff and the bank's attorney, on the other part, that the property should not be sold, but should remain in the possession of the constable until the circuit court of Lauderdale county should determine the rights of the respective parties in the premises; that in January, 1893, the said bank obtained judgment in its attachment suit,—the defendants therein being the same persons against whom Kohlman had previously recovered his judgment,—and in its judgment erroneously had condemned to sale the same property levied upon under Kohlman's writ, the sheriff having pretended to levy the bank's writ thereon, though he never had levied, in truth; that the bank, after obtaining its judgment, well knowing Kohlman's rights by virtue of his levy of his attachment, and of his lien on the property, in violation of its agreement, hereinbefore set out, wrongfully had an execution issued and put in the sheriff's hands, and requested the officer to advertise the goods for sale; that Kohlman immediately protested to the officer, in writ-

ing, and notified the sheriff not to sell, but, if he should sell, then to hold the proceeds arising from the sale of the property subject to the order of the said Lauderdale circuit court; that the sheriff, disregarding said protest, disregarding Kohlman's rights, and disregarding the said agreement, forcibly deprived said constable of the possession of the property, and sold the same under the bank's venditioni exponas; that the sheriff obtained from such sale of the property \$150, and now holds the same; and that Kohlman, and not the bank, is entitled thereto. If these facts do not disclose inexpugnable ground on which to rest Kohlman's claim to the proceeds of the property, it is impossible to conceive of any state of case in which a third party could successfully propound a claim to the proceeds of personal property taken and sold by an officer under legal process. There is not the slightest merit in any of the numerous causes of demurrer assigned, and the court should have promptly overruled the same, and required the bank to answer, and contest Kohlman's claim, or, in default thereof, have entered judgment in favor of the claimant. The judgment of the court below is reversed, the demurrer is overruled, and the cause remanded for further proceedings in accordance with this opinion.

(71 Miss. 890)

WALKER v. MAYOR, ETC., OF VICKSBURG.

(Supreme Court of Mississippi. March 19, 1894.)

NEGLIGENCE—LIABILITY OF CITY—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE.

A city is not liable to a fireman injured in driving to a fire by reason of a defective street, where the injury would not have happened but for his own negligence.

Appeal from circuit court, Warren county; John D. Gilland, Judge.

Action by R. E. L. Walker against the mayor and aldermen of Vicksburg to recover damages for personal injuries caused by a defective street. From a judgment for defendants, plaintiff appeals. Affirmed.

Gibson & Henry, for appellant. Booth & Anderson, for appellees.

CAMPBELL, C. J. Assuming the law to be that Walker did not sustain such relation to the city, by reason of his employment as a fireman, as to preclude him from recovering for an injury sustained because of a defect in the street, under circumstances which would entitle any traveler to recover, it appears too plain for dispute that his injury resulted from want of due care on his part, and that on this ground he should not be allowed to recover. The extent of the obligation of the city is to keep the streets in a condition reasonably safe for general use, and it is not required to have them so as to

insure the safety of a reckless driver, whether a fireman or another. According to the testimony of Mr. Gibson, for the plaintiff, "a person driving prudently and with ordinary care could have passed the place without accident." A fireman is not exempt from the duty to exercise ordinary care and prudence in driving to a fire. Affirmed.

(71 Miss. 821)

DAVIS et al. v. BLANTON.(Supreme Court of Mississippi. April 9, 1894.)
LANDLORD'S ATTACHMENT—ON NEGOTIABLE RENT NOTE.

A note for rent, payable to bearer, and transferred for value to a bona fide holder before maturity, precludes the maker from defenses in an attachment for rent thereon.

Appeal from circuit court, Lee county; Newnan Cayce, Judge.

"To be officially reported."

Attachment for rent by Keith Davis & Co. against J. C. Blanton. Judgment for defendant. Plaintiffs appeal. Reversed.

Clayton & Anderson, for appellants. Finley & Long, for appellee.

CAMPBELL, C. J. We fail to perceive why the preclusion of any defense by the maker of a promissory note payable to bearer, and transferred, for value, to a bona fide holder before maturity, which would entitle such holder to a recovery, in an ordinary action, should not apply in all its force as between the same parties in an attachment for rent. None of the cases cited by counsel for the appellee is in point, for in none is the feature of a note payable to bearer, in the hands of an innocent holder for value, presented. The landlord has a lien on agricultural products, etc. This passes to his assigns; and, in this case, the debt for rent being evidenced by a promissory note, to which no defense can be made against an innocent holder for value, carried the remedy provided by law in such cases, as an incident to the claim. Reversed, and remanded for a new trial.

HUTCHESON v. TUCKER et al.

(Supreme Court of Mississippi. April 23, 1894.)

CLAIMS AGAINST DECEDENT.

When it appears that a deceased's son-in-law tenderly cared for her three years prior to her death, the testimony of several witnesses that they heard her say that she wanted him well paid for his services, and that she would not stay at his place unless he consented to receive pay, and asked him to make out his account, leaving the amount to him, is sufficient to show that deceased agreed to compensate him.

Appeal from chancery court, Wilkinson county; Claude Pintard, Chancellor.

"To be officially reported."

Action by C. V. Hutcheson, administrator, against Mattie Tucker and others. From a decree for defendants, plaintiff appeals. Reversed.

A. G. Shannon, for appellant. D. C. Bramlett, for appellees.

WOODS, J. The decree of the court below, sustaining the exception to the report of the commissioner in its allowance of the \$900 paid by the administratrix to J. W. Hutcheson, was erroneous. The evidence taken before the commissioner, and by him presented to the court with his report, is that upon which the court acted, and it is the same which is now before us. This evidence discloses unremitting and tender and devoted care and attention bestowed upon the appellant's intestate for more than three years preceding her death, by her son-in-law, J. W. Hutcheson. There is no dissenting voice on this proposition, nor is there any denial of the reasonableness of the charge made by Hutcheson for the support and care given the deceased, if pecuniary compensation is to be made at all. The contention is that the law will not imply a promise on the part of the deceased to make payment for such maintenance and care, and that there is no evidence of any contract between the deceased lady and her son-in-law, Hutcheson, for the payment of anything by the former to the latter for his services and expenditures in her behalf. The law will not raise an implied contract in cases such as this, it is true; but an examination of the evidence discloses much strongly tending to show there was a contract, and the testimony is clear that there was an understanding that compensation was to be made Hutcheson for his care and support of the deceased. Mrs. Kilray, on her examination before the commissioner, testifies that she heard deceased say she wanted Hutcheson paid, and asked him to make out his account, leaving the amount of the charge to him. Mrs. McGraw, in her answer to the sixth interrogatory propounded to her before the commissioner, states that the deceased always told her (the witness) that she wanted Hutcheson paid, and expected him paid at her death, and that she (the deceased) would not stay at Hutcheson's home unless he consented to receive pay; and, in answer to the sixth cross interrogatory, Mrs. McGraw further testified that she heard the deceased ask Hutcheson if he had made out the account as she had told him to do, and that, turning then to witness, the deceased remarked she had asked Hutcheson to make out the account for taking care of her. Mrs. Hughes also testifies that she had heard the deceased say she wanted Hutcheson well paid for his trouble and expense. The decree should have been in accordance with this unchallenged evidence. Reversed and remanded.

(71 Miss. 987)

RICHMOND & D. R. CO. v. RUSH.
(Supreme Court of Mississippi. April 23, 1894.)

MASTER AND SERVANT—NEGLIGENCE—BREACH OF RULE.

A brakeman who is hurt in uncoupling a car without using a stick, in violation of a rule of the company, cannot recover, even though he acted in obedience to an order of the conductor, "a person having the right to control or direct" his services. Const. 1890, § 193.

Appeal from circuit court, Clay county; C. H. Campbell, Judge.

Action by J. S. Rush against the Richmond & Danville Railroad Company, for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

A. F. Fox, for appellant. Critz & Beckett, for appellee.

CAMPBELL, C. J. The real question in this case is as to the validity and obligation of the rule of the company requiring coupling and uncoupling of cars to be done by means of sticks, and forbidding the going between cars when an engine is attached. If this rule was in force, and obligatory on Rush, he certainly is not entitled to recover for an injury sustained in its violation. He knew the rule, and had contracted with reference to it, and, if he violated it, and sustained injury in consequence of it, he cannot be heard to complain of his employer. He cannot shelter himself under the order of the conductor, for, even if it is conceded that the conductor, in directing the uncoupling, was "a person having the right to control or direct the services of the party injured," within the meaning of that clause of section 193 of the constitution of 1890, it cannot be held that he was under any obligation to obey an order of such person to violate the rule equally obligatory on the conductor and himself. Therefore the question whose resolution will decide this case is as to the rule mentioned. It seems to be a very proper rule, and, if it was in force, and disregarded, without excuse, by the unfortunate brakeman, he must bear the misfortune of his own indiscretion. It is apparent that the trial court had a correct view of the decisive question in the case, and yet gave two instructions, drawn by the learned counsel for the plaintiff, by which the plaintiff may have obtained the verdict he got without any regard to the rule in question. The first instruction for the plaintiff omits all reference to the rule, and entitles the plaintiff to recover if he acted upon the conductor's order, and suffered hurt from the negligence of the conductor in too soon giving the signal to the engineer to move. The fifth instruction makes the conductor's knowledge of the uncoupling without a stick, and too hastily causing the movement of the train, ground for recovery. Un-

der these instructions the jury could hardly fail to find for the plaintiff, although correctly instructed otherwise, perhaps. Both are wrong, and should have been refused. Be the relation of the conductor to the brakeman what it may, he surely had no authority to dispense with an existing rule made for him and for them, and neither his order nor his acquiescence as to its violation could give any right or have any just influence in the case. What we have said is sufficient to dispose of this case, and we will not pass upon any other question, as that discussed is the decisive one upon which the case must finally turn. We would not be understood as approving all of the instructions given for the defendant, but, regarding the question as to the rule involved as the only material one, will not decide anything else. Reversed and remanded for new trial.

(71 Miss. 975)

**HOME INSURANCE CO. OF NEW YORK
v. SCALES et al.**

(Supreme Court of Mississippi. April 30, 1894.)

**FIRE INSURANCE POLICY — CONDITIONS — VACANCY
OF BUILDING — WHAT CONSTITUTES — APPEAL —
HARMLESS ERROR.**

1. Where tenants of a store building abandon it a short time before the lease expires, but retain the key by permission of the owner, and leave a few empty barrels and some old boxes and papers in the building, it is "unoccupied," within the terms of an insurance policy.

2. It is immaterial that the local agent did not consider the building unoccupied, and for that reason did not issue a permit.

3. Though the knowledge of the agent is imputable to the company, it is not liable, in the absence of any act by him as agent, after the house became vacant, by which the assured was misled.

Appeal from circuit court, Oktibbeha county; Newnan Cayce, Judge.

"To be officially reported."

Action by W. W. Scales and others against the Home Insurance Company of New York on a fire insurance policy. From a judgment for plaintiffs, defendant appeals. Reversed.

Calhoon & Green, for appellant. Muldrow & Nash, for appellees.

CAMPBELL, C. J. Where the action of the court upon the pleadings determines the controversy between the parties, or some feature of it, and so puts an end to it as to withdraw it from the jury, and eliminate it as a factor in the trial of issues of fact, this court should pass upon the action of the lower court on the pleadings; but where the matters involved in the altercations between the parties, however voluminous, and though the judgment of the court be ever so often required and given, are afterwards litigated before a jury trying the case, this court on appeal will not perform the useless task of pronouncing *seriatim* on the various rulings

made during the preparatory skirmishing between the combatants, but will pass all by, and deal with the final engagement, and what was done in it. The only legitimate object of pleadings is to bring parties to an issue on the real grounds of controversy; and where this court, looking through the record, discovers that a trial was had finally on these grounds, it will not concern itself as to any errors committed in reaching the point of real contest. We have waded wearily through the vast mass of preliminaries to the final battle in this case to ascertain that the declaration, with its four counts, the eight pleas, the numerous replications, the motions to make definite, motions to strike out allegations, rejoinders, surrejoinder, demurrers at almost every step, leaves to amend, and judgments as required by the successive steps, the record of which covers 160 pages, all resulted in bringing the parties to trial of the only matter in dispute between them; and the question now is, not whether some slip was made in the hurry of a circuit court trial, and some error committed in deciding the multitude of questions there presented, but, in the final contest, where everything involved in the case was investigated, was any reversible error committed against the party found against?

The three matters in dispute are: (1) As to the title of the property insured; (2) as to the occupancy of the house; (3) as to proof of loss as required by the policy. The insurance company denied liability, on the ground that there was a breach of warranty in the matter of title, and that the house insured was vacant or unoccupied, and so remained for 10 days, in violation of the policy, and that there was failure to make proof of loss, as the contract required. We have carefully considered the three matters of dispute, and, while we think neither the first nor third presents an insuperable obstacle to the maintenance of the recovery had, we cannot escape the conviction that the second does. The house was unquestionably "unoccupied" for more than 10 days before the fire, and when it occurred. It matters not that Hibler, the then local agent of the insurer, now testifies that he did not consider the house vacant or unoccupied, and that he would have issued another vacancy permit if he had thought it necessary. The house had been rented, and, when insured, was occupied by merchants. They moved out, abandoning the house as their store, in August. The house was found closed, and a vacancy permit for 30 days was, at the instance of the general agent, Kreth, issued by Hibler, the local agent, and delivered to Scales, who attached it to the policy. He was thus admonished of the fact of nonoccupancy, and of the course of business pursued in such case. The time for which the tenants at the time of the issuance of the policy rented expired September 1st. By that time some meat they had left in the

house was sold and removed. They left a few empty molasses barrels, some old boxes and papers, in the house, and they had the key, not surrendered to the agent of the owners, because he told them they could keep it until another tenant came. This was not such occupation of the house, as the policy required, no matter what Hibler or anybody else may have thought. If Hibler knew the facts, and thought the house occupied, he was mistaken in his judgment of what was required to constitute occupation. Grant that his knowledge is imputable to the company, and the case is not altered. The company was not bound to notify the insured of the unoccupied condition of the house, if it actually knew it. Hibler may have been under obligation to Scales, and he may have disregarded it, or erred in his judgment, and Scales may have cause of complaint against him; but in all this Hibler was friend and agent, if at all, of Scales, and not of the company. If Hibler, the agent, had done anything in his capacity as agent, after the house was unoccupied, to mislead the insured, the case would be different; but nothing of that sort occurred. There was silence, and that is never ground for estoppel, except where it is a fraud, which cannot be predicated of this silence. The agent had a right to be silent, and give no notice as to the unoccupied condition of the house. It was no part of his business, as agent of the company, to keep policies from being avoided by violation of their conditions, whatever obligations he may have assumed by his engagement to the insured, as to which engagements he could not bind the insurer. We feel safe in the assertion that no adjudication or declaration of a text writer can be found to support the proposition that the house insured in this case was not "unoccupied," so as to avoid the policy. We have searched in vain for any such utterance. There are many to the contrary. Richards, Ins. § 150, and cases cited; 1 Bid. Ins. § 660, and citations; Ostrand. Ins. § 143, and cases cited; Wood, Ins. § 89, and cases cited; 1 May, Ins. § 249 et seq., and references. It may be regretted that careless inattention caused the policy to be forfeited, and, gratifying as it would be to us to be able to affirm the judgment in this case, we are constrained to order that it be reversed.

(71 Miss. 323)

EVERMAN et al. v. HERNDON et al.

(Supreme Court of Mississippi. April 9, 1894.)

AUTHORITY OF REAL-ESTATE AGENT.

After preliminary correspondence, a real-estate broker wrote to defendant, stating that he could sell defendant's land (800 acres) for \$4,000, one-half cash, balance in one and two years at 8 per cent. interest. Defendant telegraphed, "Accept the \$4,000 proposition." Held not to authorize the broker to contract to sell for cash.

Appeal from chancery court, Coahoma county; W. R. Trigg, Chancellor.

Bill by W. A. Everman and others against Thomas Herndon and others to enforce specific performance of a contract to convey land. From a decree for defendants, plaintiffs appeal. Affirmed.

W. A. Percy, for appellants. D. A. Scott, for appellees.

COOPER, J. On a former appeal in this case the question involved was as to the sufficiency of the description of the subject-matter of the contract to relieve it of objection under the statute of frauds, and we then held that it was permissible to look to all the writings signed by Herndon in the negotiation leading to the sale, and that by so doing it sufficiently appeared what land was intended to be sold. *Everman v. Herndon*, 11 South. 652.

The question involved in this appeal is whether the defendant Herndon is bound by the contract of sale entered into by Cross Bros., who professed to be authorized by and to act for him, by which they agreed to sell to appellants Everman & Blanton the lands now sued for. When the cause was remanded on the former appeal the parties were at issue upon the original and amended bills, and proceeded to take depositions preparatory to final hearing thereon. During the taking of the deposition of the defendant Herndon a fuller disclosure of certain parts of the correspondence between this defendant and Cross Bros. led the complainant to exhibit a second amended bill, to which the defendant demurred, and his demurrer was sustained. The cause was then set for final hearing upon the original and first amended bill and exhibits, answers, and proof. On such hearing the original and amended bills were dismissed. The errors assigned bring into review the decree sustaining the demurrer to the second amended bill, and the decree made on the final hearing.

Under our practice in chancery, exhibits filed with a bill are a part of the bill, and are considered on demurrer as if copied in the bill. Code, § 528. By the second amended bill the entire correspondence between Cross Bros. and the defendant Herndon is set out in *ipsisssimis verbis*, either in that bill or in the exhibits to the original bill, referred to, and made a part of the second amended bill. It is evident on the whole record that the complainants do not rely upon the creation of an agency in Cross Bros. for the defendant Herndon except by this correspondence, none of which is denied by the defendant. On this branch of the case the same question was presented on the hearing of the demurrer and on final hearing, and, since the cause is finally disposed of by us on the question common to both, we shall deal with the two decrees as one. It is contended by counsel for appellants that in the

correspondence between the defendant Herndon and the firm of Cross Bros. authority was conferred upon said firm, as agents for this defendant, to sell the lands in controversy at the price of five dollars per acre, cash, and that the communications between these parties on the 5th, 6th, 10th, and 13th of June (which is hereinafter specifically set out) was not in derogation of the agency before that time existing; that, if it be true that the memorandum of sale executed by Cross Bros. on June 14th (which is also hereinafter set out) would not be a valid execution of the agency created by the telegram and letters of June 5th, 6th, 10th, and 13th, it was authorized by the agency before that time conferred on them. Counsel for appellants do not point to the writing antedating the telegram of June 6th, by which the agency of Cross Bros. to sell the land was created, nor have we been able to discover any such authority from the correspondence. It does appear that Cross Bros. desired to be authorized either to sell the land for the defendant Herndon or to secure the right to commissions on a sale to be made if they could find a purchaser for the land; but there is nothing in the correspondence antedating June 6th from which it could be deduced that Herndon had appointed them as his agents, or that they so understood. The only agency we can discover in the correspondence is that created by the letter and telegram from Herndon of date June 6th, which were in reply to the communication from Cross Bros. of date June 5th. On June 4th Herndon, in reply to a letter from Cross Bros. asking him to fix the price of the land, and also asking at what price he would sell the timber thereon, wrote as follows: "Clarksville, Tenn., June 4/89. Mr. John L. Cross, Memphis, Tenn.—Dear Sir: Your favor to hand, and contents noted. I would sell my land in Mississippi for \$5.00 per acre, cash. Can give perfect title. Would ask about the same for timber as for land and all. Mr. Hane has my plat. I sent it to you, and after I got it back I sent it to Hane. Write him for it." On June 5th, Cross Bros. wrote to Herndon as follows: "Memphis, Tenn., June 5th/89. T. Herndon, Esqr., Clarksville, Tenn.—Dr Sir: In reply to your letter will say I think I can sell your place for four thousand, (800) acres; $\frac{1}{2}$ cash, bal. in one and two years, with 8% from date. Please inform me if I must close at that price and terms. Wire at my expense. Resp., Cross Bros." On June 6th, Herndon sent this telegram to Cross Bros.: "Clarksville, Tenn., June 6th/89. Cross Brothers, Real-Estate Agt., Memphis: Accept the four thousand dollar proposition. If necessary, will come Friday night. T. Herndon." On the same day Herndon wrote to Cross Bros. as follows: "Clarksville, Tenn., June 6th/89. Messrs. Cross Bros., Memphis, Tenn.—Gents: Your favor to hand, and noted. There is 830 acres in my tract, and I

propose to put it at \$5.00 per acre. My deeds are all on record in Coahoma county, Miss. Yours, &c., T. Herndon." In reply to the telegram from Herndon, Cross Bros. on the same day telegraphed to Herndon as follows: "Memphis, Tenn., June 6th, 89. T. Herndon, Clarksville, Tenn.: Proposition accepted. Particulars by mail. Cross Bros." Several other letters passed between Herndon and Cross Bros. after June 6th and before June 15th, but they are unimportant. On June 15th the following written contract was signed by Cross Bros.: "Memphis, Tenn., June 15th, 1889. This is to certify that we have this day sold to Everman & Blanton 830 acres of ground in Coahoma county, Miss., for the sum of \$5.00 per acre, and owned by Capt. Thos. Herndon, of Clarksville, Tenn., and we, Cross Brothers, being said Thos. Herndon's authorized agents. And we hereby accept the sum of \$200.00 (two hundred dollars) as part payment on said land. Witness our hand this 15th day of June, 1889. Cross Brothers." It does not appear that the terms of this instrument were communicated to Herndon by Cross Bros. or by Everman & Blanton, until after he had assumed the position that Cross Bros. had not been his agents to make any contract of sale whatever of the lands. There is an absence, therefore, of evidence of ratification by him of the act of Cross Bros. in attempting to bind him by the sale.

It seems to have been assumed by all the parties that Everman & Blanton were to be the purchasers of the land for Messrs. Perkins & Percy. Their attorneys made an investigation for them of Herndon's title, in which certain irregularities and deficiencies were disclosed. This fact having been communicated to Herndon, he employed these gentlemen to perfect his titles, which they proceeded to do. In writing to Herndon, Messrs. Perkins & Percy frequently called his attention to the fact that Messrs. Everman & Blanton expected him to carry out the contract of sale with them; but its terms were not stated, and Herndon, in his replies, seems to have uniformly refrained from making any reference to it. Finally, however, he stated in a letter to his attorneys that he had concluded not to sell the land. In reply to this Messrs. Perkins & Percy wrote him that Everman & Blanton declined to release him from the contract, and would insist upon its execution. In reply to this Herndon wrote that he had made no contract with them, and had not authorized Cross Bros. to make any, and that he would not sell the land. The validity of the agreement made by Cross Bros., professing to act for Herndon, must therefore rest upon the fact that they were his agents, authorized to enter into the contract with Everman & Blanton, and thereby to bind him. As we have said, there is nothing in the record showing that prior to June 6th any other relation had existed between Cross Bros.

and Herndon than that of broker and customer, and in that relation it is well settled that the agency of the broker extends only to bringing the parties together. He is not authorized to make sale of the customer's land, or to make a contract of sale binding on him. 2 Am. & Eng. Enc. Law, 592; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Roach v. Coe*, 1 E. D. Smith, 175; *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890; *Duffy v. Hobson*, 40 Cal. 240; *Walker v. Osgood*, 93 Am. Dec. 171, notes. The principal may, however, authorize the broker to make a contract of sale, or to execute the conveyance, but in such cases the broker, like other agents, must act within the delegated authority. Looking to the only authority given by Herndon to Cross Bros. to make sale of the lands, it is found to be limited to that of accepting "the four thousand dollar proposition." The telegram in which this authority was given created whatever agency existed in Cross Bros. to make a contract of sale. This firm was thus specially authorized to do and perform one particular act, viz. to accept a definite proposition, which had before then been submitted to Herndon. Nothing is better settled in the law than that one dealing with an agent expressly appointed to do a particular act must inform himself of the extent of authority conferred, and must see to it that the act done is within the authority. *Bank v. Cameron*, 3 Smedes & M. 609; *Brown v. Johnson*, 12 Smedes & M. 398. There was no fact to which *Everman & Blanton* might justly appeal tending to prove that any other agency than that created by the telegram existed, and it did not authorize Cross Bros. to make the contract which they made on the 15th day of June. They were authorized "to accept the four thousand dollar proposition," which was to pay that sum, one-half in cash, and the balance in one and two years, with interest at 8 per cent. per annum from date. They entered into an agreement under which the whole purchase price was payable in cash, which may have been a better or worse contract than that they were authorized to make, determinable by circumstances, but which was certainly not the contract they were directed and empowered to make. In legal effect, here was an offer by Herndon to sell his land at a fixed price,—one-half in cash, and the remainder in one and two years, with interest at 8 per cent,—and a counter proposition by *Everman & Blanton* to buy at the price named, payable in cash. There is not a legal identity between the contract which Cross Bros. were authorized to make and the one they attempted to make; and their principal, Herndon, was not bound. *Batty v. Carswell*, 2 Johns. 48, 1 Am. Lead. Cas. 653; *Schultz v. Griffin*, 121 N. Y. 294, 24 N. E. 490.

The complainants, in their pleadings, refrained from averring in what manner the purchase money was to be paid by them,

but averred a willingness to pay the entire sum in cash or to pay one-half cash and execute their notes for the remainder at one and two years, with interest at 8 per cent., and they contend that, since by the terms of the agreement it was not expressly provided how the purchase money should be paid, it may and should be inferred from all the circumstances that it was understood, and therefore agreed, to be paid at such time as the proposition submitted to Herndon had specified, whereby the proposal by Cross Bros., its acceptance by Herndon, the agency created by him, and the act of the agent in its execution would be harmonized. But this would be to make a contract by construction different from that actually entered into by the parties. Clearly, under the written agreement signed by Cross Bros., the complainants would have been entitled to make instant payment of all the purchase price of the land, and to a demand by Herndon that they should retain a part of it on interest might have well replied that such was not a part of the contract made by his agents in the sale of the land. Both parties or neither must be bound by the contract. *Cooke v. Oxley*, 3 Term R. 653. In other words, both parties must in fact assent to the terms of the contract (or, what is equivalent thereto, one must assent and the other must be precluded in law from denying that he did assent) before either is bound. 1 Chit. Cont. 20. Looking through the whole record, we find that the defendant Herndon agreed to sell his land for five dollars per acre, one-half in cash, and the balance in one and two years, with interest at 8 per cent. The complainants agreed to buy at the price named, but the purchase money was to be paid in cash. Cross Bros. were authorized by Herndon to make sale on the terms of his offer. They in fact made an agreement for him to sell on the different terms of complainants' offer, which act on their part was never ratified by Herndon. On these facts the law is with the defendants, and the decree of the court below is affirmed.

ABRAHAM et al. v. McCURDY et al.

(Supreme Court of Mississippi. April 30, 1894.)

ACCOUNT—PAYMENT BY NOTE—IMPRACHMENT.

When a note sued on is for the exact amount of the maker's account on the payee's books at the date of the note, the maker, contesting after several years the correctness of the amount, has the burden to specify the errors.

Appeal from chancery court, Jasper county; W. T. Houston, Chancellor.

Bill by William McCurdy and others against H. Abraham & Son and others for an injunction. Decree for complainants. Defendants appeal. Reversed.

Walker & Hall, for appellants.

COOPER, J. We are entirely at variance with the conclusion reached by the chancellor in this case. To us it seems evident that the note executed by McCurdy was given for the amount of an account then due by him to Solomon & Co., and that he has received credit for every dollar he is justly entitled to, as payment thereon. Neither in his original nor amended bill is there a suggestion that any part of the note was for advances to be made to him by Solomon & Co., except as to a small account to be paid to the Michigan Carbon Company; and though, as a witness, he testified that such was the fact, he does not explain, or attempt to explain, how it happened that the books of Solomon & Co. showed him to be indebted for the precise amount of the note at the date of its execution. One who executes a note for the amount of an account, and remains passive for years, must do something more than raise indefinite and uncertain objections to the correctness of the account, when called on to pay the note. He must put his finger on the error. It is not sufficient to point at the books, and assert that there is error somewhere in them. On the question of credits to which appellee McCurdy is entitled on the note, the evidence is, in our opinion, overwhelming. The cotton which he says he shipped to Levy & Sons is conclusively shown to have been largely acquired by Solomon & Co. from other persons, and the proceeds of his cotton were applied to the payment of his current account with Solomon & Co. The decree is reversed. The cause will be remanded to the court below to award damages on the injunction bond.

(71 Miss. 1008)

ILLINOIS CENT. R. CO. v. BOWLES.
(Supreme Court of Mississippi. April 30, 1894.)
MASTER AND SERVANT—HANDLING DISABLED CARS.

1. When cars have been condemned to the repair shops as disabled, one who, knowing that fact, calls for the engine to back, and goes between them without examining them, is negligent.

2. The fact that disabled cars might have been left at shops nearer the place where they were condemned will not make the company liable to a servant injured thereby, the journey having been made in safety, and the accident occurring at the destination.

Appeal from circuit court, Yalobusha county; William O. McLean, Special Judge.

Action by Eda Bowles, administratrix, against the Illinois Central Railroad Company, for damages for the death of plaintiff's intestate. Judgment for plaintiff. Defendant appeals. Reversed.

Mayes & Harris and I. T. Blount, for appellant. Calhoon & Green, R. F. Kimmons, and Chapman & Chapman, for appellee.

COOPER, J. The verdict and judgment in this cause find no support in law or in

fact. There is no controverted fact in the whole record, and the court should have given the jury a peremptory instruction to find for the defendant. The unfortunate man whose death gave rise to the suit brought destruction upon himself by failing to observe the slightest care in the discharge of his dangerous duty. Nor is there, upon the whole record, any ground to impute negligence to the defendant. If, in the prosecution of its business, it had used crippled cars, and an employee required to handle such cars had been injured, the provision of section 193 of the constitution would have applied; but that provision has no application to the case of a car transported over the line of the company to its shops, for repairs, and which has reached the place of its destination. If the disabled car, in being unnecessarily transported along the line of road, having been carried by a shop where it might have been repaired, had caused the train to be derailed, and injury to be inflicted, a different question would have been presented. But the car had reached the town in which the shops at which it was to be repaired were located. The unnecessary transportation (if it was unnecessary) from the vicinity of McComb City, by and through Canton, had ended, and had done no harm. The car in Water Valley, where the company had shops, was not more dangerous than it would have been in McComb City or Canton, where it may be that there were also shops. It was not dangerous because of its location or use, but because of its condition. It was not being used by the company as a car for the transaction of its business, but was being transported as a disabled car, condemned to the repair shops, and had reached the yard of the company from which it was to be shifted to the shops. The deceased, dealing with it as a disabled car, and controlling by his will the action of the engineer, called for the engine to be backed, and, without examination, stepped between the cars, on one of which there was no drawhead, without regard to the condition, and apparently oblivious to the imminent and deadly peril to which he exposed himself by giving the signal to back the train, and instantly getting between the defective cars. Under the uncontroverted facts of this case, no recovery can be had. The judgment is reversed.

(73 Miss. 26)

COLUMBUS INSURANCE & BANKING CO.
v. FIRST NAT. BANK et al.
SWEETZER et al. v. SAME.

(Supreme Court of Mississippi. April 23, 1894.)
CORPORATIONS—USURY—ACCOMMODATION PAPER.

1. Under Code 1857, c. 35, § 2, art. 5, declaring repealable all charters granted by act of the legislature, unless otherwise provided in the act, such a company's right under its charter to stipulate for interest not exceeding 10

per cent. discount was effectually taken away by Act March 13, 1886, repealing all provisions allowing corporations to take more than 10 per cent. interest.

2. A draft payable to the drawer's order, accepted by the drawee firm, within whose course of business it is to issue negotiable paper, is not, in the drawer's hands, notice to the discount that the acceptance is for accommodation.

3. An instrument payable to the order of the maker is, in effect, payable to bearer, and is not within the statute allowing defenses between the original parties against a bona fide holder.

Appeal from chancery court, Lowndes county; T. B. Graham, Chancellor.

In the matter of Gross & Co., Insolvent. Appeals of Columbus Insurance & Banking Company and of Sweetzer, Pembroke & Co. and others against the First National Bank and others. Decree affirmed.

E. T. Sykes, Houston & Reynolds, W. P. Pope, and Z. P. Landrum, Jr., for appellants. Wm. Baldwin and Thos. J. O'Neill, for appellees.

COOPER, J. The appeals in these cases might have been prosecuted upon one record, and we dispose of them in one opinion.

1. The court rightly held that the account of the Columbus Insurance & Banking Company should be purged of all usurious interest, and that any interest charged by that company in excess of 10 per cent. per annum was usurious. It may be conceded that, by its charter, authority was conferred upon that company to stipulate for any rate of interest not exceeding 10 per cent. "discount," and that it did not reserve any greater rate than such discount; for that rate would be usurious, and the right to receive it does not now exist, notwithstanding the provisions of its charter. By an act approved March 13, 1886 (Acts, p. 35), it was, among other things, provided "that every provision of any act heretofore passed, creating any corporation or amending any act creating any corporation, which authorizes any such corporation to take or receive more than ten per centum interest per annum, or which is in conflict with section 1141 of the Code of 1880 is hereby repealed." The charter of the company was by an act approved February 16, 1867. At that time the Code of 1857 was in force in this state; and by the last clause of article 5, § 2, c. 35, p. 292, it was expressly provided that "all charters granted under this act, or by act of the legislature, unless otherwise provided in the act, may be repealed by the legislature." There is no provision in the act of incorporation of the company withdrawing it from the operation of this law, and its corporate existence is held at the will of the legislature. *Shotwell v. Railway Co.*, 69 Miss. 541.

2. The court did not err in holding that the claim of the First National Bank was a valid charge against the firm of Gross & Co. The acceptance propounded was the renewal of one of the previous year, which was,

in turn, given in renewal of the original, which was acquired by the bank in 1889. If Gross & Co. were bound by the original acceptance, they were, of course, bound by those given in renewal and extension. The question is whether, by the original, a liability was fixed upon both Hirshman, by whom the acceptance was made, and upon Mrs. Gross, his partner, or whether Hirshman alone was bound. The acceptance was for accommodation, and as between Leigh & Co. or one taking from them, with notice of its character, was binding only on Hirshman; but if the bank was a purchaser of the instrument in good faith, i. e. for value and without notice, both partners were bound, for it is not denied that it was within the scope of the business of Gross & Co. to issue negotiable paper. The facts disclosed by the evidence are that the bank had discounted for Leigh & Co. a note executed by one Motley for the sum of \$5,000, upon which Leigh & Co. were bound to the bank as indorsers. Motley had died before the maturity of the note, and the president of the bank had notified Leigh & Co. that the note must be paid, or satisfactory security given for an extension, to which Mr. Leigh replied that the matter should have attention when the note should fall due. Leigh, for the purpose of arranging to discharge the Motley note, drew the bill of exchange in question upon Gross & Co., by which the firm of Leigh & Co. directed Gross & Co., 12 months after date, to pay to their (Leigh & Co.'s) own order the sum of \$3,400, which was accepted by Gross & Co. in the usual form. This instrument Leigh & Co. indorsed, and delivered to the bank, and gave their check for the difference between its value and the amount of the Motley note in payment of the Motley note to the bank, which note was then delivered to them as indorsers who had paid the same. We are unable to discover anything, either on the face of the paper, the circumstances attending its negotiation, or otherwise, from which to infer that the bank had notice of the character of the acceptance, or of facts which devolved on it the duty of making further inquiry. In *Bloom v. Helm*, 53 Miss. 21, the circumstances of the transaction were held to have charged the purchaser of the bill with notice that the acceptance was for accommodation, and therefore not binding upon a nonassenting member of the firm. It was there said that possession of the bill by the drawer after acceptance was sufficient to charge the purchaser with notice that the acceptance was for accommodation. And this was also held in *Bank v. Cameron*, 7 Barb. 143. And, if the maker of a note indorsed by a firm is in possession of the note, this imports that the indorsement is for accommodation; otherwise, the note would not be in the maker's hands, and the nonassenting members of the indorsing firm are not bound. *Stall v. Bank*, 18 Wend.

466; *Austin v. Vandermark*, 4 HILL, 259; *Gansevoort v. Williams*, 14 WEND. 133; 1 PARS. NOTES & B. 141; *Tanner v. Hall*, 1 PA. ST. 417. And where a nonresident partner drew a bill in the firm name upon himself, and accepted and discounted the bill, it was held that the duty of the taker to ascertain the authenticity of the signatures, if performed, would have discovered the facts, and that he was not a bona fide holder of the bill. *Cooper v. McClurkan*, 22 PA. ST. 82. So a memorandum written on the back of a note has been held to be notice of the facts it recited. *Bank v. McDonald*, 127 MASS. 82. But none of these decisions are applicable to the facts of this case, for they all proceed upon the postulate that notice is given of facts from which the accommodation character of the acceptance or indorsement should be inferred. If *Leigh & Co.* had been the drawers of a bill payable to another person, the fact that they held the bill after its acceptance would show that it was for accommodation; but they were payees as well as drawers of the bill, and, as payees, it was in the course of business that they should be in possession of the paper. Bills of this sort are irregular in form, and may be treated either as bills or promissory notes (1 Daniel, Neg. Inst. § 128), but are of common use both in England and this country (Id. § 130). An instrument payable to the order of the maker is, in legal effect, payable to bearer, and is not subject to the provisions of our statute allowing defenses existing between original parties to be interposed against a bona fide holder. *Bank v. Wofford* (Miss.) 14 South. 262.

3. We concur in the conclusion reached by the chancellor,—that the evidence fails to support the right asserted by *Sweetzer, Pembroke & Co.*, the *Tennant-Stribbling Shoe Company*, and *Wineman, Hirshman & Co.* to rescind the sales made by them to *Gross & Co.*, and recover the goods sold by them, because of the fraud of *Hirshman* in making false representations as to the financial condition of his firm. The decree is affirmed.

(71 Miss. 792)

HOOKEE et al. v. SUTCLIFF et al.

(Supreme Court of Mississippi. April 23, 1894.)

FRAUDULENT CONVEYANCES—EVIDENCE—MORTGAGES.

The fact that a creditor secured by mortgage waives his lien upon specific property in favor of a creditor whose debt is as meritorious as that of any other creditor will not render such mortgage fraudulent.

Appeal from circuit court, Le Flore county; R. W. Williamson, Judge.

Action by H. S. Hooker and others against Sutchiff & Owen, attacking a mortgage for fraud. From a judgment for plaintiffs, defendants appeal. Reversed.

Hooker & Wilson, Rush & Gardner, and Miller, Smith & Hirsh, for appellants.

COOPER, J. We are unable to concur in the result reached in this case. We can see nothing in the mortgage, and nothing done under it, upon which to rest the finding, necessarily involved in the judgment, of fraud in fact or in law. The security did not cover the stock of merchandise owned by Ullendorf, and it remained at all times subject to the demands of his creditors. So much of the mortgage as relates to the book accounts and notes is either confined to those which might become due from the tenants and employees of Ullendorf on the plantations, the crops of which were conveyed by the deed, or else the provision is ineffectual for want of certainty in their description. Ullendorf was the lessee of a number of farms, and the owner of the stock and implements thereon. The manifest purpose of the conveyance was to give security upon the personal property then on these farms, and the crops to be grown thereon during the year, and upon the sums that might be due to the grantor, during the year, from those engaged by him in and about the business of making such crops. It is true that Ullendorf was also the owner of a small stock of goods, and was engaged, to a limited extent, in business as a merchant. But the property invested in that business was not covered by the mortgage, and to hold that the "book accounts" referred to in the mortgage were those which should accrue in the mercantile business would be doing violence to the evident purpose of the parties. But the effect of disassociating these words from the planting operations, and applying them to any and all accounts which might become due to the grantor during the year, would be to render this provision nugatory, by reason of its generality and want of definiteness, and this would avail nothing in support of the judgment of the court below; for since no book accounts would, under this construction, pass by the deed, the collection and use of them by Ullendorf would not be a dealing by him with the mortgaged property, and such action on his part could not illustrate the character of the mortgage, of which they formed no part.

Aside from the collection of the accounts, and the use of the money so collected by Ullendorf, the other grounds of attack upon the mortgage are (1) that *Levy & Sons* permitted Ullendorf to ship to the *Union Oil Mill* the seed of the cotton grown on the places, and to apply the proceeds, in part, to a debt due said mills; (2) that the corn grown during the year, and covered by the mortgage, was used, before the attachment was sued out by other creditors, in feeding the stock upon the places; and (3) that, after the attachments had been levied on the property, *Levy & Sons* executed forthcoming bonds therefor, and afterwards, and without a sale having been made, turned the mules and corn over to *Mrs. Ullendorf*, by whom the corn had been consumed, and the stock

constantly used. There is nothing in either or all of these things of which creditors can justly complain. Surely, it cannot be contended that one creditor is defrauded because the mortgagee waives his lien upon specific property in favor of another creditor, whose debt is as equally meritorious as that of any other creditor. No harm was thereby done to the plaintiffs, whose claim was not more just than that of the creditor whose debt was paid by the sale of the seed. They had no lien upon the seed, and no right of theirs was diminished or impaired by the waiver of their lien by Levy & Sons, or by the sale by Ullendorf. The second objection above noted is not tenable. If the trustee had been in possession of the stock and corn, it would have been his duty to have used the corn in the maintenance of the stock. It is not shown that an improvident or unnecessary use of the corn was made, and that which was done was but in accord with the universal custom of all owners of property of like description. The disposition made by Levy & Sons of the property after they had given bond for its forthcoming to answer the demands of attaching creditors cannot serve to impair or defeat the mortgage under which they claim. The bond stands in lieu of the property, as to these creditors; for, upon judgment in their favor, Levy & Sons must return the property, or pay its value as found by the jury. The judgment is reversed, and cause remanded.

HOLMES et al. v. LEMON et al.

(Supreme Court of Mississippi. April 23, 1894.)

VERIFICATION OF BILL IN EQUITY.

Where a bill is sworn to by the agent, instead of the complainants, it does not entitle the latter to the benefit of Code 1880, § 1949, under which the rule requiring two witnesses, or a witness and corroborating circumstances, to overthrow a verified answer, is dispensed with.

Appeal from chancery court, Le Flore county; W. R. Trigg, Chancellor.

Bill by the Lemon & Gale Company and others against G. W. Holmes and others. Judgment for the complainants, and defendants appeal. Reversed.

A. H. Longino, for appellants. Rush & Gardner, for appellees.

COOPER, J. The bill in this case was not sworn to by the complainants, but the oath was made by an agent, who does not profess to have had any knowledge of the facts therein stated. If the jurat had been in proper form, because made by an agent, and not a party, it would not have entitled the complainants to the benefit of section 1949 of the Code of 1880, by which the rule requiring two witnesses, or one witness and corroborating circumstances, to overthrow

the answer, is dispensed with. *Jacks v. Bridewell*, 51 Miss. 881; *Waller v. Shannon*, 53 Miss. 500. Nor did the complainants waive an answer under oath, as they might have done, and thus have deprived the defendants of its benefit as evidence. Code, § 1874. Complainants' case, as made by the evidence, is not sufficiently strong to overcome the sworn answers. Decree reversed.

(103 Ala. 604)

HIGLEY v. WHITE et al.

(Supreme Court of Alabama. April 5, 1894.)

ATTORNEY'S LIEN—DECREE FOR SALE OF REALTY.

A decree fixing defendant's debt to complainant at a certain sum, and charging it as a lien on specified land, which, in default of payment within a fixed time, is to be sold by the clerk, and return made to the court, is not such a judgment for land as to be exempt from complainant's counsel's lien for services in the case.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Bill by Irwin B. Higley against E. B. and C. D. Powell. From a decree enforcing a lien in favor of F. S. White and Tallafarro & Smithson for attorneys' fees on the decree in favor of complainant, complainant appeals. Affirmed.

The original bill in this case was filed by the appellant, I. B. Higley, against E. B. and C. D. Powell; and sought the specific performance of a contract for sale. The report of that case, on appeal, is found in 90 Ala. 103, 7 South. 440. The proceedings, which are reviewed on the present appeal, arose in the following manner: After the decree rendered in this case, settling the equities in favor of the complainant, was affirmed on appeal in this case (at the November term, 1889), the reference ordered in that decree was executed, and a decree was rendered by the court below, on the 20th of January, 1891, ascertaining that the defendants were due and owing to the complainant on the 5th of January, 1891,—the date of the report of the clerk and register,—the sum of \$4,289.12,—including interest to that date, which, by the decree of the court, was made a charge or lien on the lots described in the bill for its payment; and, in default of the payment of that sum into the hands of the clerk and register within 10 days, he was ordered, in a manner directed by the decree, to proceed to sell said lots to the highest bidder for cash, and make report to the court. The proceeds of the sale, by the terms of the decree, were ordered to be applied—First, to the payment of the costs of the case; second, to the payment to the complainant of said sum of \$4,289.12; third, the surplus, if any, to be paid to the defendant, C. B. Powell; but, if said lots should not sell for a sufficient sum to pay said costs and the amount due the complainant, then, and in that event, the complainant shall

recover of defendant, O. B. Powell, his costs expended in the cause. A sale was made by the clerk and register, under this order, on 28th September, 1891, which was reported to the court, objected to by the complainant, and which appears never to have been confirmed. At that sale, the complainant bid the sum of \$3,500 for the lots, and he tendered in money \$432.35, the costs in the case, and his receipt for the balance of the decree, in full of payment of his bid, which was not accepted by the clerk and register. On the 21st of October, 1891, A. O. Lane and F. S. White, as Lane & White, and E. T. Talliaferro and Noble Smithson, as Talliaferro & Smithson, as attorneys for complainant, filed their petition in said court, setting out the services they had rendered to complainant in and about procuring said moneyed decree, in favor of complainant, and having a lien declared on said lots for the payment of the same, stating the value of the services they rendered in that behalf, and prayed the court for a reference to ascertain the value of their services as attorneys, and then, "that a decree be rendered, declaring a lien upon said decree for the amount found due to petitioners for their services aforesaid, and that a sufficient portion of the proceeds of the land heretofore sold under the decree of the court, be paid to petitioners in payment of their said fees." This petition was demurred to on the following grounds: (1) That the petitioners have not, in and by their said petition, made or stated such a case as entitled them in a court of equity to any relief against complainant as to the matters contained in said petition. (2) Because they have a plain and adequate remedy at law, and there being no fund in the court out of which they may be remunerated, a court of chancery has no jurisdiction in the premises. This demurrer was overruled. Thereupon, complainant filed an answer to the same, denying petitioners' right to the decree asked for. The cause was submitted on the petition and answer, and the court made a decretal order, on the 30th October, 1891, directing the clerk and register to ascertain what would be reasonable compensation to said solicitors for their services, and whether they had been paid any, and if so, what amount on their fees. By agreement of the parties, \$350 was ascertained and reported as a reasonable fee to be paid said solicitors, one-half to F. S. White, and one-half to Talliaferro & Smithson, one-fourth to Talliaferro and one-fourth to Smithson, Talliaferro's share to be credited by \$25, which had been paid to him. This report was confirmed without exception on the 30th May, 1892. On the same day, the parties came and the cause was submitted by them "for decree in behalf of complainant upon the original bill of complaint, petition of F. S. White, Talliaferro & Smithson and the order of reference thereon, as well as all other parts of the record,—

excepting the answer of said Higley to the petition of said F. S. White, and Talliaferro & Smithson; and, in behalf of complainant Higley, upon his plea and answer to said petition." The court rendered a final decree in the cause, which, having recited the proceedings in the cause, ordered that complainant, Higley, within 10 days from the date of the decree, pay to the clerk and register of the court, a sum sufficient to pay the costs of the case, and also the further sum of \$325, the balance due on the fees of his said attorneys, and upon the payment of the costs and attorney's fees,—which amount should be considered a part of the \$3,500 bid by him at a former sale, made as aforesaid on the 28th September, 1891, which was not confirmed by the court,—that his said bid should be accepted and that sale confirmed to him; but, if he failed to pay the same, that the clerk and register should proceed to sell the said lots under the original order of sale rendered in the cause on the 20th January, 1891, and the proceeds were to be applied—First, to the costs; secondly, to the attorney's fees in full, or ratably; and the remainder, if any, to the credit of said decree, in favor of said Higley; and, if he should be the purchaser, that he should not be required to pay into the hands of the clerk and register anything more than was necessary to pay the costs and attorney's fees, but that the clerk and register should not accept his bid unless he paid over a sum sufficient to pay said costs and attorney's fees. On the 27th March, 1893, in default of the payment of said sum of \$4,289.12 or any part thereof as authorized by said decree of 30th May, 1892, the clerk and register proceeded, in obedience to said decree so rendered, to sell said lots at public sale for cash, in the manner and according to the directions of said decree, at which said sale H. C. Miller became the purchaser at and for the sum of \$790, which was the highest and best bid for the same at said sale. This sale was reported to the court on the 12th April, 1893, and the clerk and register in his report stated that the purchaser had complied with the terms of the sale, and that out of the proceeds of sale he retained the sum of \$464 as costs of suit, commissions and expenses of sale, and the balance—\$325—he applied to the payment of the fees of the complainant's solicitors, as by the former decree of the court he had been directed to do. This report was ordered to lie over for exceptions. On the 17th of April, 1893, the cause was submitted on the report of the clerk and register, and no exceptions having been filed thereto, the same was, on that day, by the decree of the court, duly confirmed, and the title of the complainant and the defendant in and to the lots described in the report and bill was, by said decree, divested out of them and vested in the purchaser at said sale—H. C. Miller—and the clerk and register was ordered to execute a deed to him.

The complainant I. B. Higley prosecutes this appeal, and assigns for error (1) the ruling of the court allowing the filing of the petition of Lane & White and Taliaferro & Smithson; (2) the overruling of the demurrer of appellant to the petition of said attorneys; and (3) the rendition of the decree of the 30th May, 1892.

A. Satady, for appellant. Lane & White, for appellees.

HARALSON, J. (after stating the facts).

1. In *Ex parte Lehman, Durr & Co.*, 59 Ala. 632, this court announced that it must be regarded as settled in this state, by the decision of *Warfield v. Campbell*, 38 Ala. 527, that an attorney at law or solicitor in chancery has a lien upon a judgment or decree, obtained for a client, to the extent of the compensation the client has agreed to pay; or, if there has been no specific agreement for compensation, then, for reasonable compensation for services rendered in and about its procurement. The lien is limited to services rendered in the particular action or proceeding in which the judgment or decree was rendered, and the theory on which the particular lien rests is that the attorney or solicitor is regarded as an assignee of the judgment or decree, to the extent of his fee, from the date of its rendition,—subordinate to all counterclaims or set-offs, existing at the time. These principles have been the subject of repeated recognition in this court, since those earlier decisions. *Jackson v. Clopton*, 66 Ala. 33; *McWilliams v. Jenkins*, 72 Ala. 487; *Mosely v. Norman*, 74 Ala. 424.

2. It is as well settled, also, that an attorney or solicitor has no lien on the land of his client, where he has successfully prosecuted a suit in equity, to establish the title of his client to real estate, or on land recovered in an action of ejectment prosecuted by him, or where he has defended successfully the right and title to land against an unjust claim, or an unwarranted attempt to subject it to an alleged lien or liability. *Hinson v. Gamble*, 65 Ala. 605; *Lee v. Winston*, 68 Ala. 402; *McWilliams v. Jenkins*, supra; *Humphrey v. Browning*, 46 Ill. 476; 2 Kent, Comm. 640-641.

3. In any cause in which such a lien may be declared and enforced, there must, therefore, be a moneyed judgment or decree to which the lien may attach, or else it cannot exist. If a judgment or decree for money, however, has been rendered in a cause, as here, and real estate has been condemned to sale for its satisfaction, the lien may be declared, as was done in this case, on the decree, and made operative on the proceeds of the sale of the land, to the extent that the proceeds may not be liable to superior claims. The incidental liability of the land, or the proceeds of its sale, for the satisfaction of the decree, is no invasion of the rule

we have announced against declaring a lien on land for the payment of solicitor's fees and charges.

4. The petition of the solicitors filed in the cause, for the purpose for which filed, was an appropriate and approved proceeding, and the demurrer to it was properly overruled. *Weaver v. Cooper*, 73 Ala. 318; *Warfield v. Campbell*, supra; *Thornton v. Railroad Co.*, 94 Ala. 358, 10 South. 442.

We find no error, as assigned, and the decree of the city court is affirmed. Affirmed.

(102 Ala. 382)

JONES v. CHAFFIN.

(Supreme Court of Alabama. April 5, 1894.)

WAREHOUSEMEN — COLLECTION OF CHARGES — DESTRUCTION OF PROPERTY STORED.

Defendant purchased certain cotton stored in plaintiff's warehouse, and assumed the payment of charges thereon. It was a custom of warehousemen to collect charges only when the cotton was ordered out. Held, that the accidental burning of the cotton before being ordered out did not release defendant from the payment of such charges.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action by E. G. Chaffin against V. D. Jones to recover warehouse charges for the storage of cotton. There was a judgment for plaintiff, and defendant appeals. Affirmed.

J. D. Gardner, for appellant. R. L. Williams, for appellee.

HEAD, J. Action by appellee, a warehouseman doing business in Troy, Ala., to recover charges for storage of cotton. There were 56 bales, which had been stored by farmers, and by them sold to defendant, while in the warehouse, and delivered to defendant by indorsement and delivery of the warehouse receipts. To simplify expression we will say the whole lot, 56 bales, was stored by A. B., the producer, and by him subsequently sold to defendant, as above stated. According to the custom of this and the other warehouses in Troy, when cotton was stored a receipt was executed for the same, showing marks, numbers, weights, date of receipt, from whom received, and stipulating that the cotton was held subject to the receipt only, on paying customary charges and all advances (acts of Providence and fire excepted). A stub was retained by the warehouseman, showing by whom the cotton was stored, and to whom the receipt was issued. He kept no other account, showing who stored the cotton. The evidence shows that when cotton is stored the warehouseman's charge, of 50 cents per bale, accrues, for which the owner is entitled to have the storage for 30 days, if desired, and also to have the service of the warehouseman, if demanded, in delivering the cotton at the compress, depot, or other place in the city designated by the owner. If the cotton

remains stored longer than 30 days, an additional charge of 25 cents per bale accrues; and so for each additional 30 days, or fraction thereof. It was the custom and practice of warehousemen in Troy not to demand payment of these charges until the cotton was ordered out of the warehouse, on the production of the receipt, and the cotton would not be surrendered or delivered by the warehouseman without the payment of the charges. It is a further fact that, by custom and usage, the market price of cotton in Troy was fixed with reference to warehouse charges, and allowance therefor made by way of diminution of the price, and, further, that when stored cotton was sold, by transfer and delivery of the warehouse receipt, the purchaser assumed the charges, the seller having virtually paid him the amount thereof by way of reduction of price. Now, as we have said, A. B., a farmer, stored with plaintiff 56 bales of cotton, taking the customary receipt. Thereafter, he sold the cotton to defendant, by indorsing and delivering the receipt. Thereafter, defendant still holding the receipt, the warehouse and cotton burned, the latter never having been ordered out.

The controversy grows out of the custom and practice of warehousemen to forbear collection of their charges until the cotton was ordered out, and to require payment then to be made, before surrender of the cotton; the defendant taking the position that the meaning and intent of this custom are and were that there was no collectible debt for the charges until the owner ordered the cotton out of the warehouse, and that, as the cotton had been accidentally destroyed without being ordered out, the debt was forever destroyed. We think this an extreme view to take of the practice the warehousemen pursued. When A. B. stored the cotton, the relation of debtor and creditor, in respect of these charges, arose between him and the plaintiff. He became indebted to the plaintiff for the charges, and that relation continued so long as the cotton remained on storage; and A. B. became indebted for, and bound to pay, all charges accruing from time to time, without regard to any change in the ownership of the cotton, unless plaintiff, with knowledge, actual or constructive, of the change in ownership, expressly or impliedly agreed to release A. B., and accept the obligation of the new owner to pay the charges. For this indebtedness the law gave the plaintiff a lien on the cotton, as warehouseman, from the inception of its delivery to him, under which he had a right to hold the cotton until the indebtedness should be paid. If, by agreement all around, express or implied, the new owner became debtor for the charges, a similar lien on the cotton attached to that relation. Let us take a practical view, then, of the manner in which the warehousemen conducted their business, and get at the true intent and

meaning of the alleged custom. It is too clear for controversy that there was no intention on the part of the warehousemen, in the practice they pursued, to waive, suspend, alter, or impair, in any way whatever, or at any time, the lien which the law gave them,—the right to hold the cotton until their charges were paid; and, this being so, there was no intention, at any time, to waive, suspend, or otherwise impair the debt, for without a debt there could be no lien. The lien, so long as retained, is inseparable from the debt. The transfer of the one carries the other with it, at least in equity. Now, the defendant's proposition is that the warehousemen, by pursuing the practice of relying upon their lien, and forbearing to enforce collection of the debt, independently of the lien, so long as the customer's patronage was being continued, showed an intention to impose upon the debt a condition that it should never be collectible, independently of the enforcement of the lien, and that the lien should never be enforced so long as the owner might see fit to permit the cotton to remain in the warehouse; in other words, that the intention of the warehousemen was that they should have no enforceable debt, except by virtue of the lien, and that the time when they might enforce the lien should be left purely at the will and pleasure of the owner. If the owner did not see fit to order the cotton out for years, the warehouseman must be taken as consenting to keep it for him, without right to demand pay for the storage. No such conclusion as this can be practically drawn from the practice in question. The practice pursued was merely a rule of convenience. It is common knowledge that, in most instances, cotton is stored only a short time in the cotton season, so that the forbearance of the charges until the relation terminated, and all charges had severally accrued, did not become onerous to the warehousemen, and the lien given by law usually afforded them ample security. It was a convenience to merchants and brokers dealing in cotton, and the producer; for by that system they could more conveniently visit upon the producer the expense of marketing his product, by regulating the price with reference to the lien for warehouse charges, which had to be removed before the cotton could be reduced to possession. It relieved them of the inconvenience of going to the warehouseman, and paying the charges, every time a sale of the cotton took place. But, by this plan of operation, no practical man would suppose the warehouseman intended to waive and destroy his debt, as an enforceable obligation, if it should so turn out, for any cause, that the security the law gave him, to wit, the lien, had failed. As well might it be said that a mortgagee, who had shown by his conduct, in the most positive and emphatic manner, a purpose to rely upon his mortgage security, and had, for the convenience or ease of

the debtor, forborne collection of his debt because he was satisfied with the security, had thereby forfeited his right to collect his debt, if the mortgaged property had become destroyed. The common-sense view of the matter, as we conceive, is that the relation of creditor and debtor between plaintiff and A. B. was created when the latter employed the former to store the cotton; that a debt of 50 cents per bale, immediately demandable of A. B., arose and continued, at least, until he sold to defendant. It is unnecessary to decide whether, under the custom, his liability then ceased, and that of the defendant began. Whether so or not, the defendant became liable, at the option of the plaintiff, by reason of his assumption of the debt. It is a familiar rule in this state that a promise made by one to another for the benefit of a third person may be enforced by such third person. Besides, under the facts of this case, the defendant has money which, *ex equo et bono*, belongs to the plaintiff. A. B., in legal effect, paid him the money for plaintiff's use, when he sold him the cotton at a price reduced by the amount of the warehouse charges which it was known defendant would have to pay before he could get the cotton. Under any aspect of the case, plaintiff was entitled to recover; and, if the trial court committed errors, they were without prejudice to the defendant. Affirmed.

(48 La. Ann. 736)

STATE v. HILL. (No. 11,510.)

(Supreme Court of Louisiana. April 23, 1894.)
HORSE STEALING—INDICTMENT—COMPETENCY OF JUROR.

1. When neither the crime charged, nor its punishment, is dependent upon values, values need not be declared in the indictment.

2. Statements not necessary for the validity of an indictment are no more necessary to be alleged in it than in a petition, in order to introduce, under the indictment, evidence pertinent and relevant to the charge.

3. If, before a trial commences, it is discovered that one of the jurors is incompetent, by reason of relationship to the accused, he may be legally set aside, and the panel completed in the ordinary course.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; W. C. Perrault, Judge.

Baptiste Hill was convicted of horse stealing, and appeals. Affirmed.

John N. Ogden, for appellant. M. J. Cunningham, Atty. Gen., and E. B. Du Buisson, Dist. Atty., for the State.

NICHOLLS, C. J. Defendant was convicted of horse stealing, and sentenced to one year at hard labor in the penitentiary. He has appealed. We will pass upon his grounds of complaint in the inverse order in which they were raised:

1. A motion in arrest was made on the ground that the indictment upon which he

was tried did not allege any value in the property charged to have been stolen. Neither the crime charged, nor the punishment for the same, was dependent upon the value of the thing stolen. The crime charged was a substantive one, independent of the value of the animal taken. There was therefore no reason for making reference to value in the indictment. *State v. Wells*, 25 La. Ann. 372; *State v. Thomas*, 28 La. Ann. 828; 2 Bish. Cr. Proc. (3d Ed.) § 713; Archb. Cr. Pr. & Pl. (Waterman's Notes) p. 334.

2. The court permitted the state to offer evidence to prove the value of the horse stolen, over the objection made by defendant that there was no declaration of value in the indictment. The object of the testimony was to show that the horse, being in possession of the defendant, was sold for an amount totally disproportionate to its value, and from this fact to infer that it had been stolen. No objection was made to the testimony itself, as being irrelevant or improper. We have just said that there was no necessity, for the validity of the indictment, that it contain a recital of value. The matter of value was purely one of evidence on the trial. If the question allowed was a proper and relevant one, it was admissible, without reference to any statement in the indictment on the subject,—the indictment itself being sufficient. Statements not necessary to the validity of the indictment are no more necessary to be alleged in an indictment than in a petition, in order to introduce in evidence, under the indictment, testimony pertinent and relevant to the charge.

3. When the case was called for trial the first juror presented was sworn, he being accepted by both the state and the accused. Eight others had been subsequently similarly accepted and sworn, when the district attorney suggested to the court that the first juror sworn was an uncle of the accused, and should be made to stand aside. The juror having admitted, when questioned, that the fact stated was true, the court—over the objection of the accused that the objection to the juror should have been urged on the *voir dire*, and that, if incompetent, the juror's incompetency was not absolute, but relative—ordered the juror to stand aside. The judge states in the bill of exception reserved to this action that, under the acts of 1877 and 1880, the juror, being related to the defendant within the fourth degree, was incompetent; that this incompetency was unknown to the state at the time of calling, examining, and accepting the juror; that it had the right, under his discretion, to purge the jury of an incompetent juror at any time before evidence was offered; and that no injury could result to defendant by ordering him to stand aside. There is no complaint that the accused had exhausted his peremptory challenges, or that an objectionable juror was forced upon him. We are of the opinion that if, before the trial commences, it is dis-

covered that one of the jurors is incompetent, by reason of relationship to the accused, he may be set aside, and the panel completed in the ordinary course. 2 Hale, Pl. C. p. 296; 1 Bish. Cr. Proc. (3d Ed.) § 947; Thomp. & M. Juries, § 273; Whart. Cr. Pl. & Pr. § 672; Edwards v. Farrar, 2 La. Ann. 307; State v. Diskin, 34 La. Ann. 919; State v. Nash, 46 La. Ann. —, 14 South. 607. Judgment affirmed.

(46 La. Ann. 769)

STATE v. ROBINSON. (No. 11,525.)

(Supreme Court of Louisiana. April 23, 1894.)

CRIMINAL LAW—FORMER JEOPARDY.

1. On the completion and impaneling of a jury, the jeopardy begins. But it begins only when the panel is full. Until full, the jeopardy is not perfect.

2. Without a complete jury, the defendant cannot be conducted to the period of his jeopardy; but after the jury, being full and complete, is sworn, and added to the other branch of the court, and all of the preliminary things of record are ready for the trial, the defendant has reached the period of jeopardy. From the repetition of which the constitutional provision protects him.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

Indictment of Bob Robinson for larceny. Defendant was convicted, and appeals. Reversed.

Robert Whetstone, for defendant. M. J. Cunningham, Atty. Gen. (P. A. Simmons, Jr., of counsel), for the State.

WATKINS, J. In this case the accused was indicted at the September term, 1893, for the crime of larceny, and he was placed on trial, and a jury were duly impaneled and sworn, and the indictment read. At this stage of the proceedings the district attorney requested a temporary suspension of the trial, for the purpose of preparing an application for a continuance, in order to enable him to procure the testimony of an absent witness. This application was granted; the proceedings were temporarily suspended; the motion of continuance was filed, argued, and submitted; this case was continued for the term, and the jury impaneled to try the case were discharged,—the defendant objecting, and retaining a bill of exceptions to the ruling of the judge. At the February term of 1894 the defendant objected to going to trial on the ground that he had been once in jeopardy, and was discharged and released from prosecution by reason of the continuance of the cause, under the circumstances detailed; and to that end he filed a plea of previous jeopardy. This motion was overruled, and he retained a bill. Over his objection, the trial was thereafter proceeded with. He was found guilty, and was sentenced to 18 months' imprisonment in the penitentiary, and from that sentence he prosecutes this appeal.

The question propounded is whether the accused was put in jeopardy by the impaneling of the jury of trial, and the reading to them of the indictment (no testimony having been adduced), and did the discharge of the jury, and the continuance of the case, operate his release from further prosecution? the continuance of the case, and the discharge of the jury, being over the defendant's objection and exception.

It appears, as matter of fact, that the principal witness on behalf of the state had been duly summoned, but was not found by the sheriff, and that certain depositions which had been taken before an examining magistrate, and deposited in the clerk's office, were missing, and could not, after diligent search, be found. In order to obtain the testimony, the district attorney had requested a continuance of the case; and the judge assigned as the reason for granting it that the application proceeded upon the theory that the state was surprised that a part of the public archives of the clerk's office could not be produced, and that that fact did not evidence want of due diligence on the part of the district attorney, in not having previously advised himself of the loss, as that officer had the right to presume the record was in its proper place. The question of discretion in the judge to grant or disallow the continuance depends, however, on the main question of whether the circumstances related disclosed that the defendant was in jeopardy at the time it was granted; for if he was the judge had no discretion in the premises, and if there was no jeopardy he had. An examination of the authorities has satisfied us that the defendant's plea is good, and should have been maintained. Mr. Bishop defines "jeopardy" thus: "If, after the jury have been sworn, and thus the jeopardy has begun, the court, contrary to true practice, discharges them without a verdict, this is, in law, equivalent to an acquittal; and on motion, without plea, the prisoner is entitled to be set at liberty." 1 Bish. Cr. Proc. § 821. Again, that author says: "When, on completing and swearing of the panel, the jeopardy of the accused begins, and it begins only when the panel is full. Until full, the jeopardy is not perfect. In other words, without a jury set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury, being full, is sworn, and added to the other branch of the court, and all of the preliminary things of record are ready for the trial, the prisoner has reached the period from the repetition of which our constitutional rule protects him." 1 Bish. Cr. Law, §§ 1014, 1015. In support of this proposition, many authorities and state decisions are collated, but we have examined and cite the following, viz.: Wright v. State, 7 Ind. 324; Morgan v. State, 13 Ind. 215; McKenzie v. State, 26 Ark. 334; Hines v. State, 24 Ohio

St. 134. In treating of "the essential elements of jeopardy," the following is stated in the American and English Encyclopaedia of Law, viz.: "If there be not a complete panel of jurors, the trial is a nullity and jeopardy does not attach; and a trial without a jury is void, and not a putting in jeopardy. The jury is said to be charged with the prisoner when twelve jurors are duly impaneled and sworn; and, when the jury are thus sworn to try the accused on the charge preferred, jeopardy attaches. If it attaches for the moment only, it is sufficient to put the accused within the provision of the constitution." Volume 11, p. 833, "Jeopardy," § 4, para. 4, 5. Of the authorities cited as supporting that theory, we cite the following, viz.: *Bell v. State*, 44 Ala. 398; *Grogan v. State*, Id. 9; *Newsom v. State*, 2 Kelly, 60. But the principle is stated in *People v. Webb*, 38 Cal. 467, with more accuracy and more elaboration than in any other given case, and the opinion of the court is supported by an array of authorities, English and American. On the foregoing authorities, we consider it a settled principle that, after a jury has been set apart and sworn for the particular case, the defendant has been conducted to his period of jeopardy, and is entitled to the protection of the constitutional bar, in case the jury be set aside against his objection. But this rule is not an absolute one, and applicable to all cases alike. There are exceptional cases, to which the foregoing principles do not apply, as, for instance, where there is any illegality in the composition of the jury, or a disqualified person is found on the panel, or the jury are known to have been guilty of misconduct, for any of which causes the verdict might be set aside. The rule invoked and applied in this case is that when there is a completed jury, duly impaneled and sworn to try the issues joined, and to the legality of which no objection is urged, the accused is, at the moment, placed in jeopardy. But there is no conflict between the principle announced herein and that stated by the court in *State v. Nash*, 46 La. Ann. —, 14 South. 607, to which we adhere. For these reasons, we are of opinion that the verdict and sentence pronounced against the defendant should be annulled and reversed.

It is therefore ordered and decreed that the sentence and judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plea of previous jeopardy be sustained, and the defendant set at liberty.

(46 La. Ann. 490)

STATE ex rel. ALGIERS BREWING CO. v. KING, Judge. (No. 11,503.)

(Supreme Court of Louisiana. March 28, 1894.)
BOND ON APPEAL—SALE OF CORPORATE PROPERTY.

1. An order directing sale of the property of a corporation which is in the hands of a re-

ceiver may be suspensively appealed from by the corporation, on a bond sufficient to cover costs of appeal; the property being in custodia legis, and under the control of an officer of court.

2. Any additional bond which the presiding judge may require, as surety for such damages as may accrue during the pendency of the appeal, is not authorized by law, and cannot be imposed as a condition precedent to the appellant's right to exercise his appeal.

(Syllabus by the Court.)

Application by the state ex rel. Algiers Brewing Company against Frederick D. King, judge of division B, civil district court, parish of Orleans, for mandamus, prohibition, and certiorari.

Frank E. Rainold, for relator. Horace E. Upton, Lazarus, Moore & Luce, El. Howard McCaleb, Bernard McCloskey, and Henry P. Dart, for respondents.

WATKINS, J. This proceeding arises in the case entitled *Lafayette Bank v. Algiers Brewing Company* (No. 39,952) in the civil district court, division B, which court is presided over by the respondent judge, wherein several persons, claiming to be bondholders of the defendant company, intervened, and procured rules on all parties to the suit to show cause why the plant, and all of the paraphernalia and property of said corporation, should not be sold. On the trial of said rules, an order was made by the respondent to the effect that John H. O'Connor, receiver of the Algiers Brewing Company, should, after due advertisement, make sale at public auction of the entire property and effects of said corporation, for cash, for not less than two-thirds of its appraisement. From this order of sale the relator, acting through its president, moved the aforesaid court for a suspensive appeal, upon furnishing bond in the amount required by law; and the respondent fixed the amount of such bond at \$1,000; but, at the same time, requiring of the brewing company, as appellant, that it should furnish "and file, before his appeal bond for costs, * * * his bond, with good and solvent surety, for \$30,000, conditioned for the payment of all such damages as shall be sustained by the receiver and creditors, by the appeal from the order of sale in this case, if it should be decided that such appeal was wrongfully obtained, and illegally kept in force, by the appellant." In relator's petition are stated the grounds of complaint against the sale order thus, viz.: "Now your relator says that the judgment from which an appeal is sought is not a moneyed judgment, nor a judgment for the delivery of movables or immovables, and [the respondent] had no authority or right to demand, besides the appeal bond, the special bond hereinbefore spoken of." He further shows that all the property and assets of the corporation are in the possession and under the control of the said receiver, an officer of the court; and, if same suffer damage or deterioration, it will in no wise be his

[relator's] fault; and he represents that, when property is in the hands of an officer of the court, and there remains, pending the appeal, a bond for costs is all that can be legally demanded of an appellant. In the alternative, he denies that the proof discloses the likelihood of any loss being sustained during the pendency of an appeal. And, finally, the relator avers that the action and order of the judge in requiring a special bond of \$30,000, if maintained, will practically operate a denial of its constitutional right of appeal; they superadding to an appeal bond a requirement that is illegal and contrary to law. Hence his prayer is for certiorari to issue requiring the respondent to transmit to this court a certified copy of the record in said suit, for prohibition to restrain further proceedings in the matter of said sale, and mandamus to coerce a suspensive appeal on relator's \$1,000 bond, which has been already tendered. The respondent has sent up the original records of his court, in lieu of certified copies thereof, because of the delay which the making of certified copies would engender. He returns, substantially, that, in view of the fact that he was unable, at the moment, to fully and definitely determine what the amount of the suspensive appeal bond should be,—taking into consideration the injury which might possibly be wrought to all parties in interest by a suspension, for any length of time, of the order of sale, and at the same time be preservative of the relator's right of appeal,—he made an order for the taking of testimony on that question, regarding such to be a conservative and proper course to be pursued under the circumstances. He further returns that, in his opinion, the testimony taken in pursuance of said order established the fact that great loss and injury would be entailed upon the corporation and its property by the proposed appeal of the relator; a careful summary of the evidence adduced, and the reasons which influenced his judgment in the premises, being given at length. He further returns "that, considering all these facts and circumstances, he considered it in the plain line of his duty, and in the exercise of a just and reasonable discretion, warranted by the settled jurisprudence of this state, to demand a bond equal to the amount of damage likely to result from a suspension of the order from which an appeal was sought;" and hence he made the aforesaid order. He insists that this was a proper case for the exercise of his discretion, and that such discretion was justly and reasonably exercised, and that his action was warranted by the decisions of this court, and notably those in the cases of *State v. Judge*, 19 La. 167; *State ex rel. Coons v. Judge*, 27 La. Ann. 334; and *Hart v. Lararus*, 34 La. Ann. 1210.

The controversy is thus narrowed to one question, and that is whether the relator is entitled to appeal suspensively from the or-

der of sale, upon its furnishing bond in the sum of \$1,000, as fixed by the respondent's order, or was the right of appeal properly conditioned upon relator previously furnishing an additional bond for damages? Relator furnished, and caused to be filed, the suspensive appeal bond of \$1,000, but declined to furnish the additional bond of \$30,000 to cover such damages as may result during the pendency of the appeal. His contention is, substantially, that under an *ex parte* order of the respondent, at the request of plaintiff in the aforesaid suit, a receiver was appointed, who qualified, gave bond, and entered into possession of all the property and assets of the corporation; and is now, and has been at all times since said order was made, in the actual possession, management, and control thereof, for the account of the creditors of the corporation. That certain of the creditors of the corporation, having intervened in said suit, but having obtained no judgments therein, applied to the respondent *pendente lite* for an order for the sale of all its assets and property, as a conservatory measure, in the interest of all parties concerned. That, believing a sale would be injurious, and result in irreparable injury and loss to the corporation, relator applied to the respondent for an order of suspensive appeal, which he granted under the suspensive condition above stated. Of the imposition of this condition, the relator complains that it is illegal and unwarranted in law. It insists that the only judgment which the appellate court could render, adverse to the corporation, would be one affirming the validity and legality of the sale order, directing the sale to be proceeded with; and, inasmuch as the property is in the hands of the receiver, an officer of court, and being operated by him for account of creditors, any loss which might happen during the pendency of the appeal could not be attributed to it; no part of the revenues passing under its control, and no part of the property being under its administration. That the judgment or interlocutory decree which is appealed from is not a moneyed judgment, nor one for the delivery of property, movable or immovable, and, consequently, the only bond that can be required is one that will cover the costs of the appeal; and that any other or different bond which may be required, as an incident of the appeal, is without any warrant in law, and has the effect of a denial of its exercise of the right of appeal, notwithstanding its right to a suspensive appeal is conceded. It is therefore a fact well recognized that the only appeal bond which the corporation was required to furnish was only one that would cover costs, the corporation having been divested of possession by the appointment of a receiver; and, by his investiture of possession, it became a stranger to the litigation quoad the order of sale, and relegated to the rights of a third person.

This statement would seem to close the controversy but for the reasons assigned by the respondent, which are persuasive, though unsound. The only thing the respondent was called upon to determine was the amount of bond necessary for a suspensive appeal from the order of sale; and in order to do that, he was only charged, under the law, to ascertain what amount would cover costs of appeal. This the respondent did. He ascertained and fixed the amount of the bond for suspensive appeal, and the relator gave it. Our predecessors stated the rule comprehensively and accurately in *State ex rel. Durand v. Judge*, 30 La. Ann. 282. "The right of appeal is a precious one," say the court, "and it should be favored and aided by the courts. There should be no difficulty in fixing the amount of the bond for an appeal in any case. Where the judgment is for a specific sum, the party cast must give bond for a suspensive appeal for a sum exceeding by one-half the amount for which the judgment was given. Code Pr. art. 575. If the judgment decree the delivery of movable property of a perishable nature, the security for a suspensive appeal must be for an amount exceeding by one-half the estimated value of such movable. Id. art. 576. But, if the judgment decree the delivery of real estate, not of a perishable nature, security shall only be required to an amount exceeding by one-half the estimative value of the revenue to be derived from such realty, pending suit, and for such further amount as the judge may determine, as surety for any injury or deterioration which may be caused to the estate by the appellant while in possession of the same. Id. art. 577. In all cases not falling within the terms and provisions of these articles, no other security is necessary than such as will suffice to cover the costs." The suit of *State ex rel. Block v. Judge*, 44 La. Ann. 564, 10 South. 866, presents a case of an intervener demanding the right to suspensively appeal from a large money judgment which was awarded the plaintiff against the defendant, sustaining an attachment, on furnishing a bond sufficient to cover costs. The district judge required a bond for one-half above the amount of the judgment, and this court made peremptory a mandamus of the intervener, saying: "The law fixes no standard for the amount of bond to be given by a party who wishes to take a suspensive appeal from a judgment refusing him a participation, with others, in a fund in the hands of the court. A bond for cost is sufficient;"—citing authorities. "The bond could only be for the satisfaction by the surety of the judgment to be rendered on appeal, should the principal fail to pay it. In no event could the relators be condemned, on appeal, to pay more than the costs. Requiring a bond for more would be *oppressive, and an idle formality*." (Our italics.) Succession of *Edwards*, 34 La. Ann. 216. In *Blanchin v. The Fashion*, 10 La. Ann. 345,

the principle is stated clearly: "The expressions of the article (Code Pr. art. 575)," say the court, "imply that the judgment to necessitate a bond in one-half exceeding its amount must be one which the appellant has been condemned to pay. This amount of bond does not, therefore, seem applicable to the case of a judgment where the party appellant is condemned to pay nothing. Accordingly, a bond for costs, only, was held to be sufficient for a suspensive appeal in an action of partition, when the fund to be divided was in the hands of the court." In the case of *State ex rel. Eustis v. Judge*, 27 La. Ann. 685, the court said, very tersely: "As appellant is not in possession of the funds in controversy, he need only give bond for the amount of costs. *Blanchin v. The Fashion*, 10 La. Ann. 345; *State ex rel. Hicky v. Judge*, 20 La. Ann. 108. As he did this within ten days, the appeal operated a supersedeas. Code Pr. art. 575." In *State ex rel. Hicky v. Judge*, 20 La. Ann. 108, it was substantially held that when there is no standard specially fixed by law as the amount of the appeal bond required to operate a supersedeas, pending an appeal, the judge should allow a suspensive appeal on appellant giving bond in an amount sufficient to cover costs. *State ex rel. Sharp v. Judge*, 22 La. Ann. 176; *State ex rel. Gausson v. Judge*, 21 La. Ann. 43. In *Heath v. Vaught*, 16 La. 515, the court put the proposition thus: "The fund out of which all of the claims were to be paid was in court; it is therefore only necessary to inquire what judgment the court can render to determine the sufficiency of the bond. If the appeal should be successful, then *Heath & Co.* are not liable for anything; if they are unsuccessful, they are only liable for costs. The bond is very ample to cover them." In *State ex rel. Pecot v. Judge*, 27 La. Ann. 231, it was held that, inasmuch as the property belonged to a succession, and was in the custody of the court, a suspensive appeal could be taken on the appellant furnishing a bond for costs. *State ex rel. Beebe v. Judge*, 23 La. Ann. 31. To the foregoing authorities others of like purport might be added ad infinitum; but others are not deemed necessary. The tenor and purport of them all is that when the matter, fund, or property in dispute is not in possession of the appellant, and he is not the party concerned by the judgment that is appealed from, but the res is in the hands or custody of the court, appellant is entitled to suspend proceedings under such decree, on furnishing a bond that will cover costs.

The cases cited and relied upon by the respondent are not pertinent to the question before the court. *State ex rel. Coons v. Judge*, 27 La. Ann. 334, involved the case of a relator claiming the right to a suspensive appeal on a bond for costs, in an injunction suit in which he sought to restrain the sale of a valuable steamboat, and in which he claimed a large money judgment against the

defendant; the effect of the appeal being to perpetuate his injunction. His mandamus was refused. In *Hart v. Lazarus*, 34 La. Ann. 1210, the relator was likewise a plaintiff in an injunction suit which had been dissolved, and he sought to obtain a suspensive appeal on a bond for costs; but this court required relator to file an additional injunction bond—not appeal bond—to cover such damages as “shall have been sustained by the injunction heretofore obtained;” not for the purpose of covering possible damages which may result from the appeal. *State v. Judge*, 19 La. 167, presents a somewhat similar question of injunction and like decision. In *State v. King*, 40 La. Ann. 841, 6 South. 108, relator was plaintiff in an injunction suit restraining the defendant from exercising the functions of an office he claimed, and, from an adverse judgment, he asserted the right to appeal, suspensively, on furnishing a bond for costs; and to this effect the mandamus was made peremptory. In *State ex rel. Vial v. Judge*, 36 La. Ann. 910, another case is stated of an injunction dissolved, the only controverted question being the quantum of costs, a question not involved in this case. After having gone over this case very thoroughly, and made a careful examination and analysis of authority on the question involved, we have arrived at a conclusion different from the one entertained by our learned brother of the district court. Waiving any expression of opinion as to the right of appeal in this class of cases,—a question not presented for decision,—our conclusion is that the relator cannot be required to furnish bond to cover damages that may accrue during the pendency of an appeal; and, thus concluding, it is ordered, adjudged, and decreed that the writs prayed for be made peremptory.

(46 La. Ann. 353)

Succession of HOOKE. (No. 11,353.)¹

(Supreme Court of Louisiana. Jan. 15, 1894.)

ADMINISTRATION OF WIFE'S SUCCESSION—RIGHTS OF CREDITORS—COMMUNITY PROPERTY.

Where a matrimonial community of acquets and gains exists, and the wife dies, and her succession is opened by the qualification of the father as natural tutor of his minor children, issue of his marriage with the decedent, a creditor who has obtained a judgment on a community debt cannot compel an administration of the wife's succession. His remedy is to proceed against the surviving husband and the community property.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Petition by James H. Ashbey in the succession of Harriet R. Hooke, wife of Joseph H. Ashbey, praying to be appointed administrator. Judgment in favor of petitioner. Opponents appeal. Reversed.

¹Rehearing refused March 12, 1894.

J. Zach. Spearing, for appellants Joseph H. Ashbey and Mary Ashbey. J. S. Whitaker and Ernest T. Florance, for appellee James H. Ashbey.

PARLANGE, J. Harriet R. Hooke, wife of Joseph H. Ashbey, died in 1884. A matrimonial community of acquets and gains had existed between her and her husband, who is still surviving. Shortly after her death, her husband, alleging that his wife had died intestate, leaving both separate and community property, obtained from the civil district court for the parish of Orleans an order for the taking of an inventory of the property left by the decedent. He was appointed, and he qualified, as the natural tutor of his three minor children, issue of his marriage with the decedent. An under-tutor was also appointed and qualified. The inventory amounted to \$12,456.15½, the interest of the decedent in the community property being valued at \$1,869.37½, and her separate property at \$10,586.78. In 1885, Mary Y. Ashbey, as natural tutrix of her minor children, obtained a judgment in said civil district court against Joseph H. Ashbey, on a balance of account for \$5,437.92 and interest, which account Joseph H. Ashbey had rendered Mary Y. Ashbey prior to the death of the wife of Joseph H. Ashbey, and which account constituted a community debt. In 1893, James H. Ashbey filed a petition in the succession of Harriet R. Hooke, wife of Joseph H. Ashbey, alleging that Joseph H. Ashbey, since his appointment as natural tutor of his children, and since the taking of the inventory, has taken no action whatever in said succession; that the same remains unsettled; that Joseph H. Ashbey refuses to either settle or acknowledge claims against said succession; that he refuses to represent the same; that the petitioner is a creditor of the same, and prays to be appointed administrator. The application is opposed by Mary Ashbey, one of the heirs, now of age, of the deceased wife of Joseph H. Ashbey, and by the latter as natural tutor of one of his children, for the reasons that the application is not properly made or filed according to law; that James H. Ashbey is not a creditor of the succession, and has no right, and is not a proper person, to be appointed administrator; and that the succession owes no debts, and the appointment of an administrator is unnecessary. The opponent Joseph H. Ashbey prayed in the alternative to be appointed administrator in case petitioner's application should not be rejected. On the trial of the matter James H. Ashbey offered in evidence the judgment rendered against Joseph H. Ashbey in 1885, and also the account upon which that judgment was based. James H. Ashbey also offered a judgment of said civil district court, rendered in 1893 in the succession of one James H. Ashbey, recognizing and putting in possession his sole heirs, among whom is James

H. Ashbey, the party to the instant case. We understand that the claim of the latter to be a creditor of the present succession is founded on the fact that the judgment against Joseph H. Ashbey belonged to the succession of one James H. Ashbey, of whom the James H. Ashbey, party to the instant case, is one of the heirs. The lower judge rendered judgment ordering an administration, and he appointed Joseph H. Ashbey the administrator. The opponents have appealed. In our opinion, the judge *a quo* erred. Under the circumstances of this case he should not have ordered an administration. It is settled that, notwithstanding the actual dissolution of a matrimonial community of acquets and gains by the demise of one of the spouses, it has a fictitious existence subsequently for the purposes of liquidation and payment of community debts. Succession of Dumestre, 42 La. Ann. 411, 7 South. 624; Insurance Co. v. Levi, 42 La. Ann. 434, 7 South. 625; Landreaux v. Louque, 43 La. Ann. 234, 9 South. 32, and cases therein cited; Succession of Cason, 32 La. Ann. 792. The judgment being a conceded community debt, we see nothing to prevent its owner or owners from proceeding against Joseph H. Ashbey, who was the head of the community, and against the community property, for the satisfaction of the judgment. It is therefore ordered that the judgment appealed from be annulled, reversed, and set aside, and that the application of James H. Ashbey for an administration of the succession of Harriet R. Hooke, deceased wife of Joseph H. Ashbey, be, and the same is hereby, rejected and dismissed, at the cost of said James H. Ashbey in both courts.

(46 La. Ann. 347)

Succession of REISS.¹ (No. 11,847.)

(Supreme Court of Louisiana. Feb. 12, 1894.)

GRANDPARENTS—RIGHT TO VISITS FROM GRAND-CHILDREN—JUDICIAL ENFORCEMENT.

Plaintiff, the mother-in-law, appeals from a judgment ordering her son-in-law to send his children, aged, respectively, six and eight years, issue of the marriage with her late daughter, to visit her, and directing further that she shall visit the grandchildren at their father's home in alternate weeks, on such days as the parties may agree. She complains of the judgment in so far as she is to visit the children, and asks that it be limited to the imperative duty of the children to visit her. There is very little difference in principle between the parties as disclosed by the evidence. The husband does not deny the filial piety that is due by the children. Differences and incompatibilities have arisen shocking to the grandparent and that may prove painful, in course of time, to the children. The question is of first impression in the courts of this state. In France, under similar laws, the courts and commentators greatly differ upon the subject. There are well-considered decisions holding that the precept, "Honor thy father and thy mother," as embodied in the Civil Code, includes the grandmother or

grandfather as a legal obligation. Other courts and certain writers lay down the principle that under a law of nature the child is under the authority of the father or mother alone, and that the law has conformed to natural law, and that the judge has no authority to intervene. The court of the first instance has pronounced judgment based upon the principles that the parties in their testimony admit are correct, but which they have not followed. On appeal to this court it does not appear that there is cause for judicial intervention.

(Syllabus by the Court.)

Appeal from district court, parish of Orleans; George H. Theard, Judge.

In the matter of the succession of Louise Marie Reiss, wife of Henry J. Rolling, Jr. On rule by the mother of said decedent to compel said Rolling to allow his children to visit her. From the judgment said plaintiff in rule appeals. Reversed.

Aristee L. Tissot, for appellant. Bernard McCloskey, for appellee.

BREAUX, J. The father and tutor of two minor children, one eight and the other six years of age, is defendant in a rule issued at the instance of their maternal grandmother to compel him to send his children to visit her at her residence and domicile on such days and at such hours as the court may deem proper to determine. She alleges that he arbitrarily, wantonly, maliciously, and cruelly denies her the privilege of seeing her grandchildren, thus abusing parental authority, controllable by the courts. The defendant denies that he has refused to mover in rule the privilege of visiting his children, and averred that he is willing that she shall visit his children. The judgment of the court *a qua* makes the rule absolute, and orders the father to send the children to visit their grandmother, and further orders that the grandmother shall visit the children at their father's home, in alternate weeks, on such days as the parties may agree, provided the visits do not in any manner interfere with the schooling of the children. Before this court the appellant asks that her rule be made absolute, commanding the defendant to send the children to visit her, without reference to any visit by her. The appellee, in his answer to the appeal, prays for a dismissal of the rule. The mother of these children has been dead about six years. They live with the father. The relations between the son-in-law and mother-in-law are not only strained, but acrimonious. More than three years have elapsed since he has sent his children to visit their grandmother. She has requested him, she testifies, to send them, but he failed to comply with the request. The defendant's household consists of his father and other members of his family. They and the children live at the same residence. The relations of plaintiff with the members of the son-in-law's family are not, it seems, of the most pleasant character. The plain-

¹ Rehearing refused March 12, 1894.

tiff, by her testimony, creates the impression that the coolness and feeling existing would render the visit anything but pleasant. Moments with her grandchildren while on such visits, which, under other circumstances, would be highly enjoyed, at this time would possibly only cause irritation and bad blood. The differences are, we are led to believe, of an entirely personal character, and have no reference to the standing of the parties, in regard to which there is not the most remote suggestion. The plaintiff states as a witness that she does not entertain any objection on that score. The witness testifies: "Q. Have you visited those children at the house of their father? A. No, sir. Q. Why not? A. Why not? Because I thought they should be sent to see me, and not to go there and see them. Q. Why not call upon these children at the home of their father, to see them? A. Because I thought it was proper to send them to me. Q. Is that the only reason? A. That is my reason that I wish to give. Q. Do I understand you, then, as refusing to visit those children at the house of their father? A. No, sir, I don't refuse; but I have other reasons. I may be wrong, but at the same time I have never visited the Rolling family; and I did not think it was my place to go to see those children there, as I think their place was to come and see me." When examined as a witness, the son-in-law, in answer to the question: "Q. Don't you think that there is a law of nature that children should visit their grandparents? A. I think that's right." Manifestly the difference between these parties is inconsiderable, and would not be sufficient to arrest attention, were it not that it affects the good relation and intimacy that should prevail between these little children and their grandmother. While we appreciate the affection that moves her to seek the occasional company of the offspring of her daughter, this court's jurisdiction does not include the cause pleaded. The issue is not incidental to any other cause. However disinclined we are to discountenance causes of action such as the one under consideration,—for they are inspired by a true and commendable impulse,—we find no authority in law to entertain jurisdiction of the issue presented. The question involved is *res nova* in this state.

In interpreting articles of the Civil Code in France similar to ours on the subject, the courts and commentators greatly differ. There is respectable authority listed in favor of the precept of Deuteronomy, "Honora patrem tuum et matrem," embodied in the Civil Code as including also the grandfather and the grandmother. They construe under the articles of this Code that the obligation involved in the case at bar, legal in so far as relates to the father and mother, is legal also in so far as relates to the grandfather and the grandmother, and that the court

can intervene for its enforcement without regard to the will of the father or mother. Other courts hold, and other commentators state, that under the law of nature the child is under the authority of the father or mother after the death of either. We translate from 4 Laurent, p. 362, who propounds the question, can the ascendant demand that the authority of the father and mother be limited? In truth, the ascendants have certain rights that the law, in accord with nature, gives them; but only when the father and mother are dead, or are incapable of manifesting their will. During the existence of the father and mother, the law properly accords them no authority over the children. To permit them to intervene would occasion embarrassment and annoyance; even more, it would injuriously hinder proper paternal authority by dividing it. The authority sought is said to be in the interest of the children. Are the children interested in anything in the nature of a conflict of authority? Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their grandchildren be strengthened and unceasing, but, if there is a conflict, the father alone or the mother should be the judge. The law gives no right of action to the grandparents. The father may have good reasons to avoid all contact between his children and their grandparents,—either that he fears that they may inculcate bad principles, or that they will unsettle the respect and affection due him. He owes no account to any one for his motives. They may be so intimate that the honor of the family requires that they shall remain a secret. Shall we say that the judge shall be the arbitrator between the grandparent and the father? The court of Bordeaux replies that the intervention of the tribunals would, as a consequence, render the dissensions of the family more pronounced by delivering them to the public. Other views than these above expressed, says the commentator, would be proper on the part of the legislator. We do not understand them when emanating from interpreters of the present laws. We refer approvingly to the French authorities only so far as they lay down the principles that there is not a *vinculum juris*; that the obligation ordinarily to visit grandparents is moral, and not legal. There may be cases of downright wrong and inhumanity demanding judicial intervention, even to the extent of dismissing the father and tutor from his trust. The case at bar does not disclose so grave an issue. Ill feeling and bad blood separate the father and grandmother. The former admits the respect due to the latter by his children. The ties of nature will prove more efficacious in restoring kindly family relations than the coercive measures which must follow judicial intervention. It is therefore ordered, adjudged, and decreed

that the judgment of the court a qua be annulled and avoided, and that the rule be dismissed, at plaintiff's costs in both courts.

(46 La. Ann. 738)

Succession of TROXLER. (No. 11,432).¹
(Supreme Court of Louisiana. March 12, 1894.)
ADMINISTRATOR'S ACCOUNT—OPPOSITION—OBJECTIONS AS TO SALE—SETTLEMENT PENDING SUIT—EFFECT.

1. Though the issues raised in an opposition to an administrator's account may be such as to require to be disposed of by a direct action, the opposition may stand by way of notice.

2. In proper cases, where the result of a pending suit is dependent upon the decision in another, proceedings in the first may be stayed to await that decision.

3. The actions of an administrator should be subjected to full investigation. Whenever they appear of questionable legality, ratification of the same should be established by very clear proof. Whenever practicable, light should be thrown on, in aid of right.

(Syllabus by the Court.)

Appeal from district court, parish of St. Charles; Emile Rost, Judge.

In the matter of the succession of Rosemond Troxler. On opposition by Rosemond Troxler, grandson of said decedent, to tableau of distribution filed by the administratrix. From a judgment for the administratrix, said opponent appeals. Reversed.

Gus A. Breaux, for appellant. T. J. Sames & Legendre, for appellee.

NICHOLLS, C. J. Rosemond Troxler died in August, 1880, leaving a widow, several children, and one grandchild,—Rosemond Troxler, Jr.,—the child of a predeceased son. Three of the children were minors, and of these their mother was appointed and qualified as natural tutrix. The grandchild was also a minor, and his mother was appointed as his tutrix. Upon the application of the widow, an inventory was taken of the property of the succession on the 25th and 26th of October, 1880. This property, as appears by the inventory, was valued at \$10,708.72, and was all described as community property. The recapitulation shows:

1. Total value of real estate.....	\$ 4,300 00
2. Total value of crops.....	2,600 00
3. Total value of movable property.....	1,828 15
4. Total amount of active credits left by deceased, consisting of promissory notes, debts due said deceased by verbal obligation, and cash	1,980 57

Total amount..... \$10,708 57

In December, 1881, Mrs. Marie Troxler, the widow, filed a petition in which she alleged that the inventory which had been taken was erroneous, and that it was necessary that a new one should be made. She further averred that, in order to settle the succession, it was necessary that an administrator be appointed. The inventory asked for was

made on the 24th and 27th January, 1882; and the applicant was, after advertisement and delays, qualified as administratrix. In the second inventory, a certain tract of land, which had been described in the first as community property, was declared to be, and inventoried as, separate property of the deceased, and valued at \$3,000; and a one-fourth interest in a certain sugar house, which likewise had been mentioned as belonging to the community, was declared to have been erroneously so described, and inventoried as separate property of the husband, and valued at \$500. The sugar crop, which had been estimated at the sum of \$2,600, had been in the mean time manufactured, and had netted, not the amount stated, but the sum of \$1,094.10; and the rice crop netted \$140.10, instead of \$225, the sum it had been expected to realize. In March, 1882, upon the application of the widow, who represented to the court that all of the property dependent upon the succession of her late husband, save that mentioned as separate in the second inventory, was community property, she was placed in possession of the same, as usufructuary. Simultaneously with the application just mentioned, she prayed for a sale of the separate property, declaring the sale to be necessary to pay the debts of the succession. The property was sold under an order of court rendered upon this prayer, and at the sale the widow became the adjudicatee, at the price of \$3,000. On the 1st June, 1882, the administratrix filed a petition in which she declared that, as survivor in community, she had claimed and been awarded the usufruct during her natural life of the property, depending upon the community between herself and her husband; that the separate property, as shown by the inventory, consisted in a sugar plantation, and the undivided one-fourth of a sugar house thereon; that she had caused said property to be sold, according to an order of court, to pay debts, and from said sale she had realized the sum of \$3,000; and that she presented a tableau showing the proper disposition to be made of that fund. She prayed that notice of the filing of said tableau be given by publication, and by personal service upon the heirs, and that all parties be ordered to show cause why the tableau should not be homologated, and the administratrix authorized to make payments accordingly. In the tableau referred to, the administratrix charged herself with the sum of \$3,000, as proceeds of the sale of the separate property; and she proposed to account for that amount by paying out of that sum \$505.93, which seem to be the entire costs of the administration of the husband's succession, and \$2,273.71 as an amount due the administratrix individually, by her husband's succession, for a like amount of her separate funds received by her husband for her account, which had never been turned over to her, but had been

¹ Rehearing refused April 23, 1894.

expended by him. The tableau closes by the following recapitulation and statement:

Amount of assets.....	\$3,000 00
Amount of debts.....	2,889 64

Balance for distribution.....	\$ 110 36
The heirs are five in number, making the share of each.....	\$ 22 07

At the foot of the tableau we find the following statement: "I have examined the above and foregoing tableau, and find the same to be correct, and have no objection to the same being homologated. St. Charles, May —, A. D. 1882. [Signed] Justine Bourgeois. Francois Troxler. Edward Troxler. Louisiana Troxler. Fst. Martin,"—and under these signatures the following: "The within petition being considered, the prayer thereof is granted. St. Charles, May 31st, A. D. 1882. [Signed] M. Hahn, Judge."

We find no order homologating this tableau. Justine Bourgeois and Francois Troxler, who signed the above consent, were the tutrix and under-tutor of the minor Rosemond Troxler, Jr. This minor was emancipated, and relieved from the disabilities which attach to minors, on the 14th January, 1889, by judgment of court. Subsequently to this he signed the following receipt: "Received, parish of St. Charles, March 3, 1891, from Mistress Marie Pollmine Troxler, widow of the late Rosemond Troxler, administratrix of her said husband's succession, the sum of thirty-one dollars and ninety cents, being amount due me as per tableau of distribution, and interest thereon, filed June 1st, 1882, as heir therein by representation of my father, Lucien Troxler. \$31.90/100. Rosemond Troxler." In October, 1891, he filed an opposition to the tableau of distribution which had been filed in the succession of his grandfather by the administratrix. In this opposition he averred that he only became of age in the year 1891; that he opposed the tableau because it failed to account in any manner for the large personal property shown to have belonged to the estate, in the hands of the administratrix, and much more than was sufficient to have paid any debt existing, and the sale of the real estate was illegal and unwarranted, because, as there were in existence, and in the hands of the administratrix, funds and personal assets belonging to the community and estate of the deceased more than sufficient to pay all indebtedness alleged to be due, she could not legally ask for the sale of real estate, the separate property of the deceased, to reimburse to herself her alleged paraphernal dues, even if real, and this indebtedness was exclusively that of the community; that the sale to the administratrix was invalid, illegal, null, and void, because, further, as the judicial representative of the estate, she could not purchase it at a sale provoked of the separate and sole property belonging to the estate; that the order of sale rendered March —, 1882, was illegal, and improvi-

dently issued, and was a nullity. The prayer of the opposition was that the tableau be rejected, annulled, and set aside; that the sale of the real estate be decreed null and void, and of no effect. The administratrix excepted to the opposition on the ground: (1) That opponent could not attack the sale described, for the reason that he received from her in March, 1891, under a final settlement then made, his share of the proceeds of said sale; that he ratified it, and is estopped from questioning its validity. (2) That said settlement cannot be set aside, unless it be for error or fraud, neither of which is alleged. (3) That he cannot attack by an opposition the sale described in his petition; that a direct action is necessary. (4) That the property described in his opposition now belongs to J. C. Friche; that all parties in interest are not before the court. (5) That the decree of the court under which the sale was made cannot be attacked collaterally.

On the trial, judgment was rendered in favor of the administratrix, and against the opponent, and dismissing the opposition. In passing upon the case, only one issue was examined and disposed of by the court. It held that the receipt given by the opponent, as explained by his testimony, was a complete ratification of the acts of the administratrix, under article 1875 of the Revised Civil Code. Opponent has appealed, and the administratrix has moved to dismiss the appeal on the ground: (1) That the petition for appeal is not addressed to the court which rendered the judgment appealed from; it being addressed to the judge of the twenty-sixth judicial district court, instead of the twenty-first judicial district court. (2) That the bond of appeal is made payable to the clerk of a district different from the one in which the case was tried and decided; said case having been tried and decided by the twenty-first judicial district court for the parish of St. Charles, and the said bond being made payable to the clerk of the twenty-sixth judicial district court for the parish of St. Charles.

The designation of the district as the twenty-sixth judicial district was an immaterial clerical error. The proceedings were all carried on in the judicial district court of the state of Louisiana for the parish of St. Charles. The petition of appeal was addressed to that court, and the bond was made payable to the clerk of that court. That was sufficient. See *Clark v. Comford*, 45 La. Ann. 502, 12 South. 763. The motion to dismiss must be overruled.

The district judge having expressly referred to the testimony of the opponent in connection with the receipt, it may be well, as it is not long, to state it. He stated: "I was given no written statement, or written paper were submitted to me, at the time I signed that receipt. The nature of the settlement made with me on March 3, 1891,

explained nothing to me. Mr. Friche [the person acting for the administratrix in the matter of the payment] told me at that time that that was my money, and that he wanted to pay it. I was shown none of the succession papers, and was told nothing about them." On cross-examination he stated: That the account of the administratrix was not shown to him. That he figured the amount of interest due him. He knew what he was about. He did not remember what was the result of the calculation. He received from Mr. Friche \$31.90. That his grandmother promised to give him \$100. He told Mr. Friche, at the time of the settlement, that his grandmother had promised him \$100. Friche told him that was all she gave him to give him. Then he took it. That the settlement is incorrect, because she gave the others \$100, and she promised his mother to give him \$100, so his mother told him. That he did not know to what he was entitled. He did not say the settlement of March 3d was incorrect. He did say his grandmother promised his mother \$100. He knew nothing about it. He knew that his grandmother gave her other children \$100 because she told his mother, and she told him. That he did not know what he was entitled to as heir of his grandmother. He did not know what the debts of his estate amounted to. He was 22 years of age. Came of age on the 5th February, 1891. He knew that a proper settlement of the estate according to law would show what he was entitled to, and he had employed a lawyer to find that out. J. C. Friche (who, as we have said, was the party representing the administratrix in the payment), being placed upon the stand, deposed that he showed the opponent the account in the succession of Troxler, and that he took the figures therefrom, and computed the interest thereon; that he (witness) took the account, and took the amount therefrom for his calculation, and he told opponent the amount. That witness is a son-in-law of administratrix, and is, we presume, the party referred to in the pleadings as the present owner of the property whose sale is attacked, he holding it by purchase from the administratrix after she had herself bought it. Opponent's counsel is in error in stating that the act of sale to J. C. Friche was never offered in evidence, and that it is improperly in the record. The act was offered, and admitted over opponent's objection, and a bill of exception was reserved.

We are of the opinion that the issue which the opponent tendered, and seeks to have disposed of, touching the legality of the sale made in the matter of the succession of his grandfather, cannot at this time, and in the present form, be passed upon; that a direct action for that would be necessary; and, inasmuch as the property appears to have passed into the hands of a third person, that it would be proper to make him a party

to that suit. *Cathey v. Kerr*, 15 La. Ann. 228; *Succession of Sanchez*, 41 La. Ann. 506, 6 South. 791. If such an action were brought, and should terminate favorably to the plaintiff, the direct result of the decision would be to do away with the account filed by the administratrix. That account is not a general settlement of the affairs of the succession of Rosemond Troxler, carrying with it, as incidental thereto, a full and complete settlement of the community of acquets and gains. The account is nothing more than a proposed application of the fund or price arising from the succession sale of a specific piece of real estate which belonged to the separate estate of the deceased, and of which she had become the adjudicatee, to the payment of a claim alleged by the administratrix to be due to her by reason of her husband having received and expended, and not accounted for, certain of her paraphernal funds, and to the further payment of the entire expenses of the administration of the succession. The administratrix singled out one particular act in her administration, and made it the basis, and sole basis, of the account she filed. There has been no attempt, even up to date, to liquidate the community; and prior to her appointment as administratrix the widow had caused herself, by an ex parte order, to be placed in possession of all the community property, as usufructuary, under the act of 1844. *Succession of Fitzwilliams*, 3 La. Ann. 489; *Succession of Bringer*, 4 La. Ann. 389; *Day v. Collins*, 5 La. Ann. 588. At the time of the death of her husband, very considerable property—real and personal rights and credits—were left, belonging to that community. The property of the separate estate, consisting of a small plantation, and an interest in the sugar house, which were inventoried together at \$3,500, was subsequently purchased by her at a succession sale, which was made upon the ex parte application of the administratrix, as necessary to pay debts by the administratrix, at \$3,000. The small balance left after payment of the expenses of administration and the claim of the widow is declared to be the amount due to the heirs of the husband; and it is the receipt by the opponent of the one-fifth of this amount upon which the district court acted in reaching its conclusions. *Prima facie*, the receipt and expenditure by the husband of the paraphernal funds of the wife would give rise to a debt by the community, and would be primarily payable out of community assets. *Lawson v. Lawson*, 12 La. Ann. 604; *Downs v. Morrison*, 18 La. Ann. 379. We say "*prima facie*," for the husband's separate estate might, under exceptional circumstances, be held liable to a claim of that character, as for a debt due by himself individually.

The manner in which the succession of Troxler has been conducted has not been such as to impress us as calculated to lead

up to correct legal results. It will be seen from the recitals made that, even should plaintiff fail in an attempt to have the succession sale set aside, he would still be in position to question the application of the price as attempted to be made, unless, by some act of his own, he has deprived himself of that right. If he has done so, it would be upon the theory of a ratification by him of everything which had been done. We are not satisfied that opponent, at the time he received the money, had such a knowledge of the situation as should bind him by ratification. *Rivas v. Bernard*, 13 La. 168; *Bennett v. Bennett*, 12 La. Ann. 254; *Williams v. Car Co.*, 40 La. Ann. 93, 3 South. 631; *Breaux v. Sarvoie*, 39 La. Ann. 246, 1 South. 614; *Rist v. Hartner*, 44 La. Ann. 382, 10 South. 760. As between the parties to transactions whose legality is fairly debatable, the doctrine of ratification should not be too rigidly applied. Light should be permitted to be thrown in, as far as possible, in aid of right. We are exceedingly doubtful whether the opponent was aware that the particular property which was sold had been dealt with as the separate property of the grandfather, or knew the circumstances under which the funds of the grandmother had been received by him, or how they had been applied. In commenting on the administration of the widow, we leave matters completely at large, our remarks being intended simply as explanatory of our reasons for doing so. We think the ends of justice would be best attained, in this case, by subjecting the administration to full investigation, and to the tests of law. Although, in this case, the legality of the succession sale cannot be passed upon, the opposition filed is not without some effect upon that question. In the *Succession of Bartlett*, 21 La. Ann. 532 (on rehearing), an opposition which was dismissed for want of jurisdiction was none the less held good as a notice; and in *Succession of Sanchez*, 41 La. Ann. 506, 6 South. 791, the court, referring to the opposition in that case, recognized that accounts could sometimes be properly withheld from homologation, to await judgment in another suit, which, when decided, might have a controlling influence on the pending case. In the case at bar, we feel satisfied that all the claims for succession expenses have been paid by the usufructuary, whose duty it was to have done so long ago, and that the payment of no debts will be held up by the nonhomologation of the account for the present.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, annulled, avoided, and reversed, and this case is hereby remanded to the lower court for further proceedings according to law, with leave granted to the opponent to amend his pleadings.

(46 La. Ann. 879)

ADLER et al. v. BURTON LUMBER CO.
(No. 11,485.)

(Supreme Court of Louisiana. March 12, 1894.)

SALE — VENDOR'S PRIVILEGE — PURCHASE-MONEY NOTES — NOVATION OF DEBT — SEQUESTRATION PROCEEDINGS—SALE BEFORE JUDGMENT.

1. The vendor preserves his privilege though he takes notes for part of the price, and no presumption that he novates the debt and extinguishes the privilege arises from the fact that in acknowledging delivery of the notes he gives a receipt worded, "I acknowledge receipt of the price, payment being satisfactory, and in notes," especially when, by the contract, notes were to be given for part of the price, and, besides, when it appears by the testimony no novation was intended. To hold that the privilege of the vendor was extinguished under such circumstances would be subversive of the principle that novation is never presumed, but is accomplished only by the discharge of the debt or express agreement of the parties. *Civ. Code*, arts. 2185, 2190, 3227; *Bourgeat v. Smith's Syndics*, 16 La. 469; *Bergeron v. Patin*, 34 La. Ann. 535; cases collected in 2 *Hen. Dig.* p. 993, par. 1; *Bacchus v. Moreau*, 4 La. Ann. 313; *Boner v. Mahle*, 3 La. Ann. 600.

2. To sell the property of a defendant before any judgment against him is to exercise power which, if the courts can exercise it, should be exerted only in exceptional cases; and this is not such a case.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; George W. Buckner, Judge.

Action by A. Adler & Co. against the Burton Lumber Company to compel payment of certain notes. From a judgment dissolving a writ of sequestration and dismissing plaintiffs' application to sell property for the purchase price of which the notes were given, plaintiffs appeal. Affirmed in part and reversed in part.

Kernan & Laycock, for appellants. C. C. Bird and Alvan E. Read, for appellee.

MILLER, J. The plaintiffs, holders of promissory notes given by the defendant for the credit portion of the price for certain logs purchased by them, bring this suit to compel payment of two notes. The original and supplemental petitions set forth the purchase of the logs by defendant, the execution and delivery of the notes in part settlement of the price, the acquisition of the notes by plaintiffs, and there is the averment that plaintiffs were informed and believe that the notes are secured by the vendor's privilege. On these petitions, supported by affidavits, a writ of sequestration issued, and the logs were seized by the sheriff. The plaintiffs soon after applied for an order to sell the property *pendente lite*, on the ground that, lying in the Mississippi river, it was expensive to keep, and liable to be lost. The defendant moved to dissolve the writ on the grounds that the affidavit was insufficient and that plaintiffs had no privilege. The lower court dissolved the writ on both grounds, and dismissed plaintiffs' application to sell

the property. From this judgment plaintiffs appealed.

The motion to dismiss for supposed insufficiency of the affidavit is based on the averment in the petition that plaintiffs are informed and believe that the notes are secured by the vendor's privilege. This privilege arises from the nature of the debt. The petitions set forth that debt; i. e. that the notes were given to the vendor by the defendant for the price of the logs, and that the notes are unpaid. These allegations are supported by the required affidavit. The averments in the petitions that plaintiffs are informed and believe that the notes are secured by the vendor's privilege, announce merely the legal conclusion necessarily arising from the facts stated in the petitions, and sworn to by the attorney for plaintiffs. We cannot perceive any defect in the affidavit. It was stipulated in the contract for the purchase of the logs that the notes were to be given for part of the price. The vendor from whom or through whom plaintiffs acquired the notes gave to defendant a receipt reciting the receipt of the price of the logs, stating settlement in full, with this addition: "The payment being all satisfactory, and in notes." The contention of defendant is that under this receipt expressing "payment in notes" there is no privilege on the logs; or, in other words, that the privilege of the vendor is destroyed because of the form of this receipt. The vendor's privilege arising by operation of law from the contract itself is not readily presumed to be relinquished. The privilege exists without stipulation, and its relinquishment is to be deduced not from inference, but only from the consent of the vendor, expressed or plainly implied. *Bacchus v. Moreau*, 4 La. Ann. 313; *Boner v. Mahle*, 3 La. Ann. 600. It is not easy to infer any release of the privilege from the form of this receipt. After all, the supposed relinquishment involves the question of intention. It would be forcing the significance of words to hold that the vendor intended to surrender his privilege by the words "payment in notes." The words themselves imply not a payment absolutely, but the giving of notes to represent the price. Of course, novation of the debt extinguishes the privilege. But is there any novation by the creditor taking notes from the debtor for the debt? This would seem to be answered in the negative by the text of the Code that the privilege subsists though the creditor take a note, and by the articles of the Code defining novation. Civ. Code, arts. 3227, 2185, et seq. Novation not arising from the fact that the vendor takes notes for the price, nor arising from any inference consistent with the significance of the language of the receipt, the remaining contention of defendants is that the receipt expresses payment of the debt. Does it? The receipt is qualified. It is receipt for the price, "payment in notes."

The qualification is material. Its import is that the debt is not paid, but still subsists in the form of notes. The receipt imparts a mere change of form, but the debt itself, with the privilege attached to it, remains. In reaching this conclusion we are aware there are some dicta seemingly to the contrary as to the import of "received payment by notes." We cannot give to the words used here the meaning of an absolute payment,—a meaning we think repelled by the language and the manifest intention of the party. We are aided, too, in this case by the proof in the record that there was no intention to novate. The authorities later in date in our Annual Reports sustain, we think, our conclusion; and, as to the French authorities arrayed in the brief of plaintiffs, they are practically unanimous that there is no relinquishment of this privilege in a case like this. See *Bourgeat v. Smith's Syndics*, 16 La. 469; *Bergeron v. Patin*, 34 La. Ann. 535. But the application to sell the property pendente lite we do not think should prevail. To sell a defendant's property before any judgment against him for the debt seems to us as involving the exercise of power which, if it exists, at least is to be exerted only in exceptional cases. Without passing on the question of power at all, it suffices to say we decline its exercise in this case. The views we have expressed control the decision, and obviate more detailed reference to other points in plaintiffs' brief, to which we have given careful attention. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed in so far as it refuses the application to sell, and reversed in so far as it maintains the motion to dissolve plaintiffs' writ of sequestration, and appellee to pay costs.

(46 La. Ann. 536)

EAST LOUISIANA R. CO. v. CITY OF NEW ORLEANS. (No. 11,378.)

(Supreme Court of Louisiana. March 26, 1894.)

RAILROAD COMPANIES — SALE OF FRANCHISE — RIGHT OF WAY THROUGH CITY—REVOCATION OF GRANT.

1. Section 4 of Act No. 135 of 1888 applies to street railways operated within the corporate limits of the city of New Orleans.

2. The city council of New Orleans has the power to refuse the grant for a right of way through the streets of the city to a railroad operated beyond the city limits. It can also demand a price for the privilege; and it can also, if it deem the exercise of the power reasonable and proper, grant the right of way to a railroad operating its lines beyond the city into other territory, without compensation in money, but for other considerations.

3. In such a case, if the grant is accepted, it is irrevocable, except for a violation of its terms.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Suit by the East Louisiana Railroad Company against the city of New Orleans to

declare null and void an ordinance of such city. Judgment for plaintiff, and defendant appeals. Affirmed.

E. A. O'Sullivan, City Atty., for appellant. Farrar, Jonas & Kruttschnitt, for appellee. Charles Louque, *amicus curiae*.

McENERY, J. The plaintiff company has its domicile in the parish of St. Tammany, and operates a railroad from Pearl River station, on the line of the New Orleans & Northeastern Railroad Company, to Covington, in said parish, with a branch to Mandeville, and has 38 miles of road in active use. The charter of the company confers the power to extend the road to points in Mississippi and Louisiana. By an arrangement with the Northeastern Railroad Company, it runs its trains on that road to the city of New Orleans, at its terminus on Press street. To facilitate its business in the transportation of freight and passengers, and for the convenience of its patrons, it obtained from the city council of New Orleans, by Ordinance 6139, the privilege to construct and operate a railroad with steam power from a point on the Northeastern Railroad, where it intersects Edinburgh avenue, through said avenue to Bayou St. John, across said Bayou St. John to the roadbed of the Spanish Fort Railroad, and over said roadbed to the corner of Canal and Basin streets. No price was paid for this grant, and the consideration alleged is the convenience of the citizens of New Orleans, in giving them better access to the trains of the plaintiff company, which at present are some distance from the center of the city. The plaintiff company accepted the grant, and proceeded to comply with it, and expended some \$3,000 in work, and, in anticipation of its benefits, constructed the Mandeville Branch. No price having been paid for the grant, the city council, believing it to be null and void, repealed the ordinance granting it. Hence, this suit to have declared null and void the repealing ordinance.

The action of the city council was based on the provisions of section 4 of Act No. 135 of 1888. This section of the act manifestly applies only to street-railway franchises granted for the purpose of operating a road exclusively within the city limits. It does not apply to railroads conveying the mails, and transporting freight and passengers long distances beyond the limits of the city. The legislature never intended—and, in the nature of things, such intention would be impracticable in execution—to cause railroads coming into the city from a distance to have the franchises of the right of way sold at stated times to the highest bidder. The act is limited in its application when it says that the city council shall have no power "to sell or dispose of any street railroad franchise except after at least three months' publication of the term and speci-

cation of said franchise and after the same has been adjudicated to the highest bidder by the comptroller, as provided by the city charter." No latitude of construction could make the provisions of this section of Act No. 135 of 1888 extend to other than roads which are operated exclusively within the corporate limits. The fact that the plaintiff's road reaches the city over another road does not change its character into a street railway. Its attempt to reach the road over which in part it runs its trains is a matter of convenience. Its destination is still beyond the city limits, and practically it is a continuous line of road from the city to its objective point,—Covington. If it ran its trains only from its intersection with the Northeastern Railroad within the city limits, and carried passengers and freight between these points, it would be classed as a street railway, and come within the provisions of section 4 of Act No. 135 of 1888. But this is not a fact. The object of the plaintiff company is to carry freight and passengers on its own cars beyond the city limits to Pearl River station, where they will reach its own roadbed. As the road of plaintiff is not a street railway, the city council had the power to grant the franchise without requiring a compliance with Act No. 135 of 1888. Const. art. 243. The consent of the city is only necessary to grant the privilege of a right of way to a railroad running beyond the city's limits. Rev. St. § 689. Having granted the franchise to plaintiff, and it having been accepted, the contract was perfected. *City of New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, 3 South. 533. In the case of *City of New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, 3 South. 533, this court said: "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract; and the city is powerless to set it aside, or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the Dartmouth College Case, 4 Wheat. 518." The city of New Orleans can, as a matter of right, refuse to grant the authority for a passage through its streets of a railroad. It can also demand a price for the privilege. But it can, also, as a matter of right, if it deem the exercise of the power reasonable and proper, grant the right of way to a railroad operating its line into other territory, without a compensation in money, but for other considerations. In the instant case the council has granted to a railroad company a right of way through certain streets for the purpose of operating its road beyond the limits of the city. The grant has been accepted, and, except for a violation of its terms, it is irrevocable. Judgment affirmed.

(46 La. Ann. 623)

STATE v. LEE et al. (No. 11,496.)¹

(Supreme Court of Louisiana. March 26, 1894.)

CRIMINAL LAW—AUTREFOIS ACQUIT—SEVERANCE OF TRIAL—HOMICIDE—INDICTMENT.

1. Whenever a plea of autrefois acquit is demurrable, it is triable by the judge, and not referable to the jury.

2. The allowance of a severance of trial is matter within the discretion of the judge, except evidence discloses that different defendants have antagonistic defenses.

3. An indictment may be fatally defective quoad a charge of murder, and perfectly good quoad a charge of manslaughter.

(Syllabus by the Court.)

Appeal from district court, parish of De Soto; W. Pike Hall, Judge.

Leonard Lee and others were indicted for murder. Lee was convicted of manslaughter; the other defendants were discharged. Lee appeals. Affirmed.

Goss & Parsons and C. C. Egan, for appellant. M. J. Cunningham, Atty. Gen., J. B. Lee, Dist. Atty. (Scarborough & Carver, of counsel), for the State.

WATKINS, J. Leonard Lee having been jointly indicted with O. B. Adams, Douglas Carpenter, and Bill Adams, for the murder of Patria Cordoway, he was convicted of manslaughter, and the other defendants were discharged. From this verdict and judgment of conviction Lee alone appeals, relying upon an assignment of errors and three bills of exception, embracing the following objections, to wit: First, that the trial court erred in overruling his plea of autrefois acquit; second, in refusing him a new trial of the aforesaid plea; third, in disallowing him a severance of trial from the other defendants; and, fourth, in overruling his motion in arrest of judgment.

1. The plea of autrefois acquit is predicated upon a previous indictment of Leonard Lee alone on a charge of the murder of Tom Cordoway, of which he was duly acquitted on the day previous to his indictment on the instant case for the murder of Patria Cordoway. These facts appearing on the face of the two indictments, the controverted question is whether this plea was one for the judge or jury to decide; and, the judge having decided it, defendant's counsel assigns his thus deciding as error. In our opinion, the ruling of the court was correct. The question of the sufficiency of the plea was made to depend solely, in the court below, upon the recitals of the two indictments notwithstanding some other testimony was adduced, thus presenting a question of law. The plea was filed at the August term of the court, 1893, and overruled. There was no bill of exceptions reserved to the judge's ruling. The court was adjourned for the term, and the trial of the cause was deferred until the February term, 1894. At this lat-

ter term defendant's counsel filed a motion for a new trial of the plea of autrefois acquit, which had been overruled at the previous term, assigning as error therein that the question was for the jury, and that the judge had decided it. The judge refused to entertain the motion, on the ground that his first ruling was correct, and defendant reserved a bill. We take it to be clear that the same rule obtains with regard to the allowance vel non of a new trial of a simple motion or plea as of a new trial of the merits of the cause; and, adhering to that rule, we cannot reverse the decision of the trial judge, except in case he has committed a manifest error to the injury of the accused. And the action of the trial court relative to a new trial cannot be examined by this court unless it is brought before it in such manner as to present an unmixed question of law. State v. Bass, 11 La. Ann. 478; State v. Hooten, 16 La. Ann. 309; State v. Gregor, 21 La. Ann. 473; State v. Smith, 22 La. Ann. 468; State v. Bower, 26 La. Ann. 383; State v. Washington, 28 La. Ann. 129; State v. White, 35 La. Ann. 96. Taking up the question as we find it in the record,—an unmixed question of law,—and applying the precepts of our jurisprudence thereto, it is clear that the defendant's plea of autrefois acquit was correctly submitted to the trial judge, and disposed of by him, in the first instance; and hence the view that was entertained by the judge on the application for a new trial of the plea was correct also. In State v. Shaw, 5 La. Ann. 342, it was held that "when the plea of autrefois acquit shows on its face that the offense pleaded was not the same of which the prisoner was before acquitted, the plea may be demurred to, and it is not necessary to submit it to a jury;" citing Hite v. State, 9 Yerg. 357. In State v. Helveston, 38 La. Ann. 314, it seems that the plea of autrefois acquit was demurred to by the state, tried by the judge, and sustained, and from the judgment the state appealed. But this court, not doubting the jurisdiction of the trial judge to entertain the plea, reversed his finding on the ground "that the offenses charged in the two informations are not the same," etc. In thus demurring the state in that case followed the common-law practice, for it is stated by Mr. Bishop to be the rule that, "if the plea is inadequate in form, or if the two indictments are such that the offenses cannot be the same, the prosecuting officer demurs." 1 Bish. Cr. Proc. § 817. And the purport of our decision in the recent case of State v. Williams, 45 La. Ann. 936, 12 South. 932, is that this is a correct rule, and is to be followed. Mr. Wharton announces a like doctrine. Whart. Cr. Pl. §§ 482, 484. Looking into the defendant's plea of autrefois acquit filed in the instant case, we find it to be alleged that he had theretofore been indicted, tried, and acquit-

¹ Rehearing refused April 9, 1894.

ted of the murder of Tom Cordoway, referring to the cause by title and number, and averring that the crime therein charged against him is identically the same as that for which he is prosecuted in the indictment in the instant case. But, looking into the indictment in the instant case, we find the charge against the defendant to be the murder of Patria Cordoway. The two indictments are component parts of the plea; and, considering them in connection, it is evident that the plea was demurrable, as the crimes charged were not the same. As this court had occasion to say in quite a similar case: "The corpus delicti in each [case] is in every respect distinct and independent." *State v. Vines*, 34 La. Ann. 1079.

2. This point of objection being necessarily involved, in principle as well as in fact, with the first one, the two were taken together, and disposed of at one and the same time.

3. The defendant Lee filed a motion praying for a severance of trial from his codefendants, on the ground mainly that his defense was contradictory of those of the other defendants (one of the defendants having on a former trial made statements implicating him as a participus criminis in the homicide); and, the trial judge having declined to award the severance, he reserved a bill of exceptions. It is stated by the judge as a reason why he had refused the application "that no sufficient ground for the severance was shown. The district attorney states in his evidence on the trial of the motion that he would offer no confession of either of the four defendants indicted as principals in which either of the others was involved, and this was strictly adhered to throughout the trial," etc. The general rule is that persons jointly indicted are not entitled to a severance of trial as matter of right, though the trial judge may, in the exercise of his discretion, grant a severance. *State v. Leonard*, 6 La. Ann. 420; *State v. Cazeau*, 8 La. Ann. 109; 1 Bish. Cr. Proc. § 1018; Whart. Cr. Pl. § 309. It is proper for the judge to grant a severance in case the confession of one jointly indicted may implicate both, in case the prosecution intends to offer same on the trial. 1 Bish. Cr. Proc. § 1019; Whart. Cr. Pl. § 310. It appears that the district attorney directed the evidence on the part of the state to this exception, disclosing his intention to be not to make use of any such confession on the trial as the defendant apprehended, and it was on that testimony the trial judge rested his declination to grant a severance; and it is quite apparent that he in no wise abused his discretion in refusing it. The question that is raised for decision on the motion in arrest of judgment is—the indictment charging the defendant Lee jointly with several other persons with the murder of Patria Cordoway, and the averment thereof being that the several parties "did willfully, feloniously, and of his malice

aforethought, kill and murder Patria Cordoway"—whether the indictment is fatally defective in a matter of substance because the singular pronoun "his" was employed, representing only one of the several persons accused. The trial judge assigns the following reasons why he declined to entertain defendant's motion, viz.: "While the indictment is not good for murder, it is good for manslaughter, for which [crime] the defendant is convicted; and he is without interest to inquire as to its sufficiency for murder, since he is acquitted of that [crime]." It is evident that the judge's ruling was correct. Had all the parties been convicted,—or, possibly, if any one of them had been,—the indictment would have been held bad, on the authority of *State v. Jones* (La.) 14 South. 218, the doctrine of which case we unhesitatingly affirm. The case appears to have been correctly disposed of in the court below. Judgment affirmed.

(46 La. Ann. 547)

STATE v. SAINTES. (No. 11,527.)¹

(Supreme Court of Louisiana. April 23, 1894.)

JURY—MOTION TO QUASH VENIRE.

In the absence of some charge of fraud or wrong committed in the drawing or the summoning of the general venire of jurors, which would work great and irreparable injury, a motion to quash and set the venire aside cannot prevail.

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; Felix Voorhies, Judge.

Ben Saintes was convicted of murder, and appeals. Affirmed.

Edward Simon and L. O. Hacker, for appellant. M. J. Cunningham, Atty. Gen., and R. F. Broussard, Dist. Atty., for the State.

WATKINS, J. The defendant appeals from a judgment and verdict convicting him of murder, without capital punishment, and a sentence to imprisonment, at hard labor, for life. The errors assigned are (1) that the trial judge improperly overruled the defendant's motion to quash the general venire; (2) that he declined to grant him a new trial; and (3) that he improperly refused to sustain his motion in arrest of judgment. To each of the several rulings of the judge, the defendant's counsel reserved a bill of exceptions.

1. The first bill of exceptions, in point of time as well as of importance, is that which relates to the defendant's motion to quash the venire. From the record, it appears that on the first day of the jury term of court the defendant's counsel filed a motion to quash the general venire of jurors which had been summoned for the term, for the following reasons, to wit: That the said venire is illegal, null, and void, because the order of court under which said venire was drawn directed the jury commissioners to draw same for the third Monday of February, in-

¹ Rehearing denied.

stead of which, and without authority of law, the said jury was drawn for the fourth Monday of February. The facts are that there was a general order of court fixing the February-March term for the third Monday of February, annually, and the jury commissioners selected, and caused to be summoned, a jury for the fourth Monday of February, instead; and the consequence was that when the court convened, on the third Monday, there was no jury in attendance, and the grand jury could not, for that reason, be impaneled on that day, as the law directs. Act No. 44 of 1877, of the regular session, under authority of which the jury commissioners acted, in drawing the jury, governs the case; and we need look into no other authority, as its terms are clear. It provides "that it shall not be sufficient cause to challenge the general venire, or set aside the venire, drawn for any term * * * because of any other defect or irregularity than in the manner of drawing the jury as above provided, and no such defect or irregularity in the drawing thereof or in the summoning of the jury shall be sufficient cause, if it shall not appear that some fraud has been practiced, or some great wrong committed in the drawing and summoning of the jury, that would work a great and irreparable injury." Section 10, Act No. 44 of 1877 (regular session). On the face of this statute, there is no merit in the defendant's motion, inasmuch as it contains no suggestion of fraud or wrong having been committed by the jury commissioners in the selection and drawing of the venire. The judge a quo correctly overruled the motion.

2. The second bill of exceptions relates to the refusal of the judge to grant the defendant a new trial. The grounds of the motion for new trial are the following, viz.: (1) That the verdict is contrary to law and evidence; (2) that the presumption of malice which attaches to the homicide alleged in this case was entirely destroyed by the evidence; (3) that the jury entirely misapprehended the evidence; (4) that in point of fact the trial in this case was illegal, in that the grand jury who pretended to have found the bill of indictment had no legal existence or authority; (5) that after evidence had been adduced on the trial, and the jury had been closeted by order of the court, the deputy sheriff in charge of said jury did actually and illegally participate with the said jury in their discussion of the merits and evidence, which influenced said jury in their conclusions, and said action constitutes misconduct on the part of the jury which authorizes their verdict to be set aside. As the first three grounds of the motion relate to matters of evidence, this court has no power or jurisdiction to examine them, no question of law being thereon raised. On the fourth ground, our conclusions on the motion to quash the general venire are conclusive, the objection to the jury being the same. On the fifth

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ground, evidence was taken (the deputy sheriff and each of the petit jurors testifying), but not a word of testimony was adduced in support of the statement that the deputy sheriff in charge of the jury participated in the deliberations of the jury. On the contrary, all of them testify, with one accord, that the case had not been submitted at the time of the occurrence specified, and not a word of conversation occurred between the deputy sheriff and any member of the jury in reference to the trial of the cause. We do not think there can be any doubt of the correctness of the ruling, and refusal of the judge to grant the defendant a new trial, on the showing made.

3. The motion in arrest of judgment was evidently filed *ex industria*, as it is grounded on the same objections to the grand jury that were examined and disposed of in treating of the defendant's motion to quash the venire, and his motion for a new trial; and, of course, this is not good in arrest of judgment.

The defendant's objections are unavailing. Judgment affirmed.

(46 La. Ann. 861)

**CITY OF NEW ORLEANS v. BOARD OF
ADM'RS OF TULANE EDUCATIONAL
FUND. (No. 11,523.)**

(Supreme Court of Louisiana. May 7, 1894.)

**SPECIFIC PERFORMANCE—CITIES—POWERS OF
MAYOR.**

1. The board of administrators of the University of Louisiana, having contracted and agreed with the city of New Orleans, for a fair and adequate consideration, to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans, said administrators and their successors and assigns can be kept to their agreement, and held bound to accept and educate the designated number of boys of indigent parents when properly appointed.

2. The mayor of the city is incapacitated to enter into any act of compromise, and bind the city thereby, unless specially authorized by competent authority; and he cannot, by acting under such a compromise, estop the assertion of the city's legal rights.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Bill by the city of New Orleans against the board of administrators of the Tulane Educational Fund for specific performance. Judgment for plaintiff, and defendants appeal. Affirmed.

James McConnell and Edgar H. Farrar, for appellants. E. A. O'Sullivan, City Atty., for appellee.

WATKINS, J. The object of this suit is to obtain the enforcement of an alleged contract which the defendants entered into to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans; that is to say, to coerce the said administrators to receive

annually five cadets, to be appointed by the mayor, and to give them the regular course of education established by that institution. It is alleged that the consideration of said contract was the remission on the part of the city of the taxes assessed against the property formerly known as the "Mechanics' Institute" for several years, so as to enable the then University of Louisiana to purchase the same for educational purposes. It is further alleged that by an act of the legislature additional powers were conferred upon said university, and "in recognition of the benevolent acts and munificent gifts of Paul Tulane the corporate name of the University of Louisiana was changed to the Tulane University of Louisiana, and created in lieu and stead of the state board of administrators of the University of Louisiana, the board of administrators of the Tulane Educational Fund." It is further alleged that demand was made by the mayor of the city upon the defendant administrators to receive five boys, to be by him appointed, annually, in conformity to the aforesaid contract (naming the five boys to be by him appointed), and that said demand was by the defendant administrators refused. Plaintiff's prayer for judgment conforms to the allegation of its petition. The defendants' answer avows their willingness, "as provided in said Ordinance No. 6767, to educate five boys of indigent parents, to be appointed annually from the public schools by the mayor and administrators of the city of New Orleans; meaning thereby that there shall be five scholarships so appointed, the vacancies in which are to be filled annually, and not, as illegally claimed, that every year the mayor is entitled to appoint five students, who are to receive free education at the hands of this board." Further answering, they aver "that the said ordinance was the subject of contention between the mayor of said city and board of administrators of the University of Louisiana as to what the rights of the mayor were under the said ordinance, and, after much discussion, the said board, * * * on the 14th of April, 1883, adopted a resolution * * * to the effect that the obligation of said board extended only to furnishing free tuition to five students, and that the mayor had power to fill all vacancies occurring, so that there should be always five students in the university without cost, and no more. That on the 10th of May, 1883, a resolution was adopted by said board, * * * which purported to be a compromise between said city and board of administrators, proposed by the city attorney, by which said board agreed to educate ten (10) boys of indigent parents, to be appointed as mentioned in said Ordinance 6767, all vacancies to be filled by the mayor; it being the intent of said resolution that ten boys should be so educated free in said University of Louisiana, the term of tuition to be four years." The defendants further aver

and represent that during the 10 years that have intervened between the date of the adoption of said resolution and the receipt of the mayor's demand of date May 10, 1892, the selection and appointment of 10 students have been made in accordance with the aforesaid compromise; and they further and finally state that, "without admitting any legal liability in the premises, and with full reservation of all and singular their legal rights in the premises, they are willing that ten students should continue to be received and educated in the manner and according to the terms of said compromise." On these issues the following judgment was pronounced in favor of the plaintiff, namely: "Declaring the contract entered into between the defendant and the city of New Orleans to be in full force and effect, and commanding the said board to receive within thirty days, and to continue to receive each and every year thereafter, five boys, to be selected under said contract by the mayor of New Orleans, and to retain said boys, yearly appointed as aforesaid, until their collegiate course is completed under the rules and regulations of the said university." From this judgment defendants prosecute this appeal.

It is evident that there are but two questions for our consideration: First, the import of the defendants' original contract; second, the effect of the alleged compromise. While the contract is found in a proviso at the foot of the ordinance, yet we think it but right that we should reproduce the entire ordinance, and have extracted same from the defendants' brief: "City Ordinance No. 6767. Mayoralty of New Orleans, City Hall, December 22d, 1890. (No. 6767. Administration Series.) Whereas, it is to the interest of the people of this city that every facility be afforded the University of Louisiana for increasing its usefulness and furthering its purposes of education now so well begun and ably conducted, and it is represented to the council by the president of the board of administrators that more room and buildings are needed, and that the building known as the 'Mechanics' Institute' is, from its location and construction, the only suitable and possible addition to be had; whereas, it is further represented by said board that an opportunity now offers by which they can obtain every right and title in and to said Mechanics' Institute for a small price, but that they are prevented or deterred from acting because of certain taxes claimed by the city of New Orleans as due by the Mechanics' Society, and asserted to be an incumbrance on said property; and whereas, said taxes are only due for such times as said building was not occupied by the society, and then only on the value of the parts not so occupied,—inconsistencies which would greatly reduce the said taxes as they now stand; and further, considering that the partial title now existing in the state has

prevented and will forbid the subjection of said property by the city to the payment of said taxes by a sale or other conveyance, in that no satisfactory and indefeasible title can be made to a purchaser: Therefore: Section 1. Be it ordained by the mayor and administrators of the city of New Orleans, in council convened, that any tax lien, privilege, or mortgage heretofore claimed by the city of New Orleans for any municipal taxes assessed on the Mechanics' Institute for any and all years, and written or recorded as bearing on the property known as the 'Mechanics' Institute,' be relinquished, canceled, and annulled as to said property whenever the University of Louisiana, through its board of administrators, shall have obtained full title to and possession of said property, and to this end the mayor is instructed to intervene in the act affecting such transfer of title and giving possession, to carry out the provisions of this ordinance, and until said intervention and act has been completed said taxes and privileges, etc., shall continue undisturbed: provided, nothing herein shall be construed as relieving the Mechanics' Institute from its obligations for said taxes. Sec. 2. Be it ordained, etc., that a copy of the title to said board of administrators, embodying the intervention of the mayor as aforesaid, shall be furnished the administrator of accounts of the city of New Orleans, and the same shall be and constitute his authority to erase and annul from his books, and from those of the recorder of mortgages, all of said taxes, privileges, and mortgages, so far as they affect said property the Mechanics' Institute: provided, that the said institute binds itself to educate five boys of indigent parents, to be appointed annually from the public schools by the mayor and administrators of the city of New Orleans. Adopted by the council of the city of New Orleans, December 21st, 1880."

The controverted question is now, as it has been for many years past, as to the correct interpretation to be placed upon the phrase, "to educate five boys of indigent parents, to be appointed annually," as occurs in the proviso to Ordinance 6767. Both the city and the administrators have given their respective interpretations thereof, as the foregoing sketch of the pleadings discloses; and, the district judge having accepted that of the plaintiff as the correct one, it is our province to determine whether his opinion was erroneous vel non.

The Code has established and formulated certain fixed rules for "the interpretation of agreements." One article declares that "legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them. * * * (2) That courts are bound to give legal effect to all such contracts according to the true intent of all the parties. (3) That the intent is to be determined by the words of the contract, when these are clear and explicit and lead

to no absurd consequence." Rev. Civ. Code, art. 1945. Another article declares that "the words of the contract are to be understood, like those of a law, in the common and usual signification, without attending so much to grammatical rules, as to general and popular use." Id. 1946. Another article declares that "all clauses of an agreement are interpreted, the one by the other, giving to each the sense that results from the entire act." Id. 1955. Following these rules for interpretation of agreements, we are of the opinion that the judge a quo gave a correct interpretation to the language of the proviso of the ordinance. The intent and purpose of the parties is plainly and easily discoverable from "the words of the contract." The obligation of the defendant was "to educate five boys of indigent parents, to be appointed annually from the public schools." These words mean just what they say, "five boys * * * appointed annually;" and, as the courts are bound to give legal effect to all contracts according to the true intent of the parties, we feel bound to affirm the correctness of the ruling of the district judge in this respect.

With reference to the alleged compromise that it set up by the defendants as a matter of defense, there is nothing said in the judgment; but from the tenor of it it is to be presumed that he disregarded it, as he could not have otherwise arrived at the conclusions he did arrive at. The following is an extract from the minutes of the board of administrators of the University of Louisiana of March 28, 1883, viz.: "Extracts from Minutes: Extract from minutes of the board of administrators of the University of Louisiana, held March 28th, 1883. Present: J. H. Kennard, and Messrs. Howard, Macon, Labatt, Lavillebeuvre, Seymour, Lafitte, and Mayor Behan, constituting a quorum. The president stated that the meeting had been called at the request of the mayor, who wished to learn exactly the agreement concerning the five scholarships in the academic department of the university allowed the city of New Orleans. Mr. Mayor Behan wished to know whether he had the right to appoint five persons to scholarships each year, without considering whether those appointed in previous years remain at the university or not, or whether it had been agreed that not more than five persons appointed by the city should be entitled to tuition free at any one time. After much discussion, during which Mr. Baldwin entered and took his seat, it was decided, upon motion of Mr. Macon, that the decision of the question should be postponed until the original resolution of the board, which the secretary was unable to find, granting the right to the city, could be found. Respectfully, Chas. B. Stafford, Secretary." The following is an extract from the minutes of the board of April, 1883, viz.: "Be it resolved, that the sense of this board with reference to the rights of

the city of New Orleans to the appointment of free students to the University of Louisiana is that the obligation resting on the university under the existing ordinance and agreement extends only to furnishing tuition free to five students; that the mayor has power to fill all vacancies in the five whenever occurring; the true intent and meaning being there shall be five students in the university without cost, and no more. Mr. Labatt and Mayor Behan voted against the resolution." The following is an extract from the minutes of the board of administrators on the 10th of May, 1883, viz.: "Extract of minutes of the board of administrators of the University of Louisiana, held May 10, 1883: The president stated that the object of the meeting was to consider the matter of city scholarships. Judge Kennard stated that he had a conference with the city attorney, and that, to save the university from the expenses of litigation, he had agreed to present to the board a resolution drawn up by the city attorney, with some changes agreed to by the same persons, settling the matter by compromise. The president then read the motion, which was as follows: 'Whereas, a doubt exists as to the number of boys it is the duty of the University of Louisiana to educate at one time under provisions of Ordinance No. 6767, A. S., and as it is for the best interest of all parties that the same should be amicably arranged, and that equal justice should be done both to the university and to the city, be it resolved by the board of administrators of the University of Louisiana that the board, etc., binds and obligates themselves always to educate at one time ten boys of indigent parents, said boys to be appointed in the manner pointed out in the Ordinance No. 6767, aforesaid, all vacancies to be filled by the mayor; it being the full intent of this resolution that there shall be always ten boys as aforesaid educated free in the university at one and the same time, and no more; the term of tuition to be four years; said students to be subject to the same rules, when admitted, as other students.' Mr. Baldwin entered while the motion was being considered, and the president restated the case. Mr. Lafitte then offered the board the resolution prepared by the city attorney. Mr. Lavillebeuvre seconded it, and it was unanimously carried." Taking into consideration the foregoing proceedings and resolutions of the board of administrators, and giving to them the full weight and force to which they, on their face are entitled, it is our opinion they do not evidence a compromise, for the main reason that they were ex parte. It is quite true that they disclose that the president of the board of administrators had an interview with the city attorney in reference to city scholarships, "and that to save the university from the expense of litigation he had agreed to present to the board a resolution

drawn up by the city attorney, with some changes agreed to by the same person, settling the matter by compromise;" but neither the proceedings nor the resolution of the board declare that the city attorney had authority to bind the city in any manner, or that he had acted on the request, or at the suggestion of the proper city authorities in so doing. And the proceedings as well as the resolution show that it was the resolution of the board of administrators alone that construed their previous contract, without the sanction or concurrence of the city; and it is therefore not binding on the city as a compromise.

The defendants' counsel invites our attention to their willingness to receive and educate five boys of indigent parents, as stipulated in the Ordinance 6767, and refer to the altered phraseology of the Ordinance No. 7050, adopted January 3, 1882. It is as follows, to wit: "Ordinance 7050: Be it resolved, that the mayor is hereby authorized to select and appoint said five cadets from among the deserving boys or lads attending the public schools of the city of New Orleans. Adopted January 3, 1882." That ordinance did not and could not alter the terms of the prior ordinance and the contract made under it in any respect. Under this last ordinance the appointing power was conferred upon the mayor alone, in lieu of the mayor and administrators of the city; but it did not relieve the mayor from the duty of making selections of appointees from those boys who have indigent parents, the language of this ordinance being, "to select and appoint said five cadets." It is of equivalent import. We do not regard it of any special consequence that the mayor acted on the faith of the alleged compromise, and annually appointed the number of boys therein designated. The city could be no more bound or estopped by the ex parte action of that officer, in this respect, than in attempting to effect a compromise, or in assenting to it after it was made as stated. Judgment affirmed.

(46 La. Ann. 306)

BOARD OF HEALTH v. MAGINNIS COTTON MILLS. (No. 11,381.)

(Supreme Court of Louisiana. Dec. 4, 1893.)

APPEAL—SECURITY FOR COSTS—ABATEMENT OF NUISANCE—INJUNCTION.

On Rule on Clerk.

The board of health having failed to show that it comes within the statute exempting the state from furnishing security for costs in the courts of this state, a rule taken in its behalf upon the clerk of this court, requiring him to file a transcript without first furnishing the security, or making the cash deposit required by the rules of this court, will be discharged.

On the Merits.

1. The nuisance charged, if it exists at all, is of that character which should be abated.

2. A civil action on behalf of the public will lie if the nuisance is public.

3. A nuisance per se may be abated which affects the health, and under proper limitations and restrictions a writ of injunction may be issued.

4. The functions of that writ in behalf of the public should only be exercised on the broad grounds of preventing irreparable injury, interminable litigation, and the protection of a public right. Their exercise is subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance.

5. The plaintiff has alleged a nuisance per se. For the trial of an exception of no cause of action the facts are necessarily admitted.

6. The right to the writ, at this point of the case, is shown on the face of the papers, and therefore the injunction is reinstated for further proceedings.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Theard, Judge.

Bill by the board of health against the Maginnis Cotton Mills. From a decree refusing an injunction, plaintiff appeals. Reversed.

Frank McGloin, for appellant. Gilmore & Baldwin, for appellee.

On Rule Taken against Clerk of Supreme Court.

WATKINS, J. On motion of the counsel of the board of health as appellant a rule was granted upon the clerk of this court to show cause why its appeal should not be filed without making the cash deposit required of other parties litigant, because the board of health, acting in the interest of the state and its people, is entitled to litigate in the courts of this state without the payment of costs. In answer to the rule the clerk avers that—First, there is no law of this state which exempts the plaintiff in rule from making the deposit required by the rules of this court; second, nor is there any law of this state which relieves the plaintiff in rule from the payment of clerk's costs incurred in this court. Under the law the clerk of this court is entitled to demand and receive fees which are fixed. Rev. St. § 756. Under the rules of this court the party applying for the filing of a transcript in a cause in this court must first tender to the clerk his bond and security, or make a deposit of \$20. Rule 2. The contention of plaintiff in rule that the board of health, being a part of the machinery of the state government, cannot, for that reason, be required to pay costs, or furnish security for costs, is applicable with equal force to every municipal and parochial corporation in the state; they constituting a part of the machinery of the state government also. The law exempts the state from furnishing security for cost, but the exemption must be strictly construed; the language of the statute being that "no court of this state, nor officer thereof, shall demand of the state, or of the attorney general, any security for costs, or advance costs," etc. Act

1884, No. 65, § 1. Counsel for appellant has referred us to the following cases as supporting the theory of plaintiff in rule, viz.: State v. Taylor, 84 La. Ann. 978; Succession of Townsend, 40 La. Ann. 66, 3 South. 488; State v. Succession of Taylor, 83 La. Ann. 1270. In the first case cited the court said: "By special legislation, all costs incurred in criminal prosecutions are to be paid by the respective parishes in which the offense charged may have been committed. Rev. St. § 1042. Hence it would be a more than idle ceremony to exact of the state security for costs which are not chargeable to her. 'It is well settled in American jurisprudence that the sovereign never pays costs.' This doctrine, which is essential to our system of government, was recently recognized by us in the case of the State v. Succession of Taylor, 83 La. Ann. 1271." The same principle was recognized in Succession of Townsend, 40 La. Ann. 66, 3 South. 488; and followed in State v. Lazarus, 40 La. Ann. 856, 5 South. 289. It is the duty of plaintiff in rule to make out a clear case of exemption from the rule of law applicable to other litigants; but this it has not done, and its rule must be discharged. It is therefore ordered, adjudged, and decreed that the plaintiff's rule be discharged, at its costs.

On the Merits.

(April 23, 1894.)

BREAUX, J. This was an application for a writ of injunction directed to the defendant. The petition of the board of health in substance sets out that the Maginnis Cotton Mills maintains issues or outlets from the privies and cesspools of its large factory into the public gutters of the city; that through these outlets from the privies, cesspools, or water-closets upon its property to the public gutters there flows foecal and other offensive, dangerous, and injurious matter, to the peril and detriment of public health, and the inconvenience of the public; that these issues or outlets are a nuisance, to abate which an injunction should issue. Petitioner alleges that it has ordered and enjoined the defendant to close these outlets; that the defendant refuses to comply, and has ignored the notice served. The plaintiff avers that it is specially charged with the protection and preservation of public health, and the removal of causes exposing the health of the inhabitants; that the city of New Orleans has prohibited the use of any issue or other communication leading offensive matter from privies, water-closets, or cesspools into the public streets or gutters. The first of these ordinances in date copied in the transcript ordains that privies shall be so constructed as not to have any outlet on any street, way, yard, or place, and that any person violating the section shall be liable to a fine not to exceed \$20, and the court

shall order the privy to be reconstructed in accordance with the specifications contained in the ordinance, and in case of noncompliance the party at fault shall be subject to another penalty, not exceeding \$20, and it is also ordained that the board of health may have the work done required by the ordinance, and recover the expense from the person not complying, in any court of competent jurisdiction. This ordinance was amended, and the specifications for building privies were changed and enlarged, so that the system shall apply to factories and other establishments in which a large number of workmen are employed. The penalties fixed in the original ordinance were affirmed in the amended ordinance. The plaintiff alleges that it, the board of health, also, in addition, and for reasons similar to those that moved the city of New Orleans, prohibited the establishment or use of the issues or communications of which it complains. To the petition of the plaintiff, exceptions of no cause of action, and to the jurisdiction of the court *ratione materiae*, were filed. The exception of no cause of action only is argued in this court. This exception was maintained by the judge of the district court.

The nuisance being denounced by ordinances of the city of New Orleans, and a penalty provided against those who committed the nuisance, it is contended that a writ of injunction should not issue, and that the authority seeking to abate the nuisance must find procedure in the statute itself. The board of health, by Act No. 14 of 1870, was invested by the state with the power of removal of "any substance, matter or thing which they may deem detrimental to health." It was also authorized to adopt sanitary ordinances, and to fix penalties for their enforcement. By Act No. 80 of 1877 the board was given power, on the concurrence of the city council, to provide for, protect, and preserve by adequate means the health and salubrity of the city of New Orleans, and, with the consent of the council, incur reasonable expenses to that end. This act contains the following section: "This act shall not be construed so as to deprive the board of health of any powers or authority it has under existing laws." Section 6 of the same act provides that the "board shall in any suit or proceeding in which it may be a party obtain all writs, appeals or other process without being compelled to furnish bond." The plaintiff and the city council co-operated in adopting the first ordinance, No. 4077. The amended city ordinances were passed by the city council. The plaintiff seeks to abate an alleged nuisance by injunction, and not by the collection of a fine, or the removal of the cause of nuisance by the commissioner of streets, in accordance with authority conferred for such removal. The authority to enforce the ordinance by imposing a fine, the board contends, is too limited to prove of any service,

and it is urged that the first fine, which may be much less than the limit, is impossible only once, for building a privy in violation of specifications; and the second fine, impossible only once, may be imposed for failing to obey the order to reconstruct the work, and make it comply with the ordinance. It is also argued in behalf of plaintiff that the jurisdiction of the recorder's court does not include jurisdiction over all remedies needful to enforce these ordinances, and to secure prohibition from their violation that will prove effective. The defendant argues, through counsel, that there is adequate remedy by statute, and that an injunction should not "be granted to restrain an alleged nuisance." In weighing the different grounds of attack and defense, it suggests itself that the nuisance is no longer an "alleged nuisance." In the present condition of the case, for the purpose of the trial of the issues on the exception of the defendant, the nuisance is necessarily admitted. The fact of the nuisance is clear. The right of the plaintiff is well defined, and the law on which it depends not doubtful. They have an established right to remove this nuisance. No judgment at law would add to the admitted violation. The right to abatement being made manifest by the allegations admitted as true, it only remains for us to determine whether further remedy shall be prosecuted before the recorder's court or the district court. Each of these courts has jurisdiction over certain questions involved. These are questions exclusively within the jurisdiction of the district court. The fact that there is a partial, or even complete, remedy in another tribunal in different proceedings, will not alone prevent injunctive relief, but it is good reason to confine that relief to cases of very plain character, with great prudence, where there is a continuous nuisance, and to prevent its threatened repetition. Even then every step, possible and legal, should be taken, in order not to inflict wrongful damage and loss. The writ of injunction is of the highest character, and should be granted to municipal authority on the broad ground only of "preventing irreparable injury, interminable litigation, multiplicity of actions, and the protection of rights." It should be hedged by limitations and restrictions, and, if needful, its enforcement suspended, until it is ascertained that a public right is violated. "If the authorities abate a nuisance under the authority of an ordinance of the city, they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance." Wood, Nuis. (3d Ed.) p. 976. The nuisance is clearly of that character, if it exists at all, which should be abated, if needful, by process of injunction. We would not feel justified in curtailing the court's authority in cases of the character of the one at bar, unless the grounds were quite clear. To plaintiff is given the power and imposed

the duty of preserving and promoting public health, and to that end it is vested with authority to sue for the removal of public nuisances. It may be said of the case at bar as was said of other similar cases: "There are many cases—of which this would seem to be one—where the remedy of injunction would be much more efficacious than by enforcing the penalties of an ordinance." Wood, Nuis. (3d Ed.) p. 974, note 1. High, Inj. (3d Ed.) p. 568, approvingly quotes the following: "So, if plaintiff's right is clear, and the injury is manifest, and of a constantly recurring nature, the relief may be granted without requiring the fact of injury to be determined by an action at law." It is announced with clearness and emphasis in Wood on Nuisances (page 1120, note) "that an injunction is a proper remedy to stay mischief resulting from a public nuisance. In *City of New Orleans v. Lambert*, 14 La. Ann. 247, the nuisance was not as great as the nuisance complained of in the case at bar. The court held that the facts set forth in the petition authorized an injunction. We do not wish to be understood as favoring hasty action in the matter of injunction, applied for without bond, in the interest of the public. But where health is exposed, if there is nuisance, it should be abated, even if injunction must be resorted to for its abatement. It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, the injunction reinstated, and the cause remanded to the district court for further proceedings according to law, and that appellee pay the cost of this appeal.

(46 La. Ann. 906)

PALMES v. KUHN. (No. 11,489.)

(Supreme Court of Louisiana. May 7, 1894.)

COUNTER LETTER—EFFECT—APPEAL—COSTS.

1. A paper in the nature of a counter letter, to the effect that the person executing it has no interest in certain property apparently conveyed to her by authentic act, is effective as a renunciation of title, and protects the purchaser acquiring the property from the party in whose favor the renunciation is made. Rev. Civ. Code, arts. 2239, 2240, 2242; *Bradford v. Clark*, 7 La. 151; *Wells v. Lamothe*, 10 La. 411.

2. The appellant, in good faith seeking in this court the determination of a question affecting his rights, will not be made to pay damages merely because the supposed question admitted of easy solution without appeal.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Mary R. Palmes against J. J. Kuhn. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Rosser, Jr., for appellant. Frank L. Richardson, for appellee.

MILLER, J. Defendant appeals from the judgment of the lower court adjudging that

he shall comply with the adjudication to him of certain property of plaintiff. The defense is that the title tendered by plaintiff is not satisfactory. It appears that plaintiff once executed a deed of the property to her daughter. But, soon after, her daughter signed a paper to the effect she had no interest in the property, "waiving ownership of the same," and declaring the property is hereby returned to her mother. This paper is under private signature, but is proved, and has been on record since 1887. This paper, and a letter from an attorney of the sister of the daughter, to whom the mother once made the deed, asserting an interest in the property, is the basis of the defense. The sister in whose behalf the letter was written intervened in this suit, offered no proof in the lower court, and files no brief here. The paper or counter letter is none the less effective because under private signature. Rev. Civ. Code, arts. 2239, 2240, 2242; *Bradford v. Clark*, 7 La. 151; *Wells v. Lamothe*, 10 La. 411. The title tendered by plaintiff is hence incontestable. Besides, the sister, the heir of the daughter of the plaintiff, on whose behalf the attorney's letter was written, being a party to the suit, is bound by the judgment, and that protects defendant.

We are not disposed to encourage unnecessary appeals, but, where the litigant in good faith comes to this court for the determination of questions affecting his rights, he should not, we think, be mulcted in damages merely because the supposed questions admitted of easy solution without appeal. The case, in our opinion, is not one in which damages should be given. It is therefore adjudged and decreed that the judgment of the lower court be affirmed, with costs.

(46 La. Ann. 1083)

McNEELY v. HYDE et al. (No. 11,459.)¹

(Supreme Court of Louisiana. March 26, 1894.)

RES JUDICATA.

Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never be called in question by the parties, or their privies. It matters not under what form the question be presented; whenever the same question recurs between the same parties the plea of *res adjudicata est* opas. (Syllabus by the Court.)

Appeal from district court, parish of Grant; George Wear, Judge.

Action by M. L. McNeely against James H. Hyde and others, warrantors. Judgment for plaintiff. Defendants appeal. Affirmed.

Robert P. Hunter, for appellant James H. Hyde. John C. Ryan, for appellant M. Ryan. R. J. Bowman, for appellants Thomas J. Hickman et al. W. C. Roberts, for appellee.

¹ Rehearing refused May 14, 1894.

On Motion to Dismiss Appeal.

WATKINS, J. Plaintiff and appellee shows to the court that the amount in dispute is below the lower limit of its jurisdiction, and for that reason the appeal should be dismissed. The demand of the petition—and the prayer is to a like effect—is for the recovery of a tract of land valued at \$1,200, for the value of timber cut and removed, \$200, and for the rental value of the cleared land, at the rate of \$200 per annum, from 1839 to the date suit was instituted, August 18, 1892. A simple calculation shows that the amount in dispute is something over \$2,000, and consequently this court has appellate jurisdiction. The motion is therefore overruled.

On the Merits.

The plaintiff claims to have inherited the property in controversy, in common with her brothers and sisters, from her father, Littleton Bailey, who died in 1861, and from her mother, Frances J. Bailey, who died in 1867, and that she subsequently inherited the interests of her brothers and sisters, all of whom have since died without issue. To the title she claims by inheritance, she adds that she has acquired by the prescription of 30 years; and in this court she sets up the prescription *acquiriti causa*, of 10 years, as possessor in good faith. She claims to have thus acquired title to a tract of land on the left bank of Red river, descending, having a front on said river of 20 arpents by a depth of 40 arpents, which tract of land is known as the "Juan de Leon Spanish Grant," containing 683 44/100 American acres, and embracing Spanish sections 37 and 38 in township 6 N., of range 4 W.; Spanish section 37 in township 6 N., of range 3 W.; Spanish sections 45 and 46 in township 7 N., of range 4 W.; and Spanish sections 37 and 39 and 40 in township 7 N., of range 3 W.—as per survey made by George S. Walmsby, deputy United States surveyor, in 1847 and 1848, said property being known as "Rock Island Plantation." Petitioner represents that the claim of title by which her said parents became the owners of said land is as follows, to wit: That said land was granted to Juan de Leon, by virtue of an order of survey given by Gov. Miro, Spanish governor at New Orleans, on the 8th of August, 1790; same then being situated in the parish of Natchitoches, as will appear by reference to a certified copy of the report of D. T. Sutton, register of the land office for the district in Louisiana north of Red river, made on 6th of January, 1821, pursuant to an act of congress of date May 11, 1820, which Spanish grant was on the 28th day of February, 1823, confirmed as a valid Spanish grant, as against any claim on the part of the United States government, and the title of the said Juan de Leon thereto recognized to be good and valid. Petitioner

further represents that, under the treaty by which the United States acquired the territory of Louisiana, tracts of land previously granted to a Spanish subject were permitted to remain the property of such subject, and such Spanish grants were afterwards confirmed by an act of congress which put at rest any question of their validity. Petitioner further represents that the order of the Spanish governor Miro, at New Orleans, in 1790, was prior in date to the cession of the territory of Louisiana to the United States in the year 1803. She then sets out with precision the chain of title whereby her father and his authors acquired the ownership of said Spanish grant, as follows, to wit: That her father, Littleton Bailey, acquired same from James Bowie and Juan de Leon on or about the 1st of December, 1832, and January 8, 1836, respectively, by certain acts of sale referred to as of record in the parish of Natchitoches; that Bowie acquired the title which he conveyed, from Juan de Leon, by an act of sale of date December 15, 1818, likewise duly recorded; that on the 1st of December, 1832, her father conveyed to T. J. Wells an undivided half interest in said property, retaining a mortgage to secure the price, likewise recorded; that on the 9th of February, 1838, T. J. Wells conveyed same to J. Madison Wells. She further represents that on the 24th of February, 1838, J. Madison Wells purchased from W. H. T. Bynum the title he had acquired from Andrew Hunt Adams on the 31st of March, 1835, who, it appears, acquired a title from Juan de Leon on the 26th of March, 1835. She further represents that on the 25th of January, 1839, J. Madison Wells executed a mortgage on said property in favor of the Canal Bank, under which same was subsequently sold on the 6th of May, 1848, and at said sale the property was adjudicated to John K. Elgee, and he subsequently conveyed same to J. Madison Wells in 1859, who during the same year conveyed it to the petitioner's mother, Frances J. Bailey. She then finally avers that both of said deeds—that is to say, the one from Elgee to Wells, and that from Wells to her mother—were destroyed by the burning of the courthouse in Rapides parish in 1864. From the foregoing statement, it is clear that prior to February 23, 1838, plaintiff's father was full and exclusive owner of the entire grant, and so remained, with respect to an undivided one-half interest, until the time of his death, unless his title was divested by the Bynum title. But conceding that, for the argument, and under the statement of plaintiff, the Bynum claim of title passed through the two Wellses to her mother, and she being the sole heir to the estates of her father and mother and of her sisters and brothers, the entire title has united in her. That, in addition, she has 10 and 30 years' prescription. This statement appears to be clear, and must become conclusive on

the production of the titles. So much for the grant itself.

Petitioner further avers that in 1889 the defendant Hyde took illegal possession of a portion of said tract of land,—the portion including Spanish sections 45 and 46, aggregating about 129 acres,—and refuses to surrender the same, and hence the necessity for this suit; and she accompanies her other demand with one for the value of timber cut and removed, and for the rental value of the cleared land. This is the real gist of this suit.

Finally, petitioner supports her claim of ownership with a plea of *res adjudicata*, as follows, viz.: "Your petitioner further shows that in a suit styled *L. Bailey and Wells v. T. J. Hickman*, reported in the 12 La. 415 and 416, and in a suit styled *T. J. Hickman v. L. Bailey*, 9 La. Ann. 485, the title of the Juan de Leon grant was in controversy, which causes were decided by the supreme court (to which tribunal same had been appealed) in favor of said Bailey and of his heirs; and she pleads [same] as *res adjudicata*."

Substantially, the answer of the defendant Hyde is that he is a good-faith possessor under a title from M. Ryan, and entitled to fruits and revenues up to date suit was instituted; and he calls Ryan in warranty. The answer of this warrantor is similar in purport, he claiming under a title from Hickman brothers in 1888; and he calls the Hickmans in warranty. The latter answer, setting up their title by inheritance from their deceased father, Thomas J. Hickman, who obtained title from the United States; that is to say, by a certificate of entry of the E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ section 36, township 7 N., of range 4 W., on the 15th of May, 1835, and by patent of the S. W. $\frac{1}{4}$ and W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of same section, township, and range in 1837, same covering the land in suit. They further aver that the Juan de Leon grant was never surveyed or located by the United States, and that the United States had not parted with its title at the time the land in controversy was sold to their ancestor, and that, without survey and location of the Juan de Leon grant prior to sale to him, it could not be subsequently located so as to divest said ancestor's acquired rights.

On these pleadings and issues there was judgment in favor of the plaintiff on the question of title, sustaining her plea of *res adjudicata*, and awarding her judgment for \$720 as the rental value of 60 acres of cleared land for a period of three years; and in favor of the defendant for \$800 for clearing land, and \$534.90 for the construction of buildings, etc. There was judgment against each of the warrantors, and from these various decrees the defendant and warrantors have appealed.

In this court the appellee seeks an amendment of the judgment, rejecting defendant's claim for improvement, on the ground that

he is a possessor in bad faith, or that, in the alternative, his claim therefor should be reduced to a reasonable sum. The judgment of the court below did not award to the plaintiff anything on the score of timber cut and removed; and, as no amendment has been requested on this score, it may be treated as abandoned. It is therefore clear that, in respect to the title, the only question raised on the pleadings is as to which is the better title,—the Juan de Leon grant, or the United States register's certificate of 1835, and government patent of 1837,—and that to this question we must apply the decision of this court relied upon as forming *res adjudicata*. But a question incidental to the discussion of the plea of *res adjudicata* is whether the plaintiff has properly connected herself with the title to the Juan de Leon grant, for otherwise proof of the plea would be inadmissible. It appears that there is no written title in the record showing a conveyance of the property from Elgee to J. Madison Wells, and from Wells to the mother of plaintiff, as alleged in the petition. Plaintiff's theory in regard to those missing documents is that the originals were destroyed by the burning of the courthouse at Alexandria in 1864, and that she was entitled to offer secondary evidence of their contents. To the offer of the parol evidence of J. M. Wells for that purpose, defendant's and warrantors' counsel objected on the following grounds, viz.: "That it is not the best evidence; that it is not alleged or proved that a copy of the original was not in existence, nor could be obtained. It is not shown that there is no record of this deed in the parish of Natchitoches, in which this land was situated at that time, and where the plaintiff shows all of his other deeds were recorded, and where a copy of the deed might have been found." The rule of law on this subject is that "when an instrument in writing, containing obligations which the party wishes to enforce, has been lost, or destroyed by accident or force, evidence may be given of its contents," etc. Rev. Civ. Code, art. 2279. But this article does not place upon the evidence the limitation that is suggested in the exception. Other articles of the Code declare that a copy of an act "is good proof, and supplies the want of the original," in case "the loss of the original be previously proved." Id. art. 2269. The record of an act is likewise receivable in evidence "on proving the loss of the original," etc. Id. art. 2270. Our conclusion is that neither an examination of the record, nor an effort to find a copy of these two conveyances extant, was a condition precedent to the introduction of parol testimony of their contents, and that the judge *a quo* properly overruled the objections urged, and admitted the evidence, thus completing plaintiff's connection with the Juan de Leon grant.

On the trial in the lower court, plaintiff offered in evidence certified extracts from

the record of the case of *Hickman v. Bailey*, No. 2,808 of the docket of this court,—the case plaintiff relies upon as forming *res adjudicata*,—which were objected to by the defendant and warrantors on the ground (1) that the judgment and verdict of the lower court were not pleaded as *res adjudicata*, and proof of same is inadmissible; and (2) that the document offered is not a full and complete copy of the aforesaid record, and a part thereof is inadmissible. These objections were overruled, and the testimony admitted, the objectors retaining a bill of exceptions. We think the judge's ruling was correct. Inasmuch as the judgment of this court was pleaded as *res adjudicata* it is evident that the record of this court had to be consulted on the subject, and this necessitated its production. That this record included the proceedings in the lower court is evident, and that they included the verdict of the jury and the judgment of the lower court is equally evident. In this respect the testimony is unobjectionable, and conforms to plaintiff's plea. As to the objection that only extracts from the record were offered, in lieu of a full and complete record, it only goes to the effect, and not to the admissibility, of the evidence; and an inspection of the certified extracts in evidence exhibits a full and complete record of the case on appeal, less the opinion of this court and one or two exhibits; the former appearing in the published Reports, of which this court will take cognizance, and the latter being merely a matter of evidence, not determinative of the plea of *res adjudicata*. They contain the pleadings, minutes of court, finding of the jury, and judgment thereon based, and the proceedings incident to an appeal to this court. These are all the essentials to an examination and decision of the plea of *res adjudicata*. The objections were properly overruled. It is manifest that the judgment and decree of this court, which are set up as *res adjudicata*, necessarily embrace the verdict and judgment of the lower court, as an essential and integral part thereof. It was held in *Bealrd v. Russ*, 34 La. Ann. 315, that an appeal is not an independent suit, but an incident, merely, of the original suit, and the continuation of it. The original suit in the lower court, and the appeal, are the same action, without any substantial change. In *Shakspeare v. Ware*, 38 A. 570, it was held "that the rule as to the verdict of the jury, like a judgment, is that it forms the authority of things adjudged upon all matters and demands set up in the pleadings." But the judgment of this court does not rest on the verdict of the jury, simply and alone, but upon a definitive judgment of the district court which was based upon the verdict of the jury. The judgment of this court dismissed the plaintiff's appeal because he had not cited the warrantors as appellees. Hence, it was the result of this judgment of dismissal which put an end

to the case, by leaving the judgment of the lower court in force. It would be impossible for this court to determine what force and effect are to be given to the judgment rendered, without consulting the judgment that was appealed from. The plea of *res adjudicata* embraces the verdict of the jury, and the judgment of the district court thereon based; and, in determining whether the bar of the judgment of this court is complete, same must be taken into consideration.

Looking into the opinion of this court in the case of *Hickman v. Bailey*, 9 La. Ann. 485, we find the following statement of facts, viz.: "The plaintiff claims the ownership of several tracts of land described as being situated on the Rigolet du Bon Dieu, in the parish of Natchitoches, under titles derived from the government of the United States. He alleges that the defendants have entered upon and taken possession of this land, and claim to be the owners of the same, by virtue of a pretended title derived from Juan de Leon, which title they represent to be fraudulent, and as never having been located by the proper authority under the government of the United States. The defendants Bailey and Hughes, in answer, aver that they hold by good and valid titles derived, as to the defendant Hughes, from Littleton Bailey, who derived same from Juan de Leon, the grantor, under the Spanish government; that said grant was confirmed by the government of the United States, and was located by the officers thereof. They aver that they purchased from their respective vendors in good faith, and for a valuable consideration, and, in case of eviction, are therefore entitled to improvements, etc. * * * That the heirs of the late James Bowle are bound in warranty to them, and pray that they may be accordingly cited, and, in case of eviction, that such judgment be rendered against said heirs, in their favor, as may be legal and just. The other defendants, Thomas and Wells, claim also under said Bailey. The heirs of Bowle, being cited, also joined issue, and denied any liability as warrantors. The case was submitted to a jury in the court below, and from the judgment rendered on their verdict in favor of the defendants the plaintiff has appealed." The court, coming to consider the case, dismissed the appeal, on the motion of appellees' counsel, grounded on the plaintiff's failure to cite the warrantors as appellees. From the foregoing statement by the court, it is evident that the issue in that case was, as it is in this, which is the better title to the land,—the Juan de Leon grant, or the certificate and patent of the United States? the land in controversy in this suit constituting an integral part of that involved in that suit. There is no doubt of the fact that the Littleton Bailey who figures in the former case as defendant is the same person who figured in the deeds which the plaintiff intro-

duced in evidence as the source of her title by inheritance; and there is likewise no doubt of the fact that the T. J. Hickman who is plaintiff in that suit is the ancestor of the warrantors Hickman, in the instant case, and the author of defendant's title. It is likewise an undoubted fact that the title under which the plaintiff set up claim in the former case is the same identical patent and certificate from the United States government under which the defendant and warrantors claim in the instant case; and it is equally true and undoubted that the plaintiff in the instant suit claims under the same Juan de Leon grant that the defendants claimed under in the former case.

There can be no reasonable doubt or question of the efficacy and completeness of the bar of *res adjudicata* that is formed upon the judgment that was rendered in that case, if the plaintiff has properly connected herself with the Juan de Leon grant, in point of fact, as she has in allegation; and for this purpose it will be necessary for an investigation to be made, as a means of ascertaining from the record what was the status of the title to the Juan de Leon grant at the time suit was brought, on the 21st of December, 1845. It appears from the record that Juan de Leon conveyed the land covered by his grant, to James Bowie, on the 18th of December, 1818; that Bowie conveyed to Littleton Bailey on December 1, 1832; that, on the same date, Bailey conveyed one-half interest to T. J. Wells; that on the 9th of February, 1838, T. J. Wells conveyed his one-half interest to J. M. Wells; that on the 8th of January, 1836, Juan de Leon executed an act of sale of the entire land to Littleton Bailey,—the act reciting that the title he had executed to James Bowie on the 15th of December, 1818, to the same land, "has been declared null and void in consequence of informality." It also appears from the record that Juan de Leon executed a title to the same property to A. H. Adams on the 26th of March, 1835, prior in date to his deed to Bailey on the 8th of January, 1836; that Adams conveyed to Bynum on the 31st of March, 1835, and Bynum conveyed to J. M. Wells on the 24th of February, 1838; that on the 25th of February, 1839, J. M. Wells executed a mortgage on the whole property in favor of the Canal Bank, and same was foreclosed, and the property adjudicated to Elgee, on the 23d of March, 1843. Thus it will be seen that at the date the suit of Hickman was filed, in 1845, the title was either in J. M. Wells, who had derived title to part from T. J. Wells, or to the whole by a title from Bynum, or it was in Littleton Bailey and J. M. Wells in joint ownership. The parties defendant in that suit were Littleton Bailey, Thomas J. Wells, and John J. Hughes; and it was by the plaintiff averred that the defendants were in possession, claiming ownership "by virtue of a certain pretended title derived from Juan de Leon,

which petitioner avers to be fraudulent, and that it has never been located by the government," etc.; and judgment was prayed for against them, condemning them to deliver up the property. The defendants Bailey and Hughes appeared and answered, and averred that they held good and valid titles to the property, "derived, as to the defendant Hughes, from Littleton Bailey, who derived the same from and through the original grantee thereof from the Spanish government, to wit, Juan de Leon." And they further answered and averred that the title under which they claim "is superior to that set up by the plaintiff; that the government of the United States had no right to dispose of the land by sale, if it is true that it did dispose of it." They further represent "that James Bowie was bound to them in warranty, as the deeds filed herewith will show, that he is now deceased, and that his heirs are bound to them in warranty;" and they pray that they be cited in warranty,—enumerating them, and giving their places of residence. Thomas J. Wells appears, and answers by setting up title derived from Littleton Bailey, and averring that the title under which Bailey holds is superior to that of the plaintiff; following, in substance, the answer of Bailey and Hughes. It was on these issues that the verdict of the jury was rendered in favor of the defendants, and thereon a final judgment was rendered, quieting them in their title, and fully recognizing them as owners under the Juan de Leon grant; the judgment formally declaring "that said lands, thus decreed to the defendants, being so much of the lands claimed in the patents set up in the plaintiff's petition, as are covered by and found within the limits of the Juan de Leon confirmation and location, as are represented on plats numbered 13 and 72, filed in this cause." In reply to the objections of plaintiff's counsel to the motion to dismiss the appeal, the court employed this language, to wit: "It appears that on the 1st of December, 1832, James Bowie conveyed to L. Bailey a tract of land, a part of which constitutes the subject-matter of this litigation, for the price of \$2,000. The deed of sale contains the usual clause of warranty. But it is urged by the appellant that the heirs of Bowie have no real interest in the matter, and are not bound in warranty, and ought not to have been cited as such, inasmuch as the title relied upon by the defendants does not emanate from Bowie, but purports to come from Juan de Leon. In May, 1834, it appears that Bowie wrote to Juan de Leon, his vendor, that there existed some defect in the conveyance made to him in December, 1818, which he would discover from a copy which he sent, and requested him to renew the deed in favor of Bailey, the bearer of the letter, in such manner as should be satisfactory to both of them, which was done, De Leon stipulating the same price as that contained in his

deed to Bowie. It is on this that the appellant relies, to sustain his position. But it is far from being clear to our minds that this circumstance is entitled to produce the effect contended for,—the extinguishment of the obligation of warranty of James Bowie as vendor of Littleton Bailey. Instead of lessening or impairing, it would seem to increase, the warranty, or be an additional security to the purchaser." Or, in other words, the deed of Juan de Leon to L. Bailey in 1836 was, in effect, a confirmation of Bowie's previous title to Bailey. It was not, in the opinion of the court, a new title, intended to destroy the effect of De Leon's previous conveyance to Bowie, but to make formal and effective the title he had conveyed to him in 1818. It had a direct tendency to defeat the title he had made to Adams in 1835. On this theory both the plaintiff and defendants in that suit proceeded; and that theory is perfectly reconcilable with the citation of Bailey and Wells as owners, and plaintiff's failure to cite Adams or Bynum. It is consistent with the answers of the defendants and warrantors therein; this deed from Juan de Leon to L. Bailey being intended to correct an informality in the title of De Leon to Bowie, under whom Bailey held. But if it was a fact—a fact unknown, and not recognized by these parties, at the time—that the Adams-Bynum title was a better title than that of Bowie to the Juan de Leon grant, it passed subsequently, through one of the defendants, to the mother of the present plaintiff, though the judgment of the court in the case of *Hickman v. Bailey* did not take formal cognizance of it. The court passed upon and decided the main controversy, and held that the De Leon grant was a better evidence of title than the subsequent government patents; and we do not consider it of any importance that parties claiming under the Adams-Bynum title were not made parties, as they were evidently without interest, on the theory which was entertained by the court. We do not, therefore, consider it important to discuss that question further, in disposing of the plea of *res adjudicata*, the reference we have made to the title of either party having been for the exclusive purpose of determining whether the plaintiff has properly connected herself with the Juan de Leon grant. Finding that she has connected herself therewith, we are of opinion that she is entitled to urge the plea of *res adjudicata*, and that the judgment rendered in the suit of *Hickman v. Bailey* operates as a complete bar against the defendant and warrantors in the instant suit, as to the title they urge as adverse to the De Leon grant. That judgment and decree fulfill, in our opinion, all the requirements of the Code, which are as follows, to wit: "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must

be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." Rev. Civ. Code, art. 2286. In *Heroman v. Institute*, 34 La. Ann. 805, we said: "Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never again be called in question by the parties, or their privies." Again: "It matters not under what form the question be presented; whenever the same question recurs between the same parties the plea of *res adjudicata* estops." *Sewell v. Scott*, 35 La. Ann. 553. These authorities are quoted with approval in *Broussard v. Broussard*, 43 La. Ann. 921, 9 South. 910, and are followed in *Re Tutorship of Scarborough*, 44 A. 288, 10 South. 858.

On other issues of the case, we are of opinion that the judgment appealed from is correct. Judgment affirmed.

(46 La. Ann. 548)

STATE v. LABAUVE. (No. 11,545.)

(Supreme Court of Louisiana. May 7, 1894.)

INDICTMENT FOR LARCENY—SUMMONING AND IMPANELING JURY—WAIVER OF OBJECTIONS.

1. The defendant was tried for larceny, and found guilty. *Venire* for the Term. His first point in his defense was that the general *venire* for the term had been illegally drawn: This ground is not tenable, for, though under indictment, he did not move to annul and set aside the *venire* on the first day of the term.

2. Residence of Juror. That one of the jurors was a nonresident: This ground is not sustained by the facts. Moreover, the application for a new trial for cause alleged should show, not only that defendant, but that counsel, also, were not aware of any fact affecting competency of juror, if he was incompetent.

3. Arrest of a Witness. That one of defendant's witnesses, charged with perjury, was arrested in the presence of the jury that tried him: It is not proved that the arrest was made in the presence of the jury.

4. Description of Property. That the alleged stolen property was not described: The property was described with legal certainty.

(Syllabus by the Court.)

Appeal from district court, parish of Vermillion; A. C. Allen, Judge.

Theogene Labauve was convicted of larceny, and appeals. Affirmed.

L. L. Bourges and A. & Charles Fontelleu, for appellant. M. J. Cunningham, Atty. Gen., and M. T. Gordy, Jr., Dist. Atty., for the State.

BREAUX, J. The defendant was indicted for larceny. At the September term of the court, in 1893, he was arraigned, and the case was continued. At the March term of the court, in 1894, he was tried, and found guilty. The following grounds are urged by the defendant on appeal before this court: That the general *venire* for the term at which the accused was tried had been illegally drawn; that one of the jurors in the

panel that found him guilty was not a resident of the parish; that the arrest of one of his witnesses for perjury was calculated to influence the jury in its finding; that the property charged to have been stolen was not described with legal certainty.

Motion to Set Aside Venire for the Term not Timely Filed.

With reference to the general venire for the term, and the illegality, of the drawing: The accused had been indicted at a previous term. He does not allege or show that he was in any manner prevented from interposing a timely motion to quash. The record does not disclose any good ground to except him from the rule requiring all such motions to be filed on the first day of the term. "Any objection to that effect must be so filed, or exceptional circumstances shown which rendered compliance therewith impracticable." *State v. Ashworth*, 41 La. Ann. 683, 6 South. 556. He was under indictment at the time, and the law requires from accused under indictment that they shall interpose their objections to the illegality and irregularity of the drawing at the time stated in the statute. "All such objections shall be considered waived, and shall not afterward be urged." Section 11, Act 44 of 1877. Motion to set aside the venire, we held in *State v. Curtis*, 44 La. Ann. 320, 10 South. 784, must be filed on the first day of the term. When the indictment or information has been presented at a previous term, the objections to the venire at a subsequent term must be urged on the first day of the term, unless it is shown that the facts upon which the motion was based were of such a character that it was impossible for the defendant to know them until after the commencement of the term. No impossibility to timely urge the facts alleged in the motion is alleged. Moreover, evidence was admitted on the trial of the motion. It shows that there were no irregularities, such as complained of, in drawing of the venire for the term. The proces verbal of the jury commissioners is of record. The drawing of the venire has every appearance of regularity and legality, and no admissible testimony was offered in support of the charge against the drawing interposed by the defendant.

Residence of Juror.

Next in the order of the defense is a motion for a new trial, in which defendant alleges, as one of the grounds for a new trial, that after his conviction he discovered that one of the jurors by whom he was found guilty was a resident of another parish than that in which he was tried. This ground urged for a new trial is not supported by the facts. The juror sworn in behalf of the defendant deposes that, at the time he was summoned to attend as a juror, he was a resident of the parish of Vermillion. Subsequently, when he served on the jury, he had

not actually moved away with his family, but had made arrangements to move to another parish. To that end he had leased a dwelling house, to which he intended to move the remainder of his family and his effects. In the next place—conceding, a moment, that the facts are as argued in behalf of the defendant—an objection to the competency of a juror, made after verdict, must be proved not to have been known to the defendant, and that, by proper inquiry, it could not have been known, before the juror was sworn. In such case the knowledge of the counsel is that of the client. The affidavit should show that the moving party and his attorneys were in such ignorance of the facts affecting the competency of the juror that the objection could not be seriously made. *Thomp. & M. Jur. p. 304.*

Arrest of a Witness.

Another ground alleged, of motion for new trial, devoid of evidence, was that the arrest by the sheriff of a witness for the defendant immediately after testifying in the presence of the jury was an illegal and injurious influence which was brought to bear against the accused. The court's recital, made part of the bill of exceptions taken to his ruling in denying the motion for a new trial, is "that the evidence did not bear out the averment in the motion," and the unavoidable inference is that the arrest was not made as charged. Regarding arrests of witnesses charged with perjury, this court has said in *State v. Ford*, 37 La. Ann. 456: "The arrest of their witnesses, under the circumstances, may have worked a hardship on these defendants; but it was a matter beyond the control of the trial judge, and for which we ourselves are powerless to supply a remedy." These utterances are applicable to the case at bar, if it be granted that the facts are as contended by counsel in behalf of their client.

Property Described with Legal Certainty.

The ground of the motion in arrest of judgment is that the indictment does not describe the property charged to have been stolen with such certainty as to enable the defendant, in case of acquittal or conviction, to plead autrefois acquit or autrefois convict to a subsequent indictment for stealing the same property. The larceny of "eight cords of wood, of the value of sixteen dollars, and of the property of one Charles Brown and of Herbert Davis," is the description of the property alleged to have been stolen. A cord of wood is a well-known measure, and is of itself a well-known description. It is well established that the indictment for larceny must describe the articles stolen by the names they usually bear, and specify the number and value of each species or particular kind. This requirement, in the case at bar, has been complied with, in all respects, in naming the cords of wood, giving

the number, stating the value, and to whom they belonged. The following decisions in which the description of the property stolen was considered is applicable to the case at bar: *State v. Johnson*, 30 La. Ann. 904; *State v. King*, 37 La. Ann. 662; *State v. Carter*, 33 La. Ann. 1214; *State v. Curtis*, 44 La. Ann. 320, 10 South. 784.

We have carefully and attentively reviewed the proceedings, and found no ground to disturb the verdict returned and set aside the sentence pronounced. The judgment appealed from is affirmed.

(46 La. Ann. 431)

STATE v. GAINES et al. (No. 10,619.)
(Supreme Court of Louisiana. May 22, 1890.)
ACTION BY STATE—RECOVERY OF BONDS FRAUDULENTLY ISSUED.

1. The state is not liable to suit in her own courts, save by her consent, and judgment cannot be rendered against her even on a demand in reconvention.

2. It is the duty of courts to abstain from deciding questions affecting the liability of the state on disputed claims which she has not consented to submit to judicial arbitrament, unless such decision is essential to the disposition of issues validly submitted.

3. The state is not authorized, in law or equity, to invoke judicial process to wrest from the hands of her apparent creditor the sole evidence of the latter's claim against her, unless, at least, she has by valid consent submitted to the court for binding determination all the rights and obligations incident to said claim.

4. It having been shown that the bonds here in question were unlawfully and criminally put in circulation, the only ground on which the holder thereof could assert rights thereon would be as holder in good faith, of which the burden of proof would lie on him. In absence of such proof, judgment was properly rendered for interest paid as money unduly received.

Breaux and McEnery, JJ., dissenting.

On Rehearing.

Same as in *State v. Hart*, 14 South. 430, 16 La. Ann. 55.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by the state against Laura Gaines and others. Decree for plaintiff, and defendants appeal. Reversed in part.

Walter S. Finney and Henry O. Miller, for appellant New Orleans Canal & Banking Co. Walter H. Rogers, Atty. Gen., for the State.

FENNER, J. The state, acting through her attorney general, brings this suit to recover from the defendant possessors 14 state bonds, which she alleges were fraudulently and illegally embezzled and put in circulation by her late state treasurer, E. A. Burke. The bonds were held by Miss Laura Gaines, and were pledged by her to the Canal Bank, and they are both made defendants. The state also claims from Miss Gaines a judgment for \$3,600, amount of interest coupons collected by her on said bonds. The defendants answer, asserting their just title as

bona fide holders of said bonds, which they assert to be valid and binding obligations of the state, and they pray for judgment rejecting the state's demand, and further decreeing that they be paid by the state in principal and interest according to the terms of the contract. From a judgment in favor of the state, the defendants appeal. The issues involved are three, viz.: First. The right of the state to oust the defendants of the possession of the instruments purporting to be bonds of the state, and to take the same into her own possession. Second. The right of the state to recover from Miss Gaines the amount of the interest coupons collected by her as having been unduly received. Third. The right of defendants to recover judgment against the state decreeing her liability for the principal and interest of said bonds to be paid according to the terms of her contract.

The third issue just mentioned is one which must be unhesitatingly decided against the defendants. The state cannot be sued before her own tribunals without her consent, and she has given no such consent. The question is not affected by the fact that the claim is a demand in reconvention, set up in a suit brought by the state. *State v. Bradley*, 37 La. Ann. 623.

So far as the other two issues are concerned, the rights of the defendants as bona fide holders of said bonds, and the liability of the state to them as such, are urged as defenses to the demands of the state; and, if it were necessary for us to determine these questions in order to decide the issues between the parties, it might be our duty to do so. But we are strongly impressed with the sense of our duty to abstain from considering or determining the liability of the state as a debtor on these bonds, which the political authority of the state has not consented to submit to judicial arbitrament, unless such determination is absolutely essential in order to dispose of those issues which are validly submitted to us. Our decision thereon would be in no manner binding upon or executory against the state, and would simply operate an unwarranted intrusion of our opinion in matters which are confided to the free discretion of the political branch of the government. We therefore felt bound carefully to examine the issues presented in order to see if they admitted of determination on any grounds which did not involve the necessity of considering questions of such vital moment to both the state and the holders of these instruments. We have concluded that these issues may be readily determined on grounds involving no such necessity. So far as the right of the state to recover possession of the bonds is concerned, we must consider the nature of such instruments. They belong to the class of things known at common law as choses in action, or demands enforceable by action. With us they are merely evidences of debt, and be-

long to the class of incorporeal rights. They are not, at common law, subjects of larceny, though by statutes in this and many other states they have been made so. 1 Bish. Cr. Law, § 578. They are no doubt subject to corporeal seizure under judicial process, and are treated in many aspects like corporeal property. They may become the subjects of action for specific recovery, but nevertheless their essential character and value consist in their quality as evidences of debt.

The Canal Bank is undoubtedly the lawful holder and possessor of these bonds, acquired by it in good faith and for a valuable consideration. They represent, on their face, an obligation of the state of Louisiana, signed by her governor and treasurer, and under the seal of state, all attached in accordance with law. They are the sole evidence which the bank has of the claim which she asserts against the state. Where is the law or the equity which would authorize the state to invoke judicial process to wrest from the hands of her apparent creditor the sole evidence of his claim, without at least submitting to the court for valid and binding determination all the rights and obligations arising thereon? We think there is none.

The demand of the state is entirely one-sided. If we decide in favor of the state, the judgment is executory; the defendants are ousted of possession of the sole evidence of their claim, and their mouths are forever closed. If we decide in favor of defendants, they acquire no new right under the judgment, but are simply left in statu quo, and at the mercy of the state. We think it too clear to require further argument that the state should not be permitted to invoke judicial aid in wresting from defendants their lawful possession of these evidences of a serious claim against her, until she has first, by proper legislative action, consented to submit to the courts the determination of all the rights and obligations incident thereto.

The claim for the return of the interest coupons alleged to have been unduly collected and received by Miss Gaines might have presented these questions in a different shape, requiring their determination. That is a suit for money unduly received, in which we would be bound to determine whether it was unduly received or not, and which would necessarily involve the right of Miss Gaines to receive and the obligation of the state to pay. But, as the case is presented, the evidence clearly establishes that the bonds were unlawfully put in circulation by E. A. Burke, and the only ground upon which any holder thereof could assert any rights thereon against the state would be that they were negotiable instruments and that he acquired them before maturity, in good faith, and for a valuable consideration. After proof of their unlawful issue, the burden was upon Miss Gaines to show that she acquired them in good faith. This burden she has entirely failed to discharge. We do not mean to

aspersion in the slightest degree the actual good faith of this lady. It was simply her misfortune, as this record shows, to be in a condition of health and nervous prostration which, in the opinion of her physicians, rendered it improper and unsafe for her to be examined in this case either at the trial or at any reasonably certain date in the future. Her counsel therefore submitted the case without her own or any other evidence on the subject of the method and circumstances under which she acquired these bonds. This is fatal to her defense, independently of any question as to the rights of holders in good faith of these instruments, and we have no ground for reversing the judgment for \$200 rendered against her in the court a qua.

In thus disposing of this appeal we wish it distinctly understood that we make not the slightest intimation of an opinion on the rights and obligations arising between holders in good faith of such bonds and the state. When a case comes before us requiring the expression of our judicial opinion on those delicate and difficult questions, we shall not shrink from the responsibility, but our sense of official duty requires us to abstain from expressing such opinions unless absolutely necessary to the decision of a pending cause. It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it maintains the sequestration and condemns the defendants to return to the state the bonds involved, be annulled, avoided, and reversed, and that the demand of the state to that extent be dismissed, and that the sequestration be dissolved, and that in other respects said judgment be affirmed.

BREAUX, J. (dissenting, McENERY, J., concurring with him). The issues are presented. The plaintiff and the defendants pray for a decision on the merits, settling the vexing and perplexing questions growing out of the embezzlement of certain bonds from the state treasurer's office. The effect of good faith, its scope, extent, the right of those who have become owners for valuable consideration without notice, can be decided at this time, and the question forever settled. If the holders of these 14 state bonds own values for which the state is bound, they should be relieved from the cloud on their property. If they are valueless, delay serves no purpose. The political branch of the government will be influenced by the decision as well at this time as at any time hereafter. It is preferable to decide the issues at once, and not to postpone questions that must be decided later. These bonds should remain in gremio legis until the rights of the parties in interest are finally determined. We therefore dissent.

On Rehearing.

(March 28, 1894.)

McENERY, J. The consideration of the application for a rehearing in this case, by

consent of counsel, was deferred until after the decree of the case of *State v. Hart*, recently decided, and reported 46 La. Ann. 55, 14 South. 430. The issues involved in the two cases are identical. It will be unnecessary, and it would be fruitless of results, to reopen the case for argument, and postpone our decree. We will refuse the rehearing, and will annul our former decree, and will now enter such a decree as should have been rendered in the first instance. Therefore, for the reasons assigned in case of *State v. Hart* (No. 10,898) Id., it is ordered, adjudged, and decreed that our former decree rendered herein be annulled, and it is now ordered, adjudged, and decreed that the judgment appealed from be affirmed. Rehearing refused.

MILLER, J., recused.

(46 La. Ann. 572)

LICHENTAG v. TAX COLLECTOR OF FIRST DIST. et al. (No. 11,417).¹

(Supreme Court of Louisiana. April 23, 1894.)

EXEMPTION FROM TAXATION—SCHOOLS OF STENOGRAPHY.

A school building in which stenography and typewriting are exclusively taught is not exempt from taxation by article 207 of the constitution. The proviso in said article excludes from its benefits schools that are conducted for private profit.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit by Alexander Lichentag against the tax collector of the first district, the board of assessors, and the city of New Orleans to restrain the sale of certain property for taxes. From a judgment for plaintiff, defendants appeal. Reversed.

E. A. O'Sullivan, City Atty., and Henry Menshaw, Asst. City Atty., for appellants. Fenner, Henderson & Fenner and Walker B. Spencer, for appellee.

McENERY, J. The plaintiff is the owner of lot 7, in square 151, bounded by Robin, Magazine, Camp, and Race streets, in the city of New Orleans, and alleges that he is conducting a school of stenography and typewriting, which is the only means by which he obtains a livelihood; and that the above-described property is used by him exclusively for the purpose of living in and of conducting said school; and that, under the constitution of the state, said property is exempt from taxation. On the prayer of the petition he obtained an injunction restraining the tax collector of the first district, the board of assessors, and the city of New Orleans from advertising or attempting to sell the above-described property for the taxes assessed against it. There was judg-

ment for plaintiff as prayed for, and the defendants appealed.

Article 207 of the constitution of 1879 is the only provision of the constitution applicable to the present controversy. It says property used exclusively for colleges or other school purposes shall be exempt from taxation, provided it is not used or leased for purposes of private profit or income. The word "school," as employed in the above article, is used in the ordinary meaning of the word, and must, therefore, be applied to the class of institutions which are embraced within that meaning. In its most extensive signification it embraces places where learned men meet for instruction and intercourse, where they may discuss and promulgate ideas of a particular and individual character, and promote the dissemination of a particular theory. It embraces the learned of a particular profession, when associated for special purposes, such as the college of surgeons, and it is applied to describe an assemblage of a particular kind, or the followers of a particular teacher in theology, science, philosophy, or medicine. It certainly, in the constitution, applies to none of these, but is used for the purpose of describing ordinary schools, such as we know in common speech,—educational establishments below the grade of college, in which elementary knowledge is imparted. Such institutions are for the purpose of instructing young children, and are known as primary or common schools or academies. Such institutions are for acquiring knowledge and mental training. Plaintiff's evidence shows that the teaching of typewriting and stenography is made part of the instruction of schools and colleges, and is a means of mental training. But this fact would not constitute these mechanical arts as the means of acquiring general knowledge and mental training. Boxing, fencing, dancing, in fact, all gymnastic exercises, instruction in which forms a part of the course in every institution of a high grade, in some degree train the mental as well as physical conditions, but they are not for this reason the necessary accompaniments of education. Painting is one of the most instructive of the arts, yet no one will contend that a building in which painting is exclusively taught is exempt from taxation. Music, also, is instructive, and develops to a high degree certain of the mental faculties, and, like painting promotes the vigor of the imagination and strengthens the reasoning faculty. They are both taught in all well-established schools and colleges, yet no building devoted exclusively to the teaching of these arts would be exempt from taxation for the reason that they do not necessarily enter into any scheme of general knowledge, and are not essential to the training of the mental faculties. Stenography is an art; shorthand writing, the use of abbreviations or characters for whole words. Typewriting

¹ Rehearing refused May 9, 1894.

can scarcely rank as an art, and may be classed as a mechanical occupation, like the setting of type. Neither one of these occupations enter into a scheme of education for the acquisition of knowledge or the training of the mental faculties. That they incidentally improve some faculty cannot be disputed; that they may have a healthy influence on all the faculties may be admitted; but many mechanical occupations do the same thing. It is difficult to conceive of any exercise of the physical powers without in some degree exercising a wholesome influence on the mental faculties. The occupation of the plaintiff, which he is teaching to his pupils, presupposes an acquisition of knowledge and a mental training, and the object of the school is not for the purpose intended by the primary or common school or academy. It is the teaching of a trade which the pupils expect to follow for a livelihood. Schools for lawyers and doctors, exclusively devoted to the preparing of them for their professions, presuppose a previously acquired fitness, and they enter into no general plan of common education. The school buildings for these purposes are not exempt, as they are intended for a special class for special purposes of professional calling. And so it is with plaintiff's school. It is intended to educate a particular class for a special object and for a specific calling, as an occupation by which to make their way in life. The occupation presupposes all that is required for such a calling has been obtained in some school or college devoted to the purpose of imparting knowledge and mental training. The petition of plaintiff alleges that his school is conducted by him for private profit. Article 207 in the proviso excludes such schools from the exemption. The judgment appealed from is annulled and reversed, and it is now ordered that plaintiff's suit be dismissed, with costs.

(46 La. Ann. 549)

FELT v. VICKSBURG, S. & P. R. CO. (No. 11,466.)

(Supreme Court of Louisiana. April 23, 1894.)

SURFACE WATER—INJURY TO LAND—CLOSING CULVERTS—ACTION AGAINST RAILROAD COMPANY.

In a suit for damages against a railroad company for opening one, and closing two, culverts in the roadbed extending through plaintiff's land, by which it is claimed by plaintiff the rain and seepage water were made to stand in his field, and drainage prevented, causing the loss of crops, the court will inquire into the situation of the land and its means of drainage, and the company will not be held responsible if, from the testimony, it appears the plaintiff's alleged losses were due to depressions in the land and obstructed drainage, not at all connected with the closing or opening of the culverts.

(Syllabus by the Court.)

Appeal from district court, parish of Madison; Field F. Montgomery, Judge.

Action by A. T. Felt against the Vicksburg, Shreveport & Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

James T. Coleman, for appellant. Stubbs & Russell, for appellee.

MILLER, J. The plaintiff, A. T. Felt, seeks to recover from the defendant, the Vicksburg, Shreveport & Pacific Railroad Company, damages alleged to have arisen from the opening of one, and closing of two, culverts in the embankment on which the tracks of the defendant are laid through plaintiff's plantation in the parish of Madison. By the opening of the culvert it is claimed that water was diverted from its natural course, and turned on the plantation, and by the closing of the two culverts it is charged that the exit of the water from plaintiff's plantation was prevented. By these causes it is alleged the plantation was made incapable of cultivation, and the crops lost, that otherwise would have been produced in the years 1891, 1892, and 1893. The answer of the company denied liability, and attributed the alleged loss complained of in the petition to the situation of the plantation, and the natural difficulties of its drainage. Our view of the controversy dispenses with any occasion to deal with the incidental questions that arose on the trial. The plantation is what is called the "Delta Peninsula," inclosed in the bend of the Mississippi, opposite Vicksburg. The defendant's railroad passes in front of the plantation. The plaintiff claims his drainage was through the railroad embankment, in a southerly direction, to the lowlands, and that the closing of two culverts stopped this drainage. He further claims that the opening of the other culvert, where the road curved to the east, increased the flow of water already arrested before the opening by the closing of the two culverts. The two culverts were closed in the spring of 1888. The opening of the other was in the spring of 1890. The plaintiff, we gather from the record, made a crop in 1890 and in 1891. There is no claim in respect to the crop of 1890, and the testimony is that 186 bales of cotton were produced in 1891, and tends to the conclusion that it was a fair yield.

Our inquiry is first directed to the issue whether the plaintiff was injured by the closure of the culverts in the spring of 1888, opening to the south side of the railroad. The plaintiff has produced testimony that the seepage and rain water rested on his land so as to interfere with, if not prevent, all cultivation, and his witnesses attribute this lack of drainage entirely to the closing of the culverts. We think the testimony of the defendant most conclusively develops other causes. It is shown there had been serious breaks in the levee, and the floods

¹ Rehearing refused May 7, 1894.
v.1580.no.8—12

passing through these breaks had left the usual deposits, filling the ditches for conducting the water from the culverts, rendering them useless. It is shown, too, that the waters accumulated in the basin, i. e. that part of the land designated as such on the map in evidence, and the level of the land was such as to make the culverts that were closed unnecessary. After the closure of the two culverts, another was left of adequate capacity, and adapted, from its position and the lay of the land, for the necessary drainage; but it is, we think, put beyond controversy that this culvert could not perform its office because of the stoppage by the deposit from the crevasse waters of the drains leading from the culvert. Again, these culverts were closed in the spring of 1888. The plaintiff made crops down to 1891 with no interference from the closing of the culverts. The seasons in which plaintiff complains of making no crops, it seems from the testimony, were equally unfortunate to others in this Delta peninsula. That the closure of culverts in 1888 is not complained of until 1891, and that the complaint of the plaintiff of no crops or diminished production is, with respect to years, unfortunate to others in his neighborhood, from causes wholly disconnected with the closure of the culverts, must be deemed to support the conclusion that the plaintiff's alleged losses are not due to the causes assigned in his petition. The testimony, on this branch of the case, that the culverts closed served no purpose, and that the ditches leading from the culverts were filled up or clogged with deposits from the crevasse floods, comes from witnesses living in plaintiff's neighborhood, familiar with the land and its condition in respect to drainage. There is, besides, the testimony of surveyors, and a map exhibiting the relative elevations of the land, its ditches and drains, as well as the culvert, the closing of which is the subject of complaint. We reach the conclusion, from all the testimony, that closing was not the cause of any loss to plaintiff.

The culvert, the opening of which is also a ground of plaintiff's suit, was in the railroad embankment at a point where the water from rain as well as seepage accumulated between the embankment and the levee. The water resting against the levee endangered the levee itself. To guard against that danger, the levee board, in the season of high water of 1890, directed the opening of the culvert, so as to prevent the accumulation of water. The outlet thus afforded carried the water in the direction it would have pursued if there had been no embankment at that point. That natural direction was into a large canal serving as the principal means of draining the lands. The plaintiff's case supposes that the opening of the culvert so increased the volume of water in this canal as to flood the land. The testimony as to the effect of opening the culvert does not,

in our opinion, sustain the plaintiff's theory. We gather from the record that in seasons of high water all the lands in this Delta peninsula are seriously affected by seepage or transpiration water. Such lands, with the river on each side, have not the means of drainage of lands not thus inclosed by the river. It is the testimony that on these plantations in the Delta peninsula the transpiration water, increased by the height of the river, added to the rain water, seeks and stands in the depressions of the lands. With the best drainage attainable on lands thus situated it is, we think, shown that it is almost impracticable to make crops on such plantations in high-water seasons, if the height of the river is protracted. There is in the record the testimony as to the practical result of high water in augmenting transpiration water on these lands, and there is, besides the theory developed by the expert, testimony ascribing the transpiration water to the greater saturation of lands thus situated, i. e. with a high river on either side. Unfortunately for the plaintiff, the natural causes to which the witnesses refer, causing water to rest on his lands, were aggravated by the fact that the lands were subjected to the servitude of drain with respect to plantations above on the peninsula, and, besides, had no adequate drainage. With all these causes operating, we cannot ascribe the plaintiff's supposed losses to the opening of the culvert. We cannot appreciate why the judgment of the lower court ordered the culvert to be closed, and think the relief asked in this respect in the answer to the appeal should be accorded. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that plaintiff's petition be dismissed, and that he pay costs of this court and in the lower court.

(46 La. Ann. 818)

ABES et ux. v. DAVIS. (No. 11,414.)

(Supreme Court of Louisiana. April 23, 1894.)

DONATIONS BETWEEN SPOUSES—REVOCATION—EFFECT.

Donations between the spouses are revocable by mutual consent, and, when revoked, the property returns to the estate of the donor freed from any claims of his heirs for their legitime which might have attached to the property if the donation had not been revoked. Rev. Civ. Code, arts. 1559, 1749; *Scudder v. Howe*, 11 South. 824, 44 La. Ann. 1103.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Suit by Helms Abes and wife against Aaron Davis. From a judgment for defendant, plaintiffs appeal. Reversed.

James Wilkinson, for appellants. A. J. Peters, for appellee.

MILLER, J. The suit is to compel defendant to accept title to, and pay for, property sold to him by plaintiff Helms Abes. The defense is that the property was donated by plaintiff to his wife in their marriage contract; that, though this donation was afterwards revoked, the property, by the effect of the donation, became, and is now, subject to any claims of the donor's children for their legitime. The judgment of the lower court was in favor of defendant, and plaintiffs appeal.

Donations between the spouses are revocable. When revoked, the property returns to the donor free from any claims of his children for their legitime they might have if the donation was not revoked. In other words, the property returns to the donor, not by any new title, but simply because the donation is deemed never to have taken place. It follows that the plaintiff Abes can sell, and his vendee can acquire, the property, as freely as if the donation had never been made. Rev. Civ. Code, arts. 1559, 1749, par. 4; *Scudder v. Howe*, 44 La. Ann. 1106, 11 South. 824.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided, annulled, and reversed, and that the defendant Aaron Davis be, and he is hereby, ordered to complete the sale of the property described in the petition purchased by him from plaintiff Helms Abes, and that he pay plaintiff the price therefor stipulated to be paid, to wit, \$9,000, with legal interest from judicial demand, with costs of appeal and of the lower court.

(46 La. Ann. 731)

**WHEELER v. BOARD OF FIRE COM'RS
OF CITY OF NEW ORLEANS et al.**

(No. 11,407.)

(Supreme Court of Louisiana. April 23, 1894.)
**CITY FIRE DEPARTMENT—VETERINARY SURGEON—
VALIDITY OF DISCHARGE—INJUNCTION.**

1. The "veterinary surgeon" mentioned in section 6 of the ordinance creating a paid fire department of the city of New Orleans is an officer of the department, and holds his office during good behavior.

2. The board of commissioners was absolutely without power or authority to displace a veterinary surgeon who had been elected and qualified, and was in the discharge of his duties, as such, by the election of another person, the officer having not resigned, nor been impeached. Such election was absolutely null, carrying with it no legal effects.

3. The officer attempted to be displaced by such an election by the board was authorized to ask, and the court justified in granting, an injunction in his favor, restraining the newly-elected surgeon, the board of commissioners, and the chief of the department, from interfering with him in the performance of his duties.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas O. W. Ellis, Judge.

Injunction by Arthur S. Wheeler against the board of fire commissioners of the city of

New Orleans and others. From a judgment for plaintiff, defendants appeal. Affirmed.

E. A. O'Sullivan, City Atty., and **Henry Renshaw**, Asst. City Atty., for commissioners, appellants. **Lawrence O'Donnell**, for appellant **J. J. Morice**. **Frank C. Zacharie**, for appellee.

NICHOLLS, C. J. What is known as the "Fire Department of the City of New Orleans" owes its origin to the ordinance of the city of New Orleans which bears the number 5614. The general control and administration of the affairs of the department are intrusted to a board designated as the "Board of Fire Commissioners of the City of New Orleans." The powers, rights, duties, and obligations of the board are set forth in the ordinance creating it. Section 5 of the ordinance declares that the commissioners shall appoint all the officers and employes of the department; and section 6, that the said board shall appoint as many assistant engineers, firemen, * * * and other employes as may be requisite; also, one veterinary surgeon. The twenty-eighth section of the ordinance is that upon which both parties to this litigation rely. It is as follows: "All officers and men of the department shall hold office during good behavior, up to the age limit of sixty-five years, and shall only be deprived of office and position after impeachment and conviction by the commissioners." The plaintiff herein was duly elected "veterinary surgeon" of the fire department on November 13, 1891, and qualified and entered into the discharge of his duties as such. It is not pretended that he has resigned, or been either removed or impeached. On the 12th of January, 1893, the board of commissioners elected **John J. Morice** to the position of veterinary surgeon. On the 14th January, 1893, upon the petition of the plaintiff, an injunction issued, enjoining and restraining the board of commissioners and Morice from any action interfering with or infringing the plaintiff's rights of discharging the duties and receiving the emoluments of the said office, until such time as the disputed right to said office should be judicially determined. Plaintiff, in the petition upon which this injunction issued, set forth his election and qualification as veterinary surgeon, his continued possession and incumbency of the office, the terms and tenure of the office, and the powers and duties of the board. He also set forth the action of the board in attempting to replace him by the election of Morice, and declared this action illegal and unwarranted. He averred that the board of fire commissioners and Morice (the latter claiming title to the office by virtue of the election mentioned) and **Thomas O'Connor**, chief of the fire department, were seeking to impede, interfere, and obstruct him in the discharge of the duties and functions of his office, and receiving the emoluments thereof, and that

he feared that Morice would seek and obtain recognition as veterinary surgeon unless all parties should be restrained by injunction. He prayed that an injunction issue, and, after citation and hearing, that it be ultimately perpetuated, restraining the board, Morice, and O'Connor from any action interfering with or infringing upon his right of discharging the duties and receiving the emoluments of the said office until such time as the disputed right to said office shall be judicially determined. A motion to dissolve the injunction, as having been illegally issued, as the averments of the petition did not warrant it, and an exception to dismiss the suit, as disclosing no cause of action, were successively filed by the defendants, and overruled by the court. They then answered, first pleading the general issue, and, further answering, averred that Morice was duly elected under the ordinance; that he had immediately thereafter entered upon the discharge of the duties of his office, and was in the performance of the same at the date the injunction was taken out; that he was prevented by the injunction from continuing to perform said duties; and that from the date of his election he had been, and was still, the sole and actual incumbent, and de jure and de facto holder, of the office. The district court rendered judgment in favor of the plaintiff, as prayed for by him, and defendants have appealed.

Only two questions are really before us: (1) Is the veterinary surgeon of the fire department of the city of New Orleans to be classed as one of the officers and men of the department? (2) If he is, did his displacement by the board, in manner and form and under the circumstances as shown by the record, authorize him to take, and justify him in taking, out the injunction which he did, and when he did?

Defendants do not allude at all, in their brief, to the first point, and their contention in respect to it in argument was so clearly without foundation as to require no special or extended discussion. The veterinary surgeon is unquestionably an officer of the department. There is no basis whatever upon which to attempt to draw a distinction between him and the assistant engineers, the foreman, and the other persons mentioned together in the sixth section. The effect of our so holding is to bring the court at once to the consideration of the second question, for it is not claimed that the plaintiff has resigned, or been either removed or impeached, or that (assuming him to be an officer) the board had any power or authority to elect a person in his place.

The whole case of the defendants rests upon the incorrect premise that the plaintiff was connected with the department by a mere "assignment to duty," from which he could at any time be "relieved" by the board. The board was absolutely without power or authority to so relieve him at will, he hold-

ing his office by a fixed tenure during good behavior; and, as resulting from this fact, its action in electing Dr. Morice in his place was an absolute nullity, carrying with it no legal effect whatever. It is claimed that the plaintiff was present when that action took place; that his name was placed in nomination as a candidate in opposition to Morice; that he made no protest, but acquiesced in the situation until his defeat. There is nothing going to show that plaintiff's name, as a candidate, was presented by his authorization. He was not called on to interfere in the proceedings of the board, even had he been at liberty to have done so. He could safely rest on his legal rights. The situation and position of no one was injuriously affected by his course. There is no estoppel in the premises. The case of Callan v. Board, 45 La. Ann. 673, 12 South. 834, relied on by the defendants, bears no resemblance to the present. The plaintiff in that case did not pretend, in his pleadings, to have been at any time an elected officer. His utmost claim was that he was "acting" as an officer, which is something other, and very different from "being" an officer. Finding that plaintiff was elected and qualified as an officer in an office, the tenure of which is during good behavior, that he was actually in the discharge of his duties as such officer, that he had not resigned or been impeached, that any attempt by the board to displace him by the election of another person was done absolutely without power or authority, and that his attempted displacement was an absolute nullity; finding that, in the petition presented in this case, plaintiff, by pleadings containing, not merely conclusions of law, but recitals of fact supported by documents annexed, shows affirmatively to the court both the absolute character of his own rights, and the absolute want of power and authority of the board of commissioners in the premises; finding, also, that this litigation is limited to the ascertainment of the conflicting claims of the two veterinary surgeons themselves, and that no question arises as to the effect upon third parties of any act done by Dr. Morice, as being the act of a de facto officer,—we are of the opinion that the plaintiff was justified in asking, and the court warranted in granting, the injunction which issued in this case. We recognize that injunctions of this character should be granted only after the most careful examination by the judge to whom application for the same is made, inasmuch as there is danger of the judiciary being made to temporarily trench unintentionally upon powers legally committed to other departments of the government, or to special persons or tribunals, and inasmuch as public as well as private interests are almost necessarily more or less concerned in such proceedings. If district judges would refrain from action until applicants should so frame their pleadings by recital of the facts on both sides, and until they should so support them

by documents annexed, as to clearly satisfy them that the injunction, if issued, would be well taken, and if they would bring to bear, before action, their judicial knowledge (if such they have) of certain facts bearing on the particular case, instead of granting injunctions as a matter of course upon pleadings reciting mere conclusions of law (and skillfully prepared to suppress such portions of the facts of the case as, if known, would bar the remedy), and instead of acting as a matter of course upon the assumption (false, in most instances) that the injunction bond would fully and thoroughly protect and secure all interests at stake, the remedy by injunction, in cases like the present, would be conservative in its effects. The danger rests, not in the remedy, but in the carelessness or indifference of judges. We are of opinion that the judgment appealed from is correct, and it is therefore affirmed.

(46 La. Ann. 230)

FABACHER v. BRYANT et al. (No. 11,887.)
(Supreme Court of Louisiana. April 23, 1894.)
ILLEGAL COMBINATION — DRAYMEN'S ASSOCIATION
— RESULTING CONTROVERSIES — DISMISSAL BY COURT.

1. Courts will not adjust a controversy arising out of the illegal purpose and attempt of a draymen's association to deprive the presses of this city of the right to choose the labor required for hauling cotton; the association proposing to accomplish that purpose by passing a tariff of charges for hauling, designating their members to do the hauling, and subscribing money to prevent the presses from obtaining any labor except that furnished by the association, to be paid according to their tariff, and the testimony showing that the purpose was made effective by money put up by the association and other methods, by which nonunion men were compelled to abandon the services of the presses. Rev. Civ. Code, arts. 1893, 1896; Association v. Kock, 14 La. Ann. 168; Gravier v. Carraby, 17 La. 142; and cases collected in 2 Hen. Dig. p. 1007, par. 1.

2. The court, in aid of public policy and the law, will notice, irrespective of the pleadings, that the controversy submitted for adjudication grows out of illegal purposes or combinations, and, that illegality manifested by the record, it is obligatory on the court to dismiss the suit. *Id.*

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by Peter Fabacher against Bryant & Mather. From a judgment for defendants, plaintiff appeals. Affirmed.

Lazarus, Moore & Luce, for appellant. E. W. Huntington and Horace L. Dufour, for appellees. Eugene D. Saunders, for warrantor, appellee.

MILLER, J. The plaintiff, engaged in the business of hauling cotton for the presses in this city, alleges he was employed by defendants, proprietor of the Louisiana Cotton Press, to do what is termed the inhauling of cotton for that press for the seasons of 1891-

1892. The petition alleges the breach of the contract, and claims large damages. The answer of the defendants is, in effect, that at the period of the alleged contract there was no option for the presses of this city in respect to the employment of draymen, but they had to engage those designated by the Draymen's Association; that accordingly they contracted with Thomas Egan, a member of the association; that later the plaintiff called on defendants, announced himself as the choice of the association, and under that representation they were led to give him an order for cotton intended for their press, but the representation, the answer avers, was untrue; that in fact Egan, with whom they had already contracted, had been selected by the association, and he claimed his rights, which defendants recognized. The defendants, alleging that Egan was bound to defend them against the demand in the petition, called him in warranty. The warrantor answered, averring his selection by the association, his rights under his contract with defendants, and controverting plaintiff's demand. The case was submitted to a jury. The verdict was for plaintiff, but, on the new trial granted by the court, judgment was rendered in favor of defendants, and plaintiff appealed. The record of over 700 pages teems with exceptions to the testimony and rulings of the lower court, but the case as presented to this court submits the issue for our determination without reference to the exceptions.

It is in evidence that the Associated Draymen of the city, in the cotton seasons of 1891-92, adopted a tariff of charges for hauling cotton, and undertook to distribute among the members of the association the hauling of the various presses. In the theory of this association the presses were to be consulted neither in reference to the price to be paid nor as to those who should do the hauling. It is claimed, however, that in all this the association contemplated no compulsion whatever to be exerted on the presses. The weight due to this disclaimer of compulsion is well illustrated by this record. It is established that, not content with organizing the labor of the city in a tariff of charges, and assigning to the various presses the draymen to be employed by them, the members of the association subscribed money to put it beyond the power of the presses to employ any other than association or union men. The precise method in which it was proposed to use the money is not disclosed by the record. Whether to keep union men from working for the presses until the draymen's tariff of charges was accepted, or to deter nonunion men from that service, the effect was that the presses were utterly unable to obtain any labor except that provided by the association, to be paid the price exacted by the tariff. Any exertion of choice by the presses in respect to the labor required for hauling resulted in nonunion men being

driven from their drays. The defendants had exercised their supposed right of choosing their labor, and their choice had fallen on nonunion men, but, after a struggle of a few days, the men selected by the defendants were compelled to leave their employment. In the language of the president of the association, testifying in this case, the nonunion men "quit." The methods that made them "quit" were, to say the least, not pacific. In the letter we find in the record of the plaintiff, he congratulates the association on its success over the nonunion men, who, for a few days of hopeless effort, attempted to dray for defendants. The officers of the association who testify strenuously disclaim violence, as not within the scope of the association. An organization with its tariff of charges and allotment of its members to be accepted by the presses makes, we think, a large advance towards promoting violence when it puts up money to prevent the employment of any except its members, and this tendency of the measures of the association, we think, finds illustration in the record. Other methods serve as effectively as the money, the subscription of which is avowed, and, it is our conclusion, were employed. In the condition existing in this city in the beginning of the cotton season of 1891-92, the defendants found themselves with no alternative in respect to the labor needed for the hauling of cotton. It was union men at tariff prices, or no labor. The defendants acted on the theory that at least they would be permitted to choose a union man, and accordingly selected Egan, the warrantor in this case, who claimed the Louisiana Press had been assigned to him by the association. Hardly had this contract with Egan been closed when the plaintiff, Fabacher, presented himself, with the claim he, and not Egan, had been chosen by the association. The plaintiff testifies that it was not his purpose to force himself on defendants. There was, however, in his intercourse with defendants, no discussion or preliminaries usual to the making of contracts when the parties occupy equal positions. The defendants recognized the potency of the selection of the plaintiff by the association, stated by the plaintiff, and on the faith of that representation gave plaintiff an order for the delivery of the cotton intended for their press. It is this order the plaintiff deems his contract. Here the defendants supposed their troubles ended. They had, under pressure, discarded the nonunion labor previously secured. They had next engaged Egan, a union man, and because he was a member of the all-powerful association, and now, at the requirement of the association, as they supposed, they employed Fabacher. But Egan clung to his contract, strenuously denied that Fabacher had been selected, and notified defendants that he would hold them for damages if they undertook to withdraw from him the hauling.

Thus the unfortunate defendants, practically with no control over their contract, were involved, from no fault of their own, in the contention between the two members of the association,—whether one or the other had been chosen to do the work of the press. The defendants, in urgent need of labor, with no opportunity of obtaining it except from the association, and compelled to exercise their judgment between the two contestants, determined Egan had the better claim of recognition by the association, and gave him their order for all cotton intended for the Louisiana Press. The result is this suit by plaintiff.

It is claimed this court is called on to determine the issue whether plaintiff had any contract with defendants, and to award damages if the contract exists, and has been violated by defendants. In our appreciation there is another question forced on our attention by the record. The court is practically called on to find whether Egan or plaintiff was chosen by the association, and, when that issue is determined, to give effect to the action of the association prescribing to defendants the employment of one or the other of these contestants; for plaintiff's asserted employment rests on his representation of selection by the association, and, if there was no basis for that representation, there is no ground for plaintiff to complain that defendants gave their hauling to Egan. All the parties accept that this issue of the choice of the association is that to be solved by this court, and to that end the minutes of the association, and copious testimony of its proceedings undertaking to prescribe the persons, members of the association, to do the hauling for the presses of this city, have been put in evidence and discussed at the bar. It is the right of the members of the association to establish their tariff of charges, and decline service unless on their terms; but when the association goes beyond this, and undertakes, by subscriptions of money or other means, to prevent the presses of this city from obtaining any labor for hauling cotton except that furnished by the association, that purpose of the association is plainly repugnant to public policy and the law. It was in aid of, and an essential part of, that illegal purpose, that the association designated its members whether one or the other of the contestants, to do the hauling of the Louisiana Press. It is said this designation was, after all, a mere recommendation. This argument supposes the presses were unable or unwilling to select the required labor, and referred that selection to the association. The so-called "recommendation" should bear another name. It carried this significance: "Accept the recommendation, or no labor will be attainable;" and the power and machinery of the association, it is manifest from this record, were competent to enforce that significance. Nor was it until all had

been made to realize the potency in this respect of the association that the defendants yielded all choice. The nonunion men originally selected by them were denied admission as union men, compelled to abandon their drays, and the letter of the plaintiff himself exults in this triumph over defendants' rights. It is clearly in the prosecution of the unlawful purpose of preventing defendants from procuring labor of their choice, and compelling the employment of union men designated by the association, that the issue in this cause arises, to be solved by an examination of the proceedings of the association, and, when thus ascertained, this court is expected to enforce it. If Fabacher is adjudged to be the choice of the association, his asserted contract is to be maintained, and defendants mulcted in damages. If Egan is found to have been more fortunate in the deliberations of this body, then defendants' contract with him is to be permitted to stand. The designation of either is linked to an illegal purpose, in aid of which there is, on the plainest principles, no appeal to the courts. It is trite in our jurisprudence that contentions originating in unlawful purposes are not to be brought into courts of justice. It is obligatory on the courts to take notice, irrespective of the pleadings, of the phase of this controversy under discussion, and conspicuous in the record. It is deemed appropriate on this occasion to convey the instruction that a controversy of this character can find no adjustment here, but the parties will be left as they stand. Rev. Civ. Code, arts. 1893, 1895; Association v. Kock, 14 La. Ann. 168; Gravier v. Carraby, 17 La. 142; and cases collected in 2 Hen. Dig. p. 1007, par. 1.

Our learned brother of the lower court was in some doubt whether duress, as a defense, was pleaded. He finally left it to the jury as an issue to be determined. He was right in this. The jury, notwithstanding his charge, gave plaintiff a verdict. That the lower court set aside and dismissed the suit is fully warranted, we think, by the record. It may be added that the motive or consideration for the contract asserted by plaintiff, arising, as it did, from the representation that he had been selected by the association, the import of that representation was practically that the association had definitely settled for defendants the party they should employ. In point of fact, there had been no such settlement. There were meetings after plaintiff's representations to determine the question. The fortunes of the contestants fluctuated, as one or the other had friends at these meetings. Egan claimed selection in August. Plaintiff asserted his selection in September. Plaintiff maintained his ground at three meetings. But the contention went on. The defendants had no access to the meetings, nor voice or part in their deliberations, to determine who should do their work. This suit af-

firms they are to suffer because of the uncertainty in the councils of the association. If they yielded to plaintiff, they are menaced with Egan's suit. Assured by Egan he had been chosen, abiding by the contract they had with him, they are subjected to this suit. But at the final meetings of the association on the 1st and 12th of October the choice of the association was declared to rest on Egan. If there were no other ground, we think this final action should have relieved the defendants from this suit on an asserted contract, the assent to which, if assent it can be called, rested on the plaintiff's representation that he had been chosen, not verified by the action of the association whose choice of himself he had undertaken to affirm. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, at the costs of the appellant.

(46 La. Ann. 897)

SOLOMON v. DIEFENTHAL. (No. 11,404.)
(Supreme Court of Louisiana. May 7, 1894.)

ELECTION OF REMEDIES—INJUNCTION—ACTION FOR DAMAGES—SALE OF GOOD WILL—CONTRACT NOT TO ENGAGE IN BUSINESS.

1. Where a party who sells his business and the good will thereof contracts that he will not engage in the same business in the same place for five years, and stipulates "that in the event of the violation of his engagement, in whole or in part, the damages inflicted upon the purchaser in consequence thereof are liquidated and fixed at five thousand dollars, which he agrees to pay as a penalty for said violation, and consents that the purchaser shall restrain him by injunction, if necessary, from any attempt to violate said engagement, authorizing any court of competent jurisdiction to do so on application," his subsequent violation of the agreement will not entitle the other party to demand and obtain, at one and the same time, a judgment for \$5,000 and an injunction.

2. Parties are much more free to make contracts than they are to stipulate for and regulate legal remedies.

3. Where a party sues for personal judgment for \$5,000, as the stipulated penalty, or the damages fixed and liquidated, for a violation, in whole or in part, of a contract not to do certain business for five years, and demands and obtains at the same time, against the other party, an injunction restraining him from pursuing such business, as an instrumentality to enforce specific performance, the demand, as presented and filed, with the two remedies coupled, is an entirety, and an inquitable one. The injunction should not be allowed. If allowed, it cannot be made good ab initio to discontinue a part of the demand. A motion to dissolve the injunction was correctly sustained.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by M. W. Solomon against Edward Diefenthal. From a judgment dissolving an injunction issued at the instance of plaintiff, he appeals. Affirmed.

Lazarus, Moore & Luce, for appellant.
Dinkelspiel & Hart, for appellee.

NICHOLLS, C. J. Plaintiff and defend-

ant were formerly partners, as butchers, in New Orleans. The present litigation is the result of the sale by the defendant to the plaintiff of all the former's interest in the business of the firm, in the stock in trade, and all the appliances and appurtenances thereof, including the tools, horses, wagons, good will, certain patronage, and certain enumerated contracts, for the price of \$3,000, \$2,000 of which were paid in cash, and the balance represented by the purchaser's note, payable at six months. The present suit was instituted in October, 1893. Plaintiff, after setting forth in his petition the above facts, alleges that in the contract it was further stipulated, as a part of the consideration for the price paid, that defendant was not to engage in any similar business, directly or indirectly, in the city of New Orleans, for the period of five years, nor was he to solicit business for himself, or for any other person or persons so engaged, during the said period; defendant binding and obligating himself, in the event of the violation of said obligation in whole or in part, to pay damages to the plaintiff, which damages were by said act fixed and liquidated at the sum of \$5,000, defendant agreeing to pay said amount as a penalty for any violation of the said stipulation, and that plaintiff should restrain him by injunction in any attempt to violate said agreement. He further alleges that the interest conveyed by the defendant was worth much less than \$3,000, and that the main reason and consideration for the payment of the \$3,000 was defendant's obligation not to engage in business, or solicit orders, as before stated. He then represents that defendant had on the 27th of September, 1893, violated this obligation by opening and establishing at stall No. 44, Dryades market, in New Orleans, a place for the vending of fish, poultry, meats, etc., and had there sold the same, and would continue to do so unless enjoined; that, by reason of the said conduct, plaintiff had, by law and by express agreement, a right to restrain him from further conducting or pursuing the said business, directly or indirectly, and from soliciting, directly or indirectly, any trade or customers for that or any other similar business; that inasmuch as, by the stipulation of the act of sale, damages for the violation of said agreement are fixed and liquidated at the sum of \$5,000, plaintiff is entitled to recover that amount from the defendant. He prayed for the injunction to which he averred himself entitled, and for judgment in his favor for the sum of \$5,000, with legal interest from judicial demand. An injunction was granted as prayed for, and was duly served upon the defendant. On the 10th of October, at the instance of plaintiff, defendant was ruled to show cause on the 12th of the same month why he should not be punished for contempt for having violated the injunction. On the same day (the 10th)

defendant moved to dissolve the injunction on the ground that the petition showed no cause of action, and that the bond and security given for the injunction were insufficient. This motion was also fixed for trial for the 12th. The rule for contempt and the motion to dissolve the injunction seem to have been taken up and tried together, the trial resulting in a judgment dissolving the injunction. From that action of the court, plaintiff appealed. Subsequently to the taking of the appeal, defendant died; and, his widow and heirs having been made parties, they have asked, in this court, an affirmance of the judgment.

Appellant insists that, believing he was entitled, under his contract, to ask, at one and the same time, both a judgment for \$5,000, by way of damages or penalty, and an injunction for the purpose of enforcing defendant's obligation not to engage in business, he had the right to frame his demand accordingly, though possibly, in so doing, he subjected himself to being forced to an election as to which of the two claims he would stand upon, should the court hold that this could not be done. He complains that the district court, by its action, cut him off from a right and power of election which belonged to him, even if the two demands were inconsistent, and that the court itself made for him an arbitrary election, which it was not authorized or warranted in making. He maintains before us that the two claims were not inconsistent, and that he can, in the premises, legally exact both a money judgment and an injunction.

The matter, as presented to the district judge, was, on the one hand, the ordinary one of a demand for a personal judgment for a sum of money, coupled with an injunction apparently accompanying it as an incidental remedy, and, on the other, a motion to dissolve that injunction on the face of the papers, for the reason that the petition showed no cause of action. This motion was the customary one employed in matters of injunction, and the expression that "the petition showed no cause of action" had reference to it. The motion, as made, called simply for an absolute decision, either maintaining the injunction, or setting it aside. There was nothing to intimate to the judge that any right of election would be involved in his decision. Plaintiff did not suggest to the court that it should so frame its decree as to save a right of election. Possibly, this might have been done, had the right of election now claimed really existed, by a conditional or contingent order; but, whether this be so or not, such a right or privilege is not shown by the record to have been mentioned, or hinted at.

The court was probably of the opinion that the plaintiff, by asking for a judgment of \$5,000, was ipso facto in the position of having himself already forcedly made an election. It may also well be that an examina-

tion of the pleadings and prayer as a whole led it to the conclusion (injunction not being necessarily a writ of right) that the facts disclosed by the petition were of a character such as to bar the remedy of injunction, independently of the question of an election. Defendant's position, sustained by the court below, is that plaintiff, in proceeding against him, and asking for a judgment of \$5,000, abandoned any right which he might have otherwise had to an injunction. We are of the opinion that plaintiff would have had the right to an injunction against defendant to enforce the obligation entered into by him in his contract not to engage in business in New Orleans for a certain time. This court has so decided in *Levine v. Michel*, 35 La. Ann. 1121, and there are numerous common-law authorities to the same effect. Plaintiff concedes that he would take this remedy, not by virtue of any permission from the defendant, but from the law, and says he refers us to the express consent of the defendant to its exercise, as going to show the intentions of the parties, and to fix and establish the character of the claim for \$5,000. Referring to the defense made in the case, as mentioned above, plaintiff, in his brief, says: "On this proposition the authorities are agreed that the test is the intention of the parties to the contract, to be gathered from the contract itself, in its entirety. Thus, if it should appear that the intention of the parties to a contract was that, upon the payment of a stipulated sum, it should be permissive of the right to commit the breach, and that the stipulation to do or not to do may then be done or not done, as the case may be, then there can be no action for the stipulated damages, and for the specific performance also. But if, on the other hand, the evident intention of the contracting parties, as gathered from the contract in its entirety, is that a specific performance of the obligation to do or not to do is the prime or moving object or cause for the contract, and that the stipulation of a 'penalty' for the breach was intended, not as a measure of bad faith, but as an inducement to good faith, an action will lie to recover the penalty, and an injunction may go out to stay the action complained of." We do not understand the defendant to assert that the contract, as made, created a facultative obligation, enabling him, of right, to recede from his obligation not to engage in business upon payment of \$5,000, thus depriving plaintiff of any legal power or control over defendant's actions in that respect. Defendant set up no such pretension. We take it that he perfectly well understood and recognized that, in undertaking to open an establishment of his own, he did so in express violation of his obligations, and not under a conditionally reserved right, and that he well knew that he subjected himself to all the rights and remedies which would belong to the plaintiff as the result of that fact. What we have to deal with now is the ascer-

tainment of what those rights and remedies are. We have already said that he could have checked the defendant by injunction. If he thought proper not to do this, he was undoubtedly entitled to bring an action against him, demanding \$5,000 damages as for breach of contract. But the question is, is he entitled, in this case, to do both? It may be true that there are cases where a primary obligation having been entered into, and a penalty stipulated to insure its proper performance, the obligee may properly sue for the penalty, and also for the specific performance of the obligation, and also cases where a demand for the specific performance of an obligation may be legally coupled with a demand for liquidated damages resulting from its breach. We confine ourselves to seeing whether the present case falls within one or the other of those classes, without attempting to discuss or define what those classes are.

In article 2125 of the Revised Civil Code, it is declared that "the penal clause is the compensation for the damages which the creditor sustains by the non-execution of the principal obligation. He cannot demand the principal and the penalty together, unless the latter be stipulated for the mere delay,"—and, in article 2127, that the courts are authorized to modify the penalty when the principal obligation has been partly executed, *except in case of a contrary agreement*. The fifth paragraph of article 1934, Rev. Civ. Code, referring to damages arising from breach of contract, says: "Where the parties by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is executed in part, the damages agreed on may be reduced to the loss really suffered, and the gain of which the party has been deprived, *unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement.*" With these provisions of the law before us, let us refer to the terms of the special contract. The act between the parties, referring to the obligation assumed by the defendant not to engage in business, says: "In the event of the violation of this obligation *in whole or in part*, the damages inflicted upon the purchaser or his assigns in consequence thereof are hereby liquidated and fixed at the sum of five thousand dollars, collectible in any court of competent jurisdiction, and the vendor agrees to pay said amount as a penalty for said violation. He further consents that the purchaser shall restrain him by injunction, if necessary, for any attempt to violate said engagement, hereby authorizing any court of competent jurisdiction, on the application of said purchaser, and according to law." In examining the clauses of this contract, the words, "in violation of this obligation *in whole or in part*," which we have ourselves italicized, are spe-

cially noticeable. By the contract the sum of \$5,000 was fixed as the damages which would be inflicted on the purchaser, or the penalty which would be imposed upon the vendor, independently of the extent or duration of the breach, whether it should cover an hour, a day, or the whole five years during which this obligation was stipulated to continue. Let the time be long or short, let the actual damage be large or small, the parties contracted for the payment to the plaintiff of the sum of \$5,000, and withdrew from the courts a power of reduction or modification. By express agreement the bare fact of a violation of the obligation by the defendant entailed upon him a liability to pay plaintiff the full amount agreed upon.

Let us now turn to other articles of the Code relative to breach of contract, and see what their provisions are. We quote some of them in full, italicizing certain words, as we have already done in the case of articles already copied. Article 1926: "On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a *specific performance* of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section." Article 1927: "In *ordinary cases*, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an *inadequate compensation*, and the party has the power of performing the contract, he may be condemned to a *specific performance* by means prescribed in the laws which regulate the practice of the courts." In *City of New Orleans v. New Orleans & N. E. R. Co.*, 44 La. Ann. 67, 10 South. 401, this court said: "It is only when no adequate compensation can be made in damages that courts in this state can decree a specific performance of a contract. The decree cannot be demanded as a matter of right. It rests largely upon judicial discretion, not arbitrarily exercised, but according to the soundest principles of equity and justice." The injunction which issued in this case was adopted as an instrumentality by and through which to enforce the "specific performance" of defendant's obligations, and the propriety of its issuance and its perpetuation must be viewed from that standpoint. Specific performance, as we have just seen, is not demandable as a matter of right; and, under article 1927, it is not granted where the parties have provided for adequate compensation in case of breach. Such is precisely the condition of the parties to this litigation. They have themselves fixed upon \$5,000 as being an amount sufficient to compensate plaintiff for a violation during the whole five years to which the contract refers. If damages had been liquidated in the contract at so much per day or per month, and plaintiff, at the end

of two or three months, had sued defendant for the amount of the past-due and accrued and exigible damages, coupled with an injunction against further continued violation of his obligations, a very different case would have been presented to us than that which is actually before us. The contract between the parties was entered into on the 13th day of July, 1892; the first infraction of the same by defendant is mentioned as having occurred on the 27th September, 1892, and this suit (in which plaintiff sued defendant for \$5,000, and caused an injunction to issue against him, prohibiting him from engaging further in the business of butchering) was instituted on the 4th of October following,—only seven days after the first violation by defendant of his engagement. If plaintiff, after taking out the injunction, had maintained it in force for one or two years, and had then voluntarily dismissed or discontinued it, he would still be entitled, under this contract, to a judgment for \$5,000; and defendant would be entitled to no credit either for the period between the date of the contract and its first infraction (during which time his contract stipulations would have been observed voluntarily by him), nor credit for the enforced observance of those obligations through the injunction, from the time of the issuing of the injunction up to that of its discontinuance. We do not think such harsh and unreasonable results should be permitted to be brought about by the courts through a remedy which is discretionary with them in its application. The agreement of the parties in this matter is of no importance. Parties are much more free to make contracts than they are to regulate and stipulate as to legal remedies. *Levicks v. Walker*, 15 La. Ann. 246. The demand, as presented and filed, with the two remedies coupled, was an inequitable one, and an entirety, and the injunction should not have been allowed. It could not now be given life to, and legalized ab initio, by an offer to discontinue a part of the demand, even had such an offer been made, which it was not. This view of the matter relieves us of any attempted classification of the obligation which the parties entered into,—from examining to see whether there is a difference between the liability of \$5,000 provided for, considered as a "penalty," and the same liability considered as "liquidated damages," and, if such there should be, to distinguish between the effects of the one and those of the other. Our judgment in this case would not be altered by reason of any distinctions of that kind.

Plaintiff informs us that defendant is now insolvent, and a judgment against him would serve no useful purpose. The possibility of defendant's future insolvency was a matter which should have been foreseen and guarded against by proper security. Plaintiff did not deem this security necessary at the time of the contract.

The case of *Stafford v. Shortreed*, reported in 17 N. W. 756, resembles the present in many of its features. In that case the supreme court of Iowa held that "where a party who sells his business and the good will thereof contracts that he will not carry on the same business at the place of sale, or within a certain distance thereof, for three years, 'under penalty of one hundred dollars,' and violates this agreement, the only remedy is an action to recover the amount named in the contract, and in such an action an injunction to restrain the continuance of such business in violation of the contract cannot be granted." In that case, as in this, it was contended that the defendant was insolvent. The court said: "It is to be presumed that the plaintiff made his contract with full knowledge of defendant's financial standing, and ability to discharge his obligations. If he had doubts upon that question, he should have required some security to protect himself against any damages which he might sustain by reason of the failure to observe his agreement. As he took the defendant's promise to pay him \$100 if defendant should violate his agreement, he cannot ask more than the ordinary precept of the law to enforce payment. The amount which the defendant agreed to pay is in the nature of stipulated damages. It cannot be regarded as a penalty, because the actual damages which plaintiff may sustain by a violation of the agreement must, in the nature of things, be subject of mere conjecture. They cannot be established by evidence, even approximately. Section 3386 of the Code has no application to a case like this. It is therein provided that 'in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury. * * *' In this case there could be no repetition or continuance of a breach of the contract, because, when the defendant commenced to work at blacksmithing at Pottsville, he incurred the whole liability, which was to pay plaintiff the \$100." We are of the opinion that the judgment appealed from is correct, and it is therefore hereby affirmed.

(46 La. Ann. 155)

NEW ORLEANS, FT. J. & G. I. R. CO. v.
TURCAN. (No. 11,295.)¹

(Supreme Court of Louisiana. Jan. 15, 1894.)

ACTION FOR SERVICES—REPAIR OF BROKEN LEVEE
—LIABILITIES OF RIPARIAN OWNER.

1. In cases of flood, as in those of conflagration, services rendered voluntarily to preserve another man's property from destruction

are presumed to be gratuitous, and give no cause of action.

2. Under the present levee system of the state the riparian proprietor upon whose property a crevasse has occurred is not legally bound to close the same or to rebuild the broken levee. When a third person voluntarily furnishes materials and pays for labor in aid of closing the break, he cannot call upon the owner of the land to reimburse to him his expenditures. To recognize such a right would be to practically return to the old system.

(Syllabus by the Court.)

Appeal from district court, parish of Plaquemines; A. B. Livaudais, Judge.

Action by the New Orleans, Ft. Jackson & Grand Isle Railroad Company against Horace B. Turcan. Judgment for the defendant, and plaintiff appeals. Affirmed.

James Wilkinson, for appellant. H. Howard McCaleb, for appellee.

NICHOLLS, C. J. Plaintiffs allege that the defendant is the owner of the Happy Point plantation, in the parish of Plaquemines, on the right descending bank of the Mississippi river; that said land was protected on the river front by a magnificent levee built by the state of Louisiana, through the defendant as contractor, who was paid by the state for the building of the same; that under the laws of the state, and under the ordinances of the police jury of the parish authorized by said laws, the legal duty of maintaining and keeping said levee in good order and repair was imposed on the defendant, the owner of said property; that though said levee was built of fresh earth, and exposed somewhat to the river, the defendant negligently and imprudently failed to fascine the same, or even put stakes or trash or any protection to said levee from the erosive action of the swells of the rising river, and although a storekeeper, conducting and carrying on a storekeeping business within 50 feet of said levee, he remained quiescent while, during the months of April and May, the river washed the outside of this levee down until it became a mere shell; that with a nominal expenditure the levee, which was 2½ feet above the highest flood level of 1892, could have been protected, but, through a reckless indifference and disregard of his duties towards himself and the public, the defendant grossly, carelessly, negligently, and imprudently failed to protect said levee with either sacks of earth, planks, willow brush, or rice straw, and, as a result of his negligence aforesaid, a hole appeared in said levee just below his rice flume, on or about the evening of the 17th of May, 1892, when the river was very high; that before then, and then, the neighbors and laborers besought the defendant to repair and protect his levee, and to stop at least said hole, which was then spouting water at a distance of about 75 feet from his store, filling the road with water, and, being alongside of a rice flume, was known to him to be doubly dangerous, as in case of a crevasse, and the washing out

¹ Rehearing refused February 5, 1894.

of said flume, the depth of in-rushing water would be very great; that said appeals to defendant were disregarded by him, and willfully, negligently, carelessly, and wrongfully the defendant utterly failed, omitted, and refused to either protect said levee or stop said hole, or employ the necessary force or material to accomplish anything towards said end, and then, on or about the 18th May, 1892, said levee, abandoned to its fate by its owner as aforesaid, gave way on the lower side of said rice flume, and the water rushed through with great force, flooding the plantation of the defendant and the surrounding country; that the plaintiff corporation own and operate a railroad through the west bank of Orleans, Jefferson, and Plaquemines parishes, which passes about four acres back of the crevasse on the Happy Point plantation; that, as soon as they became aware of said crevasse, plaintiffs collected large quantities of materials, lumber, and sacks, and a large number of laborers, and rushed them down to said crevasse on special trains; that, when plaintiffs took charge of said crevasse, it was increasing rapidly, and was of great depth, said rice flume washing out while the work was going on, and, if unchecked, it would have certainly washed down a large and valuable store and dwelling house and stables of defendant, and swept a deep hole through the front portion of his property; that moreover, if allowed to increase, the said crevasse would have become a very large one, and have destroyed, not only his own crops, but would have done over \$100,000 damages to other crops, for which defendant would have been liable, as said crevasse occurred through his inexcusable and criminal negligence, and want of care of his legal duty in the premises; that only by the utmost diligence and strenuous efforts of plaintiffs was said crevasse closed, which, but for them, would be still running, inflicting untold disaster to the whole community; that the closing of said crevasse cost the plaintiff corporation the sum of \$5,000, including the use of trains, for which they made no charge; that plaintiffs annexed to their petition a statement of the amount of expenditures incurred by them in the closing of the said crevasse, and they averred that the amounts paid and charged therein were just and reasonable; that defendant is liable to the plaintiffs for said amounts, first, because they had performed a work that it was the legal duty of the defendant to do, and had saved defendant's property and relieved him from heavy liability for heavy damages, and they are therefore entitled to reimbursement for said amount expended, from the defendant, with a lien and privilege on the said property; that defendant is moreover liable to plaintiffs by reason of the fact that said crevasse occurred through the negligence and imprudence of defendant, and that, if said crevasse would have been allowed to run, plaintiffs' trains would have been stopped, and plaintiffs greatly damaged

by the aforesaid acts of omission of the defendant, and that the legal and honest expenses to prevent said damages were really damages sustained by them through the fault and neglect of the defendant as aforesaid, and for which he is liable to them. In view of the premises, they prayed that the defendant be condemned to pay them the sum of \$4,473 (that being the amount shown on the exhibit or account annexed to the petition), with legal interest from judicial demand, with first lien and privilege on the property known as the "Happy Point Plantation." The charges made in the account were for sacks, lumber, nails, straw, drayage, labor, and board. The defendant pleaded the general issue, and prayed for trial by jury. The case was tried by a jury, which, by a vote of nine to three, returned a verdict in favor of the defendant. Plaintiffs moved for a new trial. In passing upon the motion for a new trial, the district judge said that the jury had been instructed as to the law applicable to the case, as shown by the written charge of the court on file, and instructed that they were the judges of the law as well as of the evidence, and of the sufficiency of that evidence and the credibility of the witnesses; that the application was made upon the evidence alone, and particularly upon the question of negligence vel non on the part of the defendant, of which evidence submitted to them the jury are the best judges. For these reasons he refused the application, and rendered judgment in favor of the defendant, rejecting plaintiffs' demand, in conformity to the verdict. The plaintiffs have appealed.

On or about the 18th May, 1892, a crevasse occurred on the Happy Point plantation, in the parish of Plaquemines, belonging to the defendant. As soon as the plaintiffs ascertained that fact, they dispatched a train with materials to the place, in order to assist in closing the break. There is no doubt but that they contributed large amounts of materials and furnished a great deal of labor, which they paid for, in aid of this result. We are called on to say whether plaintiffs are entitled to recover this amount from the defendant. The question before us is not whether the defendant was legally bound to have taken all proper steps for the repair and protection of the levee on his property; whether he performed this duty or not; whether, if he did not do so, the parochial authorities would have had the legal right to have had it repaired or protected, either directly or through the instrumentality of third parties, or third parties could, of their own motion, have done so with a legal right to reimbursement,—for no claim is asserted for expenditures made in the repairing or protection of defendant's levee prior to its breaking. What is contended for is that expenditures made by the plaintiffs for the closing of the crevasse after it had taken place are recoverable from the owner of the property

on which it occurred, in an action as for moneys expended for his use and benefit. We say in an action for moneys expended for his use and benefit, for that is the character of the one at bar. No conventional contractual relations are advanced as having existed between the parties, and, although averments are scattered through the petition to the effect that defendant was legally bound to have kept his levee in proper repair and properly protected, that he had violated that duty, and that he was guilty of negligence, which led up to the crevasse as the cause thereof, and although the plaintiffs in one allegation declared that the amount of their expenditures was in reality damages sustained by them, we are of the opinion that plaintiffs' demand is not one *ex delicto* for damages. The plaintiffs do not ground their cause of action upon the allegations we have referred to. They were inserted in the petition in support of the theory on which this case is based, which, as we have said, is that the moneys expended inured to the benefit of defendant, and were therefore to be repaid. They were doubtless suggested as useful for that purpose by the line of thought followed in *Police Jury v. Hampton*, 5 Mart. (N. S.) 393. The fact that plaintiffs in one of their allegations declare that the moneys expended by them were in reality damages to them cannot change the character of the action as shown by the prayer and the pleadings as a whole, and where, on the face of the papers, the allegation to that effect is legally incorrect. If the plaintiffs could recover from the defendant the amount demanded, they certainly could not do so under their pleadings, by way of damages. Admitting as true the fact alleged that they did expend the amount claimed in closing the crevasse on defendant's land, that fact would not furnish legal evidence of damage *per se* to them to the same amount as resulting from the break. The outlays made would have no necessary legal connection with damages suffered; it would be no test of or measure of damages. A third person may spend large amounts in closing a break in the levee on another's property, perfectly consistent with the fact that neither the crevasse nor its long continuance would affect his interest to the amount of a single dollar. Plaintiffs allege no damages outside of their expenditures.

Under the views we entertain of the action, we confine our inquiry to the question whether plaintiffs can recover the amount sued for as for moneys expended for the use and benefit of the defendant. At the very threshold we meet the rule announced in *Watson v. Ledoux*, 8 La. Ann. 68, that "in cases of flood, as in those of conflagration, services rendered voluntarily to preserve another man's property from destruction are presumed to be gratuitous, and give no cause of action." Did the plaintiffs adduce any fact on the trial of this case to take it out of

the rule so proclaimed? We think not. Formerly the front proprietors on the Mississippi river were required to construct the necessary levees and embankments along their front lines on the margin of the river at their own cost, and in default thereof the required work might be done at their expense by the parochial authorities; but this court, in *Police Jury v. Tardos*, 22 La. Ann. 58, held that the act of the legislature approved February 17, 1866, repealed all former laws authorizing the parochial authorities to construct levees at the cost and expense of the front riparian proprietors of the lands leveed, and since its date the parish could not force them to pay the cost of a levee which she has ordered to be constructed along the front line, and that no reenactment of former laws had been made at the time of its decision. It further said: "The legislation on the subject of levees since the late war has manifestly been framed with reference to the great changes which have been wrought in the condition of the country by the late war. The vast expense formerly imposed upon the riparian proprietors of building the heavy embankments necessary on the Mississippi, and to make continuous repairs upon them, would now, under the altered state of affairs in regard to capital and labor, be utterly ruinous. Hence the policy was a wise one to relieve that class of our people by a change of the laws and regulations in respect to the levee system." We have been referred to no law, and we know of none, altering the situation as stated in the *Case of Tardos*, making it the duty of front riparian proprietors to build the levees on their front either when new levees become necessary by gradual changes and encroachments of the river or from the sudden sweeping away of the old levees by crevasses. That work has now to be done by the public authorities. If the defendant in this case could not have been legally called upon to close the break which had occurred on his plantation, either by the public authorities or by his neighbors, the plaintiffs could not, by going forward of their own accord, and closing the work primarily at their own expense, force the defendant to subsequently defray that expense. To recognize such a right on their part would be practically to return to the old system. If the plaintiffs have any claim, legal or equitable, as arising from the outlay made by them, it would be against parties other than the defendant. The contention that the plaintiffs have, through their action, saved the defendant from damages for which he otherwise might be liable, is predicated upon considerations remote and purely conjectural and speculative. They might, under the former system, have been adduced as an argument supporting and fortifying such a demand as was advanced by *Police Jury v. Hampton*, 5 Mart. (N. S.) 393, under the then existing laws; but standing alone,

under the present condition of affairs, they do not form the basis of a claim for reimbursement in this suit.

The conclusions we have reached and just announced do away with the necessity of our expressing any opinion upon the positions taken by the defendant, that plaintiffs, as operating a railroad running along the river, and owning the lands upon which the tracks are laid, on portions of the properties having fronts upon the Mississippi river, would be as much bound for the repair and protection of the levees as the parties owning those properties directly upon the river, and that in making these expenditures plaintiffs were acting in their own name and for their own benefit, and not for defendant. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(46 La. Ann. 335)

STATE v. OLYMPIC CLUB. (No. 11,421.)

(Supreme Court of Louisiana. April 23, 1894.)

PRIZE FIGHTING—GLOVE CONTEST—ATHLETIC CLUB—FORFEITURE OF CHARTER.

1. A criminal statute denouncing what is commonly called prize fighting to be a misdemeanor, punishable by fine and imprisonment, coupled with a proviso that the provisions of the act shall not apply to exhibitions and glove contests between human beings, which may take place within the rooms of regularly chartered athletic clubs, presents a question of fact to be determined by the court or jury as to whether any given contest or series of contests come within the designation of the statute as a prize fight or within the scope and meaning of the proviso as a glove contest.

2. As the state of Louisiana is in court seeking the forfeiture of the defendant's charter on the ground that the corporation has committed acts ultra vires of its charter, and is met with the provisions of an act of her own legislature which, in terms, authorizes just such contests as the witnesses describe the club contests to have been, this court will be excused for declining to disturb a finding of a jury in favor of the defendant, on a question of fact.

3. Conceding such contests to be violative of good morals and of a sound public policy, the remedy comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Suit by the state of Louisiana against the Olympic Club. From a judgment for defendant, plaintiff appeals. Affirmed.

Milton J. Cunningham, Atty. Gen., Edwin H. McCaleb, Jr., Benjamin Rice Forman, and Charles Forman, for the State. Henry P. Dart, Charles H. Luzenberg, and Frank Zengel, for appellee.

WATKINS, J. The plaintiff's suit is for the revocation and forfeiture of the defendant's charter, on the ground and for the reason that it has committed acts ultra vires, and transcended the powers granted by its

charter and conferred upon it by law, in that the corporation, through its officers and agents, has fostered, encouraged, and maintained exhibitions of what is "commonly called prize fighting" in violation of the constitution and laws of this state. Accompanying the foregoing averments is a prayer for an injunction restraining and prohibiting the corporation, its officers and agents, from maintaining, fostering, and encouraging such exhibitions, and also enjoining and prohibiting the defendant from selling or disposing of its property pendente lite. The prayer is concluded by demand for the appointment of a receiver to take charge of its assets and property, and to liquidate and wind up its affairs. In the petition are set forth the various objects and purposes of the defendant organization as they are enumerated in its charter and the amendment thereto,—such as the establishment and maintenance of rooms for literary purposes; for the collection of valuable works of art, books, maps, charts, statuary, coins, etc.; for the promotion of social intercourse, enjoyment, comfort, harmony, refinement of manners, and intellectual improvement; to encourage physical culture and development of athletic exercises, such as boxing, wrestling, fencing, and exhibitions of athletic sport; to organize one or more military companies; to promote and maintain a natatorium, gymnasium, athletic grounds, rowing clubs, bowling alleys, and such other features as may be found necessary to fulfill the purposes for which this corporation is formed. Then follows the averment that "the acts of the incorporation were a fraud upon the laws of the state, the vague and indefinite language employed to express the objects and purposes of the club being purposely used to cloak, cover up, and conceal the real objects for which said corporation was organized," as set out supra. As adjuvatory of the foregoing allegation the further averment is made that the defendant is accustomed to offer large prizes or rewards to noted pugilists of other states and countries; and its arena has been the scene of prize fights that were participated in by them, intending to fight until one of the contestants should give in from sheer exhaustion or injuries received; that the fights were witnessed by large assemblies of persons, there unlawfully congregated for the purpose of encouraging same, who were compelled to pay entrance fees for admission to said exhibitions. It is then further averred that such unlawful assemblies and acts, which were public nuisances, were instigated and maintained by the club; that "these disgraceful exhibitions have attracted to this city a large number of noted thugs, confidence men, and criminal characters from other cities and states, thereby endangering the public peace, and menacing the security of life and property;" that these exhibitions are and have been an "incentive to gambling, and large sums of money have

been bet, wagered, and staked on the result thereof;" and that the defendant "has been offering and paying large sums of money to noted pugilists, and has caused and encouraged them thereby to commit assault and battery upon each other;" and that "said prize fights set evil examples to the young, discourage honest industry by disproportionately rewarding sanguinary exhibitions of brute force,—all of which are public nuisances." It is then alleged that a large number of said exhibitions have taken place at the club house of the defendant, by the direction, and under the sanction and authority, of its officers and agents, and that "the said exhibitions of what are commonly called prize fights" have taken place on the dates and between the participants named in the accompanying list, to wit:

Fighters.	Date.	Prize.	Amt. rec'd by winner.	Amt. rec'd by loser.
1 Thos. Ward. Kid Wilson.	—, 1890	\$ 400	\$ 300	\$ 100
2 Jim Carroll. Andy Bowen.	Sept. 16, 1890	3,000	2,500	500
3 Bob Fitzsimmons. Jack Dempsey.	Jan. 14, 1891	10,000	9,000	1,000
4 Cal. McCarthy. Tom Warren.	Sept. 22, 1891	1,500	1,000	500
5 J. Griffin. J. Larkin.	Nov. 19, 1891	2,500	2,000	500
6 Billy Myer. Jim Carroll.	Dec. 22, 1891	5,000	4,500	500
7 Cal McCarthy. Tom Callaghan.	Jan. 27, 1892	2,000	1,500	500
8 Bob Fitzsimmons. Pat Maher.	March 2, 1892	10,000	9,000	1,000
9 Jas. McAuliff. Billy Myer.	Sept. 5, 1892	10,000	9,000	1,000
10 Geo. Dixon, a negro. J. Skelly.	Sept. 6, 1892	7,500	7,500	—
11 Jas. Corbett. Jno. Sullivan.	Sept. 7, 1892	25,000	25,000	—
12 Billy McMillan. Billy Hinds.	March 2, 1893	800	600	200
13 N. Smith. J. Goddard.	March 21, 1893	10,000	8,500	1,500
14 Andy Bowen. J. Burke.	April 6, 1893	2,500	1,250	1,250
15 Andy Bowen, mulatto. J. Everhardt.	May 21, 1893	2,000	2,000	—
16 J. Van Heest. W. Napier.	Sept. 20, 1893	2,000	1,700	300
17 J. Gorman. J. Levy.	Oct. 17, 1893	1,000	700	300
		\$95,200	\$36,050	\$9,150

The petition further and finally alleges that in conjunction with said exhibitions or prize fights the defendant, on occasions on which same occur, operates and conducts a bar room and retail liquor establishment upon its premises, without paying a license to the state, as required by law.

The defendant moved to dissolve the injunction, on several grounds, to wit: (1)

That the injunction was not justified by the facts and allegations contained in the petition. (2) That the writ was improvidently issued, and without cause. (3) That the petition sets forth no cause for or right to an injunction. (4) The allegations on which the injunction was demanded are untrue. (5) That the plaintiff is estopped by her conduct and allegations in the suit of same title as the instant one for the recovery of a license. Contemporaneously therewith the defendant filed exceptions to the suit, of no cause of action, prescription of one year, and estoppel laid on aforesaid record. All of said exceptions were cumulated with the merits, and tried together, the defendant having in the mean while filed an answer, alleging that it was "and is a solvent and existing corporation, lawfully established, and is in the legal and actual possession of all its property, rights, and privileges, and has in no manner abandoned the same, or incurred any liability to forfeiture thereof." The case was tried by a jury, who returned a verdict in favor of the defendant, and plaintiff has appealed.

A fair summary of the charges made by the plaintiff, upon the proof of which the forfeiture of defendant's charter and the perpetuation of her injunction depend, is as follows, to wit: First. That the corporation had committed acts ultra vires, and transcended the powers conferred upon it by its charter and the law, by encouraging and maintaining exhibitions of what is "commonly called prize fighting," in violation of the constitution and the law. Second. That the defendant is accustomed to offer large prizes or rewards to noted pugilists, and its arena has been the scene of prize fights that have been participated in by them, intending to fight until one of the contestants should give in from sheer exhaustion or injuries received, and which were witnessed by large assemblies of people, unlawfully congregated for the purpose of encouraging same, which assemblies and acts constituted public nuisances, and same were instigated and maintained by the defendant. Third. That these exhibitions have attracted a large number of noted thugs, confidence men, and criminal characters from other cities and states, thus endangering the public peace. Fourth. That these exhibitions are, and have been, an incentive to gambling, and large sums of money have been wagered and staked on the result thereof; and the defendant has been offering and paying large sums of money to noted pugilists, thus causing them to commit assault and battery. Fifth. That in conjunction with said exhibitions or prize fights the defendant operates a bar room and retail liquor establishment upon its premises, without paying a license to the state. The gravamen of the suit is found in the first specification, and is to the effect that the defendant committed

acts ultra vires of its charter, by encouraging and maintaining, on its premises, and within its club room, "exhibitions of what is commonly called prize fighting, in violation of the constitution and law," thus making its acts of incorporation a fraud on the law. The remaining four specifications relate to the collateral incidents and surrounding circumstances illustrative of the exhibitions, as an aggravation of the charge complained of.

The solution of the question propounded by this action depends—First, upon a correct and proper interpretation of the phrase "exhibitions that are commonly called prize fights;" and, second, upon a just interpretation of the laws which are alleged to have been thereby violated. As pointing the issue thus formulated, we make the subjoined extract from the plaintiff's brief, viz.: "The questions at issue may be stated thus: Were these pugilistic fights for prizes, held in the arena of the Olympic Club, within the legitimate objects and purposes of the charter, or were they such abuses of its franchises as would justify a perpetual injunction, and a decree of forfeiture of the charter, and the appointment of a receiver to sell its property and distribute its proceeds among creditors and stockholders? Were they not 'what are commonly called prize fights' and did not each fight constitute the crime or offense of assault and battery and breach of the peace, and were they not in violation of the law and public policy of the state? Or were they lawful exhibitions of skill in boxing, permissible under the law, or, as the defendant is pleased to call them, 'glove contests,' whatever precisely that may mean?" The provisions of Act No. 25 of 1890 are referred to and relied upon as having been violated by the defendant, and same are distinctly invoked and quoted by the plaintiff's counsel as the basis of this proceeding. That act is couched in the following terms, to wit: "Act No. 25, 1890. Defining the crime of prize fighting, and to provide for the punishment thereof in and out of the state of Louisiana. Section 1. Be it enacted by the general assembly of the state of Louisiana, that any person who shall send, or cause to be sent, publish or otherwise make known a challenge to fight what is commonly called a prize fight, or who shall accept any such challenge, or who shall engage in such fight, or act as trainer for any such, contemplating a participation in such fight, and any such person who shall act as alder or abettor, backer, umpire, second, surgeon or assistant at such fight, or in preparation for such fight, shall upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months and be fined not more than five hundred dollars." (Section two is omitted, as unimportant.) But to this section is

appended the following proviso, to wit: "Provided this act shall not apply to exhibitions and glove-contests, between human beings, which may take place within the rooms of regularly chartered athletic clubs." Previous to the promulgation of this act, on the 25th of June, 1890, an ordinance was adopted by the city council of New Orleans, of the following tenor and purpose, to wit: "Be it ordained by the city council of the city of New Orleans, that Ordinance No. 1194 be, and the same is hereby, amended so as to read as follows: That exhibitions and glove contests between human beings for the development of muscular strength be and the same are hereby permitted to take place within the rooms of all regularly chartered athletic clubs in the city of New Orleans, provided that at the time when said exhibitions and glove contests shall take place that the sale or giving of spirituous liquors in said club rooms is hereby prohibited; and provided further, that all such exhibitions and glove contests shall be under the supervision of the police authorities of the city of New Orleans; and provided further, that a glove weighing not less than five ounces shall be used in such exhibitions or contests; but under no circumstances shall this ordinance be construed as permitting any sparring contests in such club or clubs on Sunday. Provided further, that for each exhibition the parties shall be required to donate fifty dollars for fund of public charities of New Orleans; and that a good and solvent bond of five hundred dollars cash shall be given, to be forfeited in case of any violation of said ordinance, the proceeds of said forfeited bond to go to the said fund of public charities." The foregoing ordinance bears the number 4336, C. S., and was adopted by the city council on March 5, 1890. It was with direct reference to this ordinance and the act of the general assembly that the defendant procured an amendment to its original charter, whereby, on the 16th of May, 1891, it was reincorporated as a stock company, the objects and purposes of the corporation being therein enumerated as set out in plaintiff's petition. Vide article 2 of amended charter. From the city ordinance it appears, "that exhibitions and glove contests between human beings, for the development of muscular strength," were "permitted to take place within rooms of regularly chartered athletic clubs in the city of New Orleans," coupled, however, with the proviso "that all such exhibitions and glove contests shall be under the supervision of the police authorities," and with the further proviso "that a glove weighing not less than five ounces shall be used in such exhibitions or contests." The denunciation of the legislature was addressed to "what is commonly called a prize fight," and declares that any one who shall send or accept a challenge to make such a fight shall be deemed guilty of

a misdemeanor, and punished accordingly; but it was careful to insert the proviso that it should not apply to exhibitions and glove contests which may take place in regularly chartered athletic clubs.

Having reproduced the allegations of the petition, the averments of the answer, the purport of the argument, the provisions of the city ordinance, and of the statute of the general assembly, and the provisions of the defendant's charter, the conclusion is plain that our decision must turn upon the distinction that is taken in the statute and ordinance between a glove contest and what is commonly called a prize fight, for upon this distinction depends the criminality vel non of the contests which took place between the combatants. And it is equally clear that, unless these combatants are proven guilty of the acts denounced in the statute as misdemeanors, the defendant cannot be treated as *particeps criminis*, and its charter revoked, and like contests enjoined. This brings us to the consideration of the evidence that was adduced *pro et con* in the lower court, and the various rulings of the judge *a quo* with reference to admissibility of testimony, and, as a preliminary to this examination, it is well to incorporate one of the contracts under which the club contests occurred as the best means of illustrating its character, and the following is selected as a sample, to wit: "Olympic Club. Articles of Agreement between Stanton Abbott and Andrew Bowen. We, the undersigned, Stanton Abbott, of London, England, and Andrew Bowen, of New Orleans, La., do hereby agree to engage in a glove contest to a finish before the Olympic Club of New Orleans, La., on November 15th, 1893, at nine o'clock p. m., sharp, for a purse of two thousand five hundred dollars, the winner to receive two thousand dollars and the loser five hundred dollars of said purse; said Bowen and Abbott to receive each three hundred dollars for expenses as soon as forfeit of \$500.00 is deposited with the Olympic Club. The contest to be with five-ounce gloves, and according to Marquis of Queensbury rules. The club is to select the referee and official time keeper, each of us reserving the right to appoint a time keeper to represent us, said time keeper to be subject to the approval of the club. The referee shall have the power to stop and decide the contest when so directed by the seconds and the contest committee. Should either of us commit a deliberate foul, thereby injuring the other's chances of winning, the one so doing shall lose all interest in the aforesaid purse. We each hereby agree to weigh 133 lbs. at the ring side at 9 o'clock p. m., on day of said contest. To guaranty the faithful performance of the above obligations, we each hereby agree to deposit the sum of five hundred dollars in the hands of the Olympic Club. Should either of us fail to appear at the proper time and place, the one so doing shall forfeit his deposit to the club. [Signed] A.

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Bowen. Stanton Abbott. Jno. W. Lyons. Witnesses: Thos. C. Anderson. Alb. Spitzfaden. Teddy Wilson. Date, Sept. 25, 1893."

During the progress of the trial question was made with regard to the admissibility of testimony on the part of the defendant as tending to show a difference between a prize fight and a glove contest. The judge *a quo* ruled in favor of the defendant, and admitted the evidence, and the plaintiff reserved a bill of exceptions. After the evidence had gone to the jury, the same question was presented again, in certain requested instructions to the jury that were presented by the plaintiff's counsel, and refused by the court. To be accurate, we will incorporate the pertinent portions of the charge requested, which is as follows, viz.: "The plaintiff requests the judge to charge the jury as follows: (1) The statute of this state, which applies to both persons and corporations, prohibits prize fighting, and makes it a penal offense; and also provides that this statute shall not apply to exhibitions and glove contests between human beings which may take place within the rooms of regularly chartered athletic clubs. All parts of this statute, as well as every other law, must be so construed as to harmonize with each other, and I charge you, gentlemen of the jury, that the term 'prize fighting' does not require any definition; it is a simple term, defined in all the dictionaries to be fighting for a prize or reward; and if the jury believe from the evidence that the defendant corporation held one or more fights within its arena, under the auspices of its officers and managers, in which the fighters were offered or promised a prize or reward to be paid to the victor, or either of them, such a fight is a prize fight, within the meaning of the law, and is unlawful, whether the combatants wore gloves or not. It matters not what the rules of the fight were, or how they were clothed, or whether any portions of their bodies were covered or uncovered. If they fought to a finish for a prize or reward, to be given to the successful combatant, it is a prize fight, within the meaning of the law, and the verdict must be for the plaintiff." The legislature cannot be presumed, in prohibiting prize fighting, to have enabled any one to escape the prohibitory or penal clauses of the statute by putting on and wearing a pair of gloves, and thereby evading the penalty prescribed by the law for its infraction. But, to our thinking, the foregoing requested special charge was modified, and the admissibility of such evidence (partially, at least) conceded, by the third and fourth requested special charges, which are as follows, viz.: "(3) I charge you, gentlemen of the jury, that if from the evidence you find that the defendant in this case contracted or agreed with certain noted pugilists, residing here or coming here from other states or countries, to engage in a fight for a prize or reward, in the arena of their club, and at such contests the fights were

carried on to a finish, and the reward previously promised was subsequently paid to the successful combatant, then this was a prize fight, and your verdict should be for the plaintiff. If it were a mere exhibition of skill in sparring with gloves, not calculated to do great bodily injury, it was a glove contest, within the provision of the law; but, if the jury believe from the evidence that the parties who have engaged in these contests within the arena of the defendant intended to fight until one gave in from exhaustion or injuries received, it was a breach of the law, and a prize fight, whether the combatants fought with gloves or not. (4) Gentlemen of the jury, you are to decide this case from the evidence adduced on the witness stand as to what actually occurred at the time the several contests or fights referred to in the petition, and testified to by witnesses, took place, and not by your preconceived opinions, or the opinions of any other person, as to whether these contests were prize fights or not. In other words, you are to decide this case upon the facts proven by the testimony of the witnesses on the stand, and the law as given to you by the court, and not in accordance with your preconceived opinions, or according to the opinions of any one else." Taken collectively, we understand the objection of plaintiff's counsel to be that it was permissible for witnesses to state the facts and incidents which actually occurred, as coming within the range of their personal knowledge and observation; but that it was not permissible for them to give their opinions, based upon that knowledge and information, same being a conclusion of law, and not a matter for determination by expert testimony. To the judge's declination to give the jury this special charge no bill of exceptions was retained on behalf of the plaintiff, and the state is to be considered as having abandoned it, and acquiesced in the charge that was given by the judge, and which is as follows, viz.: "There is only one question for the jury to decide, and that is as to the character of the exhibitions given at the Olympic Club. * * * The burden of proof is on the plaintiff to make out its case. The defendant is charged here with having violated the terms and conditions of its charter by having given, under its auspices, what are commonly called prize fights. The defendant resists that charge on the ground of a proviso in the law which permits glove contests. There is, then, but one question before you: Does the evidence disclose that these exhibitions were prize fights, or not, or does the evidence disclose that they were glove contests or not? Now, the rule of interpretation of words is that they must be received according to their significance in common use. I am not an expert, and can give you no opinion as to the significance of these words. You must determine for yourselves whether, in common parlance, these exhibitions were prize fights or glove con-

tests. There is no other law in this case." No objection was made to this charge, and no bill of exceptions was retained by the plaintiff to it. When the counsel for the state presented the aforesaid special charges the judge declined to give the jury any other charge than the one above quoted, stating, however, "that this is not a criminal prosecution, but that it is a civil prosecution, for the forfeiture of defendant's charter," reading to the jury Act 25 of 1890. The acquiescence of the plaintiff in the judge's estimate of this controversy is plainly indicated by the paragraph we clipped from its brief at page 10, which we reproduce in this connection for the purpose of emphasizing the correctness of the judge's conclusions: "Were they not what are commonly called prize fights? And did not each fight constitute the crime or offense of assault and battery, and a breach of the peace? And were they not in violation of the law and public policy of the state? Or were they lawful exhibitions of skill in boxing, permissible under the law; or, as the defendant is pleased to call them, glove contests, whatever, precisely, that may mean?" On the face of the statute against prize fighting (Act 25 of 1890) the denunciation of the law is against "any person who shall send, or cause to be sent, publish, or otherwise make known, a challenge to fight what is commonly called a prize fight," not a prize fight *eo nomine*. And that denunciation is coupled with the proviso "that this act shall not apply to exhibitions and glove contests between human beings which may take place within the rooms of regularly chartered athletic clubs." That is the only statute governing such contests or exhibitions to which we have been referred, or of which we are aware; and it is controlling, and conclusively affirms the correctness of the view entertained by the district judge.

Accepting this as the correct theory of this case, it is manifest that the judge ruled correctly in admitting the evidence objected to, and in refusing to give the special charge requested by plaintiff's counsel; for it cannot be readily perceived on what theory expert testimony should have been excluded when the main question for the jury to determine was the proper significance of "what is commonly called a prize fight," as contradistinguished from a "glove contest." Addressing ourselves to the definition of these terms, we are to ascertain the distinction between them in common parlance; that is to say, to ascertain their true significance in the vernacular of the prize ring and athletic club, where such exhibitions are given. Taking the contract between Bowen and Abbott as a sample of the articles of agreement between the contestants before the Olympic Club, we find that it declares they "do hereby agree to engage in a glove contest," and that it further stipulates that "the contest [is] to be with five-ounce gloves, and "according to Marquis of Queensbury rules." It

also provides that, if either party shall "commit a deliberate foul, thereby injuring the other's chances of winning, the one so doing shall lose all interest in the aforesaid purse." City Ordinance No. 4336 provides "that exhibitions and glove contests between human beings, for the development of muscular strength be and the same are hereby permitted to take place within the rooms of all regularly chartered athletic clubs in the city of New Orleans." That ordinance provides further that in such contests "a glove weighing not less than five ounces shall be used." We have extracted from the little volume entitled "Billy Edwards' Art of Boxing and Manual Training," which was introduced and filed in evidence by the attorney general on the part of the plaintiff, as immediately bearing on the contracts of the Olympic Club contestants, the Marquis of Queensbury rules. The extract is from page 100, and is as follows, to wit: "The Marquis of Queensbury rules for the English challenge cups (open to gentlemen amateurs): * * * Rule 4. There are to be three judges appointed by the committee. Rule 5. That the boxing is to take place in a 24-foot ring. Rule 6. That no wrestling, roughing, or hugging the ropes [is to] be allowed. Rule 7. That each heat consist of three rounds, with one minute interval between each; the duration of each round to be at the discretion of the judges, but not to exceed five minutes. Rule 8. Any competitor not coming up to time shall be deemed to have lost. Rule 9. That no shoes or boots with spikes or sprigs be allowed. * * * Contests for Endurance. Rule 1. To be a fair stand-up boxing match in a 24-foot ring, or as near that size as practicable. Rule 2. No wrestling or hugging allowed. The rounds to be of three minutes duration, and one minute time. Rule 3. If either man fall, through weakness or otherwise, he must get up unassisted, ten seconds to be allowed him to do so, the other man to retire meanwhile to his corner; and when the fallen man is on his legs the round is to be resumed, and continued until the three minutes have expired; and, if one man fails to come to the scratch in the ten seconds allowed, it shall be in the power of the referee to give his award in favor of the other man. Rule 4. A man hanging on the ropes in a helpless state, with his toes off the ground, shall be considered down. * * * Rule 6. The gloves [are] to be fair-sized boxing gloves of the best quality, and new. * * * Rule 8. A man on one knee is considered down, and, if struck, is entitled to the stakes." As contradistinguished from the foregoing, we refer to the Manual of Billy Edwards, at page 103 et seq., containing the London prize ring rules, from which we find the only distinguishing features to be: (1) That the contests are made without gloves or other covering for the hands; (2) that the fighting boots of the contestants are provided with three metal spikes, which

are one-eighth of an inch broad, and extend three-eighths of an inch from the sole, one to be placed on each side of the boot, near the toe, and the other at the heel; (3) that wrestling, roughing, and hugging are not forbidden,—all the prohibitions being attempts to inflict injury by gouging, tearing the flesh with the finger nails, and biting. Contests under the London prize ring rules are usually out doors, in open public view.

With these rules kept in view, the evidence will disclose whether the Olympic contests were glove contests or prize fights, as the major part of the witnesses were connoisseurs in matters of this sort, if not experts, scientifically speaking. The plaintiff only introduced four witnesses,—gentlemen who had witnessed some of these contests as reporters of the newspapers,—whose testimony was chiefly directed to the consequences of them, rather than to the modus operandi of their management. But, on this subject, the evidence of the defendant is full, and therefrom we find the following summary of facts, and extracts from the testimony of witnesses. During the examination of one of the most prominent of the witnesses the following occurred, viz.: "Q. Have you ever seen any of the contests at the Olympic Club, which are sometimes called glove contests, and which the state now calls prize fights? A. I have seen several of them. Q. Can you mention any of the names of the contestants? A. I saw the Sullivan-Corbett contest; I saw the Fitzsimmons-Maher contest; and I saw the contest between Bowen and Myer, of Illinois. Q. Did you see the McCarthy-Warren contest? A. Yes; I saw that fight. Q. Take the Corbett-Sullivan fight, and describe what you saw at that fight. A. Well, I saw the gentlemen come into the ring, and take the respective corners assigned to them, and prepare themselves for the contest. They prepared themselves by divesting themselves of their clothing, except [their] trunks and shoes, and covering their hands with gloves. Then, after the other preliminary arrangements were made, under the rules and regulations governing the contest, time was called, and they were then engaged in their boxing contest. They appeared in the center of the ring, and commenced the boxing exercise,—boxing against each other the best way they could, in order to strike one another, and to get what advantage they could, under the rules and regulations of the contest, by striking, parrying blows, dodging, or retreating; doing all they could in that way, *to save themselves from injury, and to administer injury to the opposite party, in a sporting and friendly manner, under the rules and regulations for that character of contest.* (Our italics.) I saw them through the contest, which consisted of twenty-one rounds of three minutes each. They were required to remain contesting each round for three minutes. After each round they

were given one minute's rest, during which they were refreshed by their respective attendants, after which the contest was resumed for another three minutes; and so on until one or the other either surrendered, or was rendered incapable to the call of the contest. Q. Do you know anything of what is commonly called boxing? A. Yes, sir. Q. Have you any skill in it, yourself? A. Not a great deal. I have boxed some in former years. Q. Do you feel competent to define the physical act that these men committed? A. I will say, then, * * * that what I saw is what I would call boxing, to determine the superior excellence, science, and endurance of the parties to the contest. They were governed by certain rules and regulations which had been prescribed. And each contestant is compelled to conform to those rules and regulations, and while doing so they use all the skill and strength in their possession, each endeavoring to strike the other, using all the tactics in their possession, in order to defend themselves from the blows of each other. And they do this, as I said before, by retreating, by dodging, and by parrying the blows. It is very seldom that either one of them gets a square, direct, hard blow, because the blow is either parried, or dodged, or they retreat, or they close in to each other, and lock arms, in order to protect themselves from the force of the blow. That is the case in the exercise of boxing,—whether it is for fun, for a prize, or otherwise, it is the same character of exercise. Q. You used the word 'skill.' What do you mean by that? A. I mean the skill or science or expertness of the parties to defend themselves each from the blows of the other, and at the same time to strike the other. It is an exercise that is capable of being carried to a very high degree of skill and science, both in the manner of striking, and in the manner of defending, retreating, and dodging; all of which make up the whole exercise. It is a contest for physical supremacy, physical superiority, endurance, skill, and strength. Q. It is also called 'the manly art of self-defense,' is it not? A. Yes; the manly art of self-defense. That is a comprehensive term applied to the art of boxing. * * * Q. Did you ever see a prize fight, commonly so called? A. Yes, sir. Q. Which one did you see? A. I saw the Sullivan-Ryan fight. That is the only prize fight that I ever saw. Q. Is there any difference between that contest and the contests you have seen in the Olympic Club? A. I can state the facts, and what was done at the contest between Sullivan and Ryan. They entered a ring similar to that of the other contests we have been speaking of, but they were differently prepared. They had naked fists, and they continued the contest in a more severe manner, and continued the exercise until one or the other had fallen or was knocked down. Then they were allowed to wrestle, and they were allowed to

fall upon one another, when they did [fall]. They were allowed to take advantage in their efforts to strike or injure each other that they were not allowed to do in the other contests of which we have been speaking. Then, as soon as the round had been completed by either one of them falling, they then retired to their respective corners, but only for a half-minute's rest, when time was called. Q. By the Court: That was in case of the Sullivan and Ryan contest? A. Yes, sir. They only had a half a minute's rest after each round, and a round continued up to the point when either of them fell, either of his own volition or from the effect of a blow, a slap, or a wrestle. The contest continued in that way until one of them had gained sufficient superiority over the other to justify the other's seconds to throw up the sponge. That contest, I think, lasted seven rounds, when the seconds of Ryan threw up the sponge; that is, simply surrendered the contest, and admitted that Mr. Sullivan was the superior pugilist. * * * Q. Were the contestants arrayed as they were in the contest before the Olympic Club? A. No. The shoes were heavier, and they were allowed to have spikes in their shoes, and their hands were not gloved. * * * Q. Did the Sullivan-Ryan contest that you speak of take place in the open air? A. Yes. It took place in the open air. * * * Q. Were any of the contestants injured in any of those contests which you witnessed at the Olympic Club? A. In some cases they received slight injuries. Q. Whereabouts? A. In the Maher-Fitzsimmons fight Maher received a slight injury by the bruising of his lip, and perhaps a little to the nose; sufficient to cause some little flow of blood. It is claimed, quite a considerable of a flow of blood. I saw some blood, but I saw no serious injury. Q. You saw no serious injury to any one? A. I have never seen any one of the contestants seriously injured. Q. Have you witnessed those contests from beginning to end? A. Yes. I have witnessed all the principal contests we have had here, from beginning to end." We have selected the testimony of this particular witness, because of his being a typical representative of the conservative element of this community, the president of a college, and a man apparently possessed of accurate and careful information on the subject, as furnishing the most concise exposé of the Olympic Club contests, as he seems to have witnessed the greater number of them, and closely observed them from a scientific standpoint.

The next witness to whose evidence our attention has been attracted is a prominent city official, who states that he has seen nearly all of the contests at the Olympic Club, and specially mentions the Sullivan-Corbett contest. He says that he witnessed the Sullivan-Ryan fight at Mississippi City, Miss., and Sullivan-Kilrain fight at Rich-

burg, Miss., and says they were prize fights. "Q. Now, will you kindly tell me what, if any, difference there was between that prize fight between Sullivan and Kilrain and the contests which you saw at the Olympic Club? A. Well, the rules for sparring contests are not observed in the London prize ring rules. For instance, in a glove contest, the rules require that when the contestants come together and clinch, they must separate, and, if they do not, the referee separates them by force. But you cannot do that under the London prize ring rules. Under the London prize ring rules the contestants can clinch and stand and thump and punish until one or the other goes down. That is not tolerated in a glove contest. Then, under the London prize ring rules, they are not limited as to the time they shall have for each round. In a glove contest they are. Then, under the London prize ring rules, they wear spiked shoes, and in those contests they are not allowed to use them. Under the London prize ring rules they fight with the bare knuckles, while in these contests they must wear gloves weighing not less than five ounces," etc.

The next witness whose testimony has attracted our notice is a prominent lawyer, who furnishes a like description of the Olympic contests as the first witness did. He says these contests were conducted with a high degree of skill; the participants exhibiting a great deal of skill. The men who participated in those contests were men of scientific training, almost without an exception. He does not think any of the contestants were hurt very much. He saw one or two of them bleeding from the nose or mouth, and possibly saw one bleeding from the ear. States that he witnessed the Sullivan-Kilrain fight in Mississippi, and describes it very much as the second witness does. The next witness is a police commissioner, and he was present and witnessed most all the contests which took place at the Olympic Club. Having heard the testimony of the last preceding witness, he corroborates it in every particular. States that he considers the contest between Corbett and Sullivan as one of the greatest fights that ever took place, as far as skill and science were concerned. The next witness is a leading lawyer of the New Orleans bar. He states that he witnessed several of the Olympic Club contests, and instances the Corbett-Sullivan contest, which he describes much in the same manner as other witnesses have done. That he saw nothing that was objectionable or brutal in that contest. He testifies—as other witnesses had done—that the assemblage of people who witnessed these contests was orderly and well-behaved; or, as the first witness states, these assemblages of people, in point of personal respectability and behavior, were above the average of ordinary political assemblages. He states he heard the testimony of the

third witness, and corroborates it throughout. This witness is a member of the school board, and a gentleman of first respectability. The next witness is also a prominent city lawyer of high reputation, and a man of affairs. He states that he has witnessed quite a number of the Olympic Club contests, and his description of them, and the manner in which they were conducted, is quite the same as that of other witnesses whose testimony we have commented on. His description of the effect of these contests upon the contestants physically is quite unique. "Q. The exhibitions which you have described, were they at any time bloody, or was blood shed during any of those contests? A. Well, when two men get opposite to each other and begin boxing, unless one has a pretty tough nose, there is going to be a bloody nose. I have had a bloody nose myself twenty times, when I was taking boxing lessons," etc. With regard to the cruelty or brutality of the Olympic contests this witness' statement is also quite unique. "Q. Was there anything brutal or inhuman about it? A. In my judgment, no, sir. As compared with that popular game nowadays known as football, which I think the American people have gone crazy about, the contests that I have seen at the Olympic Club are superior in every respect, and in point of humanity and as appealing to the aesthetic senses," etc. He states that the contestants were scientific and artistic in the management of their hands. They were experts in boxing. It is commonly called "the manly art of self-defense," both in England and in this country." Quite a number of other witnesses—lawyers, doctors, and professional experts—were called, and gave evidence quite in line with the statements we have detailed.

On the other hand, a fair summary of the testimony of the plaintiff's witnesses does not materially differ from that of the defendant's except as to the manner and result of these contests. One witness states that he saw blood running from the ear of one of the contestants in the Goddard-Smith contest—"just a little." He speaks of the Fitzsimmons-Maher fight as "a bloody fight." He says that in the Sullivan-Corbett contest Sullivan bled at the mouth and nose. He says that in the McCarthy-Callaghan contest the lip of the former was much swollen. Another witness speaks of some of the contestants shedding blood, but his memory of details was not accurate. The case of Maher, in the contest with Fitzsimmons, is the only one about which he is at all positive. The following cross-examination of this witness is worthy of note as characterizing these contests, viz.: "Q. Did you see any of those men bite each other? A. No, sir. Q. Did you see them wrestle with each other, throw each other down, or jump on one another? A. No, not intentionally. Q. This butting you spoke of on the part of Smith

was accidentally done, was it not? A. I don't think he fought fairly. Q. You don't think he was a fair fighter? A. No, sir. Q. The referee had to stop them? A. They warned him two or three times about it. Q. But there was no kicking of each other? A. No, sir. Q. They fought, I understand, with five-ounce gloves? A. Yes. Q. They squared themselves for the fight, and from that moment on it was give and take? A. Yes. Q. Each man trying to land his blows above a certain point? A. Yes. Q. Above his belt? A. Yes. Q. And they used their hands, and nothing but their hands, until the gong struck 'time' for the fighting to end? Q. And the round lasted three minutes? A. Yes."

The testimony of the other witness of the plaintiff is much of the same tenor as that of the two whose evidence we have quoted, and little is left us to say in the way of comment. We have only to answer for ourselves the question the judge's charge propounded to the jury: Does the evidence show that these exhibitions were what are commonly called prize fights or glove contests? We are to make answer to the questions propounded by the state of Louisiana through her attorney general, viz.: Were those contests what are commonly called prize fights? And did each fight constitute an assault and battery, and a breach of the peace? And were they or not in violation of the law and the public policy of the state? Or were they lawful exhibitions of skill in boxing, permissible under the law, or, as the defendant puts it, glove contests, recognized by law? We have only to recur to the instructions that plaintiff's counsel requested the judge to give in charge to jury for a guide in making answer to these queries. They say: "If it were a mere exhibition of skill in sparring with gloves, *not calculated to do great bodily injury*, it was a glove contest, within the provision of the law." They further say: "Gentlemen of the jury, you are to decide this case from the evidence adduced on the witness stand *as to what actually occurred* at the time the several contests or fights referred to in the petition and testified to by witness [took place], and not be your preconceived opinions, or the opinions of any other person, as to whether these were prize fights or not. In other words, you are to decide this case *upon the facts proven by the testimony of the witnesses on the stand, and the law as given you by the court*, and not in accordance with your preconceived opinions or the opinions of any one else." (Our italics.) Testing the issue presented by the evidence we have detailed—and it is of a kind that all of the evidence is—and the law as given by the court (and that was the reading to the jury of Act 25 of 1890), and there is only one conclusion to which we could come, and that is the one at which the jury arrived, to wit, that the Olympic Club contests were ordinary glove con-

tests, within the terms of that statute, and not "what are commonly called prize fights." Coming within the provisions of a special statute, such contests could not be esteemed assaults and batteries, or as breaches of the peace, unless the evidence should disclose that they were calculated "to do great bodily injury." But the evidence will be examined in vain for any such proof, for its substance and general tenor is to the effect that those contests were but trials of the skill and power of physical endurance between well-equipped athletes; and that, being trained in this so-called "manly art of self-defense," it was matter next to an impossibility for one of the contestants to administer, "above the belt" of the other, any serious physical punishment, fighting as they did with five-ounce gloves. That a nose was occasionally made to bleed, that now and then a lip was left in a swollen condition, or the face somewhat bruised and disfigured, does not alter the case, as like occurrences are apt to take place in boxing, fencing, or in football. As the state of Louisiana is in court seeking the forfeiture of the defendant's charter on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own legislature, which in terms authorizes just such contests as the witnesses describe the Olympic contests to have been, this court must be excused for declining to disturb the finding of the jury on the facts in favor of the defendant. If, indeed, such contests are violative of good morals and a sound public policy, the matter comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief. As the suit is *sui generis*, the decision of which depends upon the interpretation of a special statute of this state, authorities and decisions of the courts of other states and countries would be examined in vain, for the question is one of fact. Judgment affirmed.

MILLER, J., takes no part in this opinion, not being a member of the court at the time the cause was argued and submitted.

NICHOLLS, C. J. (dissenting in part and concurring in part). The acts prohibited and made criminal by Act No. 25 of 1890 are prize fights, not as defined by professional pugilists, but as commonly known and understood. This appears by the very wording of the statute. Fights which would be prize fights in the popular acceptance of those words should they take place outside of a club do not cease to be such, nor are they saved from criminality, because they take place within the inclosures of an incorporated club, and held under its auspices. This will scarcely be denied. Any construction of the statute, or any portion of the statute, which would lead up to and carry with it as the result of the construction that prize fights

as commonly known are any less prohibited inside than they are outside of a club, is, in my opinion, wrong, would convert a prohibitory preventive statute actually into a permissive one, and defeat the object and purpose of the law, not only as ascertained from its language, but as actually intended by those who took part in and were responsible for its enactment. Glove contests are referred to and permitted in the proviso of the statute, but, whatever may be the technical meaning of those words and the technical character of those contests, those which are referred to in this statute are necessarily those of such character, and entered into under such circumstances, as to keep the fighting all the time outside of prize fighting as understood by the people at large. If the glove contests, such as they were in this club, would have brought the contestants within the grasp of the statute had they taken place outside of the club, the same contests inside a club will not protect them. The mere place of exhibition and the patronage of a club does not legally save the situation. It is the popular idea of prize fighting, and the common meaning of those words, and not the ideas of professional sportsmen, which are to control courts in dealing with criminality in this matter. We are not dealing with prize fighting and glove contests technically, but from the standpoint from which the law directs us to view them,—prize fights from the standpoint of what are so considered by the people at large, and glove contests as necessarily subordinated to prize fights as so viewed. I am of the opinion that testimony as to what constitutes prize fighting and what glove contests in a "technical" sense was irrelevant to the issue before the court; that it should have been excluded, but that, having been admitted, it should carry no weight. I am of the opinion that the contests which have been permitted to take place in the Olympic Club fall under the prohibitory terms of the law, and that their further continuance should be checked by injunction. I do not think the charter of the club should be forfeited. I concur in part with and dissent in part from the decision rendered.

BREAUX, J. (concurring). The crime of prize fighting is defined with great particularity. The penalty is clearly set forth. No one shall send or make known a challenge to fight what is commonly known as a prize fight, and no one shall engage in such a fight. The penalty is fine and imprisonment. After defining the crime, the act contains a permissive clause, applying to exhibitions and glove contests, within rooms of regularly chartered athletic clubs. It does not refer to mere boxing with padded gloves, which may be practical for exercise, without the necessity of resorting to the rooms of a chartered club. The most extravagant in-

terpretation would not include such exercises within the definition of a prize fight. After denouncing a prize fight, the law expressly excepts exhibitions and glove contests under the auspices of chartered athletic clubs. The character of these glove contests were known at the time, and must have been incorporated in the law, only because it was well known that it would exclude them from the denunciation of a prize fight. If that was not the purpose, the proviso has no meaning. It is a question of legislation. To the legislature all legislative power is granted. Courts, however pleasant to contemplate and inviting it may be at times, are not authorized to decree that one enterprise shall be favored by their decree, even beyond the law, because the purpose in their opinion is praiseworthy, and should receive encouragement. Nor are they authorized to make nugatory a law they deem cannot be sustained on principles of propriety. The legislature must be its own arbiter as to whether glove contests shall be prohibited. Its laws in this as in all other cases must be interpreted by those rules which regulate the decisions of judicial tribunals. I assent to the decision entered in this cause.

On Rehearing.

(May 7, 1894.)

On a re-examination of this case we have reached the conclusion that expert testimony was improperly admitted at the trial, which may have influenced the verdict of the jury, and the interests of all parties will be best subserved by remanding the cause, with instructions to the judge a quo to disallow such evidence. But, as we are satisfied that in no event should the charter of the defendant be forfeited, so much of the decree as appertains thereto will remain undisturbed; our decree being in all other respects reversed, and the cause remanded for a new trial. It is therefore ordered and decreed that our former decree be annulled, except as to the forfeiture of the defendant's charter, which is left in full force; and it is further ordered and decreed that the remaining issues in the cause be remanded to the lower court for a new trial according to law and the views herein expressed, the defendant and appellee to pay the costs of appeal; those of the lower court to await final trial therein. Rehearing refused.

(46 La. Ann. 642)

CASTLES v. CITY OF NEW ORLEANS et al. (No. 11,848.)

(Supreme Court of Louisiana. April 23, 1894.)

TAXATION—ASSESSMENT OF BANK STOCK.

1. In the assessing of the shares of stock under section 27 of Act 106 of 1890, it is no ground for annulling the assessment when the list of

shareholders appears in a different part of the assessment book from that in which the amount is noted, if there has been a substantial compliance with the law in assessing the shares to each stockholder.

2. The assessment book may not be conveniently and artistically arranged, but this does not injure the bank, as it is only the agent of the shareholders for paying the tax.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by J. W. Castles, liquidator of the Southern National Bank, to restrain the city of New Orleans and others from collecting a tax. From a judgment for the plaintiff, defendants appeal. Reversed.

Horace L. Dufour, Asst. City Atty., and E. A. O'Sullivan, City Atty., for appellants. Farrar, Jones & Kruttschnitt, for appellee.

McENERY, J. The plaintiff, liquidator of the late Southern National Bank, instituted this suit to restrain the city of New Orleans from collecting a tax of \$10,208 assessed against the shareholders of said bank. The averments in the plaintiff's petition are that, under the laws of the United States and the laws of the state of Louisiana, the assessment should have been against the shareholders individually, and by name, showing the amount of taxes due by each shareholder, and to deduct the same from the interest of the shareholder in the bank; that the board of assessors, in listing the assessment, violate the laws of the United States and of this state, as they made the assessment for \$510,400 against the shareholders, in block, and against the Southern National Bank for account of the shareholders. The city answered by a general denial, and prayed for the dissolution of the injunction, with statutory damages. There was judgment for plaintiff, as prayed for. The city appealed.

Section 27 of Act 106 of 1890, under which said assessment was made, is as follows: "That no assessment shall hereafter be made under that name, as the capital stock of any national bank, state bank, banking firms or banking associations, whose capital stock is represented by shares, but the shares shall be assessed at their actual value as shown by the books of the bank, or banks, to the shareholders who appear as such upon the books, regardless of any transfer not registered or entered upon the books; and it shall be the duty of the president, or other officer to furnish to the assessor a complete list of those who are borne upon the books as shareholders; and all taxes so assessed shall be paid by the bank, company, firm, association or corporation which shall be entitled to collect the amounts from the shareholders or their transferees. * * *" On page 24 of the assessment book the shares are assessed, "Southern National Bank, square 227, Variety and Gravier street, No. of shares, 50,000;

value of each, \$102.08; total value of shares, \$510,400." On the bottom of the page is memoranda showing by what process of calculation the value of each share was ascertained. On page 124 of the book is a "List of Shareholders of the Southern National Bank." This is followed by the name of each shareholder, with the number of shares owned by him, the value of each share, and the total value of all the shares owned by him assessed to him, and opposite his name, in the appropriate columns. The shares therefore are not assessed to the bank in block, but to the individual shareholders. The book, or volume 1, is the assessment roll in which the assessment of the shares is entered. The roll is an entirety, and the assessment of the shares does not appear on a list separate and apart from the roll. Mechanically, the assessment roll might have been more artistic, and somewhat more convenient, by arranging the list of shareholders on page 24 immediately following the names of shareholders of the Southern National Bank, and the tabulated statement following, instead of preceding, this list. But it is not apparent how or in what manner the bank has suffered injury by this arrangement. The assessment is a substantial compliance with the law, and although, in the book, there is no extended space for the mention of the tax against each shareholder, yet the total of the shares is the basis for the apportionment of the tax on the shares on the tax roll. The omission of the tax on the roll will not increase the tax, when extended on the tax roll, and, as the mere agent of the shareholders for paying the tax, the bank's interest in the mere mechanical arrangement of the assessment is very remote. We do not find, however, in Act 106 of 1890, any provision making it the duty of the assessor to extend in a separate column the tax assessed against the property. This is done on the tax roll. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered that the injunction sued out herein be dissolved and set aside, without damages; plaintiff to pay costs of appeal.

(46 La. Ann. 563)

PARKER, State Tax Collector, v. SHAREHOLDERS OF SOUTHERN NATIONAL BANK. (No. 11,396.)¹

(Supreme Court of Louisiana. April 23, 1894.)

TAX COLLECTOR—ATTORNEY AS ASSISTANT—CONSTITUTIONALITY OF EMPLOYMENT—NONPAYMENT OF TAXES—PROCEEDINGS TO OBTAIN PROPERTY.

1. The attorney appointed to assist the tax collector is not an assistant to that official in his capacity as tax collector, but is appointed as a necessity for the purpose of bringing suits, which is an employment separate and independent of the duties of the tax collector's office.

¹ Rehearing refused May 7, 1894.

2. Section 54 of Act No. 85, 1888, is not in conflict with articles 52, 203, 210 of the constitution.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by C. H. Parker, state tax collector, against the shareholders of the Southern National Bank. From a judgment for defendants, plaintiff appeals. Reversed.

Richard Lyons, for appellant. Farrar, Jonas & Kruttschnitt, for appellees.

McENERY, J. The plaintiff, tax collector, proceeded by rule against defendants, under section 54 of Act No. 85 of 1888, to compel them to deliver the personal property assessed and taxed to them. The rule was discharged, and the tax collector has appealed. The defenses to the rule are (1) that the assessment of shares to the shareholders is made in block, and not individually to the shareholders; (2) that the appointment of an attorney at law to aid the tax collector is null and void, being in violation of articles 52, 203, 210, of the constitution of the state.

The first point has been disposed of in the case of *Castles v. City of New Orleans* (just decided) 15 South. 199.

On the second ground the defense to the rule is equally untenable. Article 52 of the constitution says, "The general assembly shall have no power to increase the expenses of any office by appointing assistant officials." The answer to this is that the attorney appointed to bring suit for the tax collector is not an assistant to that official. Section 54 of said act authorized the tax collector to proceed by rule, in a summary manner, against the delinquent taxpayer, when he cannot make a seizure of the personal property assessed, because of its nature, and where the taxpayer controls the property in such a manner that he cannot "lay hands upon it." The employment of an attorney at law to institute and prosecute the proceedings is a necessity. His duties are not such as to make him an assistant tax collector, any more than the clerks employed in the collector's office constitute them assistant tax collectors. Article 203 of the constitution relates only to equality of taxation. Article 210 declares that there shall be no forfeiture for nonpayment of taxes, and provides that the collector shall sell the property assessed without suit. The proceeding authorized by Act No. 85, 1888, in no way violates that article, as the authorized proceeding is not against the property, for the purpose of provoking a judicial sale, but against it and the tax debtor, to compel its delivery, so that the tax collector can dispose of it as authorized by said article of the constitution. The judgment appealed from is therefore annulled, avoided, and reversed, and it is now ordered that the rule be made absolute, as prayed for; the defendants in rule to pay costs.

(46 La. Ann. 814)

DUVALL et ux. v. RODER. (No. 11,413.)

(Supreme Court of Louisiana. April 23, 1894.)
**HUSBAND AND WIFE — CONVEYANCES BETWEEN—
DATION EN PAIEMENT—RIGHTS OF FORCED HEIR.**

1. The property was owned jointly by the husband and the wife.

2. The latter held under a dation en paiement, made to her by her husband in satisfaction of her paraphernal rights.

3. The attack upon the title on the ground that it was a donation in disguise was without foundation in fact.

4. The consideration is proved, and shows that the declarations of the wife, that she was the husband's creditor, are true.

5. The forced heir of the husband, under no contingency, would have the right to annul the title, placed on record in good faith, and supported by ample testimony.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by L. E. Duvall and wife against Henry Roder. From a judgment for plaintiffs, defendant appeals. Affirmed.

Henry P. Dart, for appellant. Merrick & Merrick, for appellees.

BREAUX, J. The plaintiffs sued the defendant to compel him to accept title to a house and lot described in their petition. The title tendered is in the name of L. E. Duvall and wife. The property had been sold to L. E. Duvall, in the year 1890 for the sum of \$3,300. The wife acquired her half in indivision by dation en paiement, from her husband, on the 18th day of August, 1892, at a value of \$2,000. In reference to the wife's half the defendant argues that he could not safely accept the wife's title without proof of a real consideration moving the giving in payment by her husband; that the act is only a *prima facie* title, and no more protection than would be a donation *inter vivos* between the same parties; that, if the donation was in reality without consideration, or a disguised donation, there could, in a proper contingency, be an attack upon the title by forced heirs. The judge of the district court rejected that defense, and pronounced judgment in favor of the plaintiffs, from which the defendant appeals.

The record contains ample testimony showing that L. E. Duvall, one of the plaintiffs, was indebted to Mrs. Duvall, his wife, for property brought him in marriage. It was in satisfaction of that debt that the transfer was made. Witnesses established that she had brought a larger amount in marriage than the sum at which the property was valued, and for which she had become the owner. The total consists of different items, in regard to which there is some difference among the witnesses as to the respective amounts. Adding the minimum amounts established by each witness as sums for which the husband was responsible to his wife, the total is more than sufficient to

prove the complete reality of the consideration. Moreover, the wife was in possession under a title placed of record some time prior to the sale to the defendant. It operated as a notice that she was the owner, and in the absolute enjoyment of the property as owner; that she had, under a permissive article of the Civil Code, chosen to accept it in complete satisfaction of the claims stated in the deed as due her by her husband. We are not inclined to enlarge the principle held in the case of *Tessier v. Roussel*, 41 La. Ann. 474, 6 South. 542, 824, regarding donation inter vivos. If not kept within reasonable limits, it will have the effect of placing property out of commerce in every case in which a discussion can be raised regarding the sufficiency of the consideration of a donation en paiement. All considerations in law and morals urge to the conclusion that a married woman should be held bound by her declarations in an authentic deed that she was a creditor of her husband for the piece of property transferred. Her forced heirs would not be in a better position to have an act annulled, passed in the utmost good faith, with every appearance of fairness and valid consideration, amply supported by the testimony of the witnesses.

The appellees, in their answer to the appeal, pray for 10 per cent. damages for a frivolous appeal. The defendant's grounds of defense were not, by any means, devoid of all merit. He sought to acquire a title translatable of property, free from all claims in every possible contingency. The facts were such that it was entirely reasonable to seek the decision of the court of last resort, in order to place at rest all possible discussion about the title.

The defendant urges that plaintiffs must stand the expense of making a perfect title, and that such expense covers the costs of this suit they should be condemned to pay. We deem it sufficient answer to say that costs are due him who recovers judgment. It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed at appellant's costs.

(46 La. Ann. 545)

WADSWORTH v. CITY OF NEW ORLEANS. (No. 11,394.)

(Supreme Court of Louisiana. May 7, 1894.)

TRANSFER OF CITY CERTIFICATES—SUFFICIENCY OF EVIDENCE.

1. In a suit by the alleged transferee of certificates or claims against the city, and the ownership of the transferee is specially denied, there must be evidence of the transfers executed by the parties to whom the amounts of the claims or certificates were primarily due. *Neugass v. City of New Orleans*, 7 South. 565, 42 La. Ann. 164; *Id.* 9 South. 25, 43 La. Ann. 78; *Johnson v. City*, 15 South. 100 (not yet officially reported).

2. A transcript purporting to be from the

books of the comptroller, headed, "Recorded on Comptroller's Books in Name of T. Nolan, Transferee," and followed by a list of names and amounts, offered to show the transfers of the claims and certificates by the parties named, does not establish ownership in the transferee, nor was it admissible for that purpose.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by W. R. Wadsworth against the city of New Orleans. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles Louque, for appellant. E. A. O'Sullivan, City Atty., and Horace L. Dufour and Henry Renshaw, Asst. City Attys., for appellee.

MILLER, J. The plaintiff seeks a judgment against the city of New Orleans as the alleged holder of certain claims for wages of laborers, alleged to have been transferred to plaintiff, and as the holder of certificates of indebtedness payable to Jaudet, transferee. The defense of the city is that plaintiff is not the owner of the claims or certificates, denies their validity, or, if valid, that there are any funds in the treasury applicable to the payment of such claims or certificates. From the judgment in favor of the city, plaintiff appeals.

The evidence offered by plaintiff to show ownership of the claims was a transcript purporting to be taken from the books of the comptroller, exhibiting the names of laborers, the amounts due them, the ordinances under which the claims accrued, the list being headed, "Recorded on the Books of the Comptroller in Name of T. Nolan, Transferee;" the plaintiff claiming as assignee of Nolan. We think it clear this transcript was not admissible in evidence. If the transfers admitted of proof by the books, they should have been produced. If the books had been produced it is presumable they would not have shown transfers from the original parties. Without the evidence of these transfers by the signatures of the parties, the heading of the list, on which plaintiff relies, is no proof. We think the objections to the admission of the transcript should have been sustained, but, as the judge of the lower court admitted it to prove *rem ipsam*, and considered it, in our opinion he held correctly that it failed to establish plaintiff's demand. This court had occasion to prescribe the proof required to establish the frequent demands brought before the courts by alleged transferees of claims against the city. There must be produced the transfers of the original parties, i. e. those to whom the sums demanded were primarily due. This is necessary for the protection of the city, for otherwise the city might be compelled to pay twice. No evidence furnished in this case to support the demand of the transferee would be the least defense against the claims of any of

the original parties. Neither the transcript nor the heading would avail to repel his demand. The evidence, then, of the transfers in this class of cases is required by law, by the ordinances, and is enforced by the decisions of this court. This defect of proof applies to the claims as well as to the certificates sued upon, for there is no evidence of any transfers of the original parties to authorize the issue of certificates to Jaudet, transferee, under whom plaintiff claims. *Neugass v. City of New Orleans*, 42 La. Ann. 164, 7 South. 565; *Id.* 43 La. Ann. 78, 9 South. 25; *Johnson v. City of New Orleans* (recently decided) 15 South. 100. Our conclusion on the issue of ownership disposes of the case. We think it appropriate to again express the view that holders of claims against the city payable out of appropriations of revenues when realized have no action unless and until there are funds in the treasury to the credit of the appropriation. The testimony in this case shows no such funds. The judgment of the lower court is therefore affirmed, with costs.

(46 La. Ann. 795)

REMINGTON PAPER CO. v. WATSON et al.
(No. 11,386.)

(Supreme Court of Louisiana. April 23, 1894.)
ACTION OF NULLITY—APPOINTMENT OF RECEIVER
—PLEADING.

If the propositions of law be as they are stated in the plaintiff's petition, and the facts are to be treated and considered as they are alleged therein, the defendants' exception of no cause of action ought not to be maintained; the authority of the appointed receiver, who contests the plaintiff's seizure, both in law and fact being repudiated and disavowed, and also alleged to have been obtained by collusion, for the purposes of defrauding creditors.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action of nullity by the Remington Paper Company against John W. Watson and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

Merrick & Merrick, for appellant. Henry L. Garland, for appellees.

WATKINS, J. This is an action of nullity, accompanied with a demand for damages, which was, upon the exceptions of the defendants, dismissed, because it stated no cause of action; and from this judgment of dismissal the plaintiff has appealed.

Whether a petition has or not stated a cause of action must be ascertained and determined from examination and analysis of the petition itself, and the test is whether, if all the allegations be taken as true, for the purposes of the exception, the petitioner would be entitled to judgment. The substantial averments of plaintiff's petition are: That it—the Remington Paper Company—

is a corporation created under the laws of New York, and having a just claim against the Louisiana Printing & Publishing Company, Limited, amounting to \$3,863.55, for paper furnished said company, and on such paper as remained on hand; and, having a vendor's lien and privilege thereon, it has a right to sue in the United States circuit court, and obtain writs of sequestration and attachment against the property and assets of said company. That, in pursuance of said claim and right, said Remington Paper Company did file suit in the United States circuit court on the 29th of May, 1893, and under writs of sequestration and attachment therein issued caused said property to be sequestered and attached; said property consisting of printing press, safe, and other articles of furniture, etc., and to be taken into custody by the marshal of the United States. That service of said writ was made on J. D. Hill, president of the defendant company, on the date of the filing thereof; and that, under the constitution and laws of the United States, petitioner is entitled to prosecute said suit to effect without let or hindrance on the part of any person. That, "nevertheless, John W. Watson, now made defendant in this suit, in violation of said petitioner's rights falsely styling himself a receiver of the said printing and publishing company, and falsely stating that he was in possession of said property attached and sequestered in virtue of an appointment as such receiver, * * * filed on the 30th of May last [1893], in said circuit court, a motion to have the said attachment and sequestration set aside; and, said motion coming on for trial, the said circuit court, without passing on the force of the proceedings of [the civil district court] on the 6th day of June, ordered that the marshal restore the property seized in [said] cause under the writs of attachment and sequestration [to] said John W. Watson, receiver, unless within five days the plaintiff applies for, and ultimately receives, authority from the civil district court, which appointed Watson, or from the appellate court, to hold same under said writ." *Remington Paper Co. v. Louisiana Print. & Pub. Co.*, 56 Fed. 287. That the aforesaid order will have the effect of preventing his obtaining a judgment against said defendant, as there is no mode of revising said order until final judgment can be rendered in said cause, without occasioning petitioner great loss and injury, say, in the sum of \$3,863.55, and endangering the loss of its said debt of \$3,863.55, for which amount petitioner alleges the defendant Watson is liable. That said Watson was without any legal right to stand in the way of the collection of its just claim against the defendant for the following reasons, viz.: (1) That at the date of its seizure aforesaid he had not given bond "nor had he complied with the order of court in the said ex

parte proceedings, nor had such proceedings been had as to perfect said order, or to give said Watson any right to control the property of said defendant, or to prevent any suit from being brought, or any court from subjecting the property of said defendant, by due course of law, to the payment of its debts." (2) That "the conduct of said Watson, Frank H. Pope, and those confederating with them, in attempting to screen the property from payment of debts, was collusive, and a constructive fraud upon petitioner, and a violation of its rights under the laws and constitution of the United States." (3) That "the said pretended order under which said John W. Watson claims pretended authority, dated 17th May, 1893, was absolutely null and void as against petitioner and the creditors of the said Louisiana Printing & Publishing Company, Limited, and conferred no authority on Watson, for the reason that the same was made upon the collusive petition of Frank H. Pope, without citation to any one, without oath or affidavit, or any proof, and without any contestatio litis; and that the said inchoate and pretended order on said Pope's petition was obtained [on] the same day said Pope's collusive petition was filed, and in which no citation was prayed for." (4) That "the officers of the Louisiana Printing & Publishing Company, Limited, were incapable, by law, from withdrawing from their offices, so as to delay or hinder the creditors of said corporation from the pursuit of creditors; and the said corporation does not cease to exist until regular proceedings have been taken against the numerous officers and stockholders of said corporation, or otherwise, under its charter." (5) That "the attempt to bolster up the illegal and ex parte proceedings by so-called interventions on the part of the attorney general will not cure the nullity of said ex parte proceeding of said Pope and said Watson; and, moreover, said so-called intervention, which contains no affirmative allegations on behalf of the state, but purports to recite Pope's allegations, is not a mode of proceeding authorized by law, and the state is without right to intrude itself in this manner into controversies of private persons, and to demand forfeitures in any other manner than that provided by law; and the attorney general was without authority to join said Pope in his prayer in said ex parte petition * * *, and pray that a receiver be appointed; and said ex parte proceeding is null and void as against creditors not parties in pursuit of their rights."

In conformity to the preceding averments petitioner prayed, among other things, "that said ex parte order purporting to appoint said John W. Watson receiver be declared, as against your petitioner, null and void, and of no effect; and that same is ineffectual as a bar to said attachment and sequestration, or other proceedings on the part

of petitioners in the said court of the United States; and that said John W. Watson and said Frank H. Pope be condemned in solido, or otherwise to pay your petitioner the sum of \$3,863.55 damages, caused by their illegal interference with petitioner's proceedings," as above recited. It is not readily perceived on what theory the defendants' plea of no cause of action rests, or on what theory the judge a quo maintained said exception and dismissed the plaintiff's suit. It is evident that this suit has for object the removal of the receiver, so as to leave the course of proceedings in the United States circuit court untrammelled and free; and if, in point of law and fact, his petition be taken as true, he is undoubtedly entitled to judgment. The opinion of the district judge—as is usually the case with his opinions—is forcibly and carefully stated, though it bears with more direct reference upon the merits of the cause than upon the exception. We cannot anticipate what will be the opinion of this court on the various abstruse and difficult propositions of law propounded in plaintiff's petition, nor can we possibly divine what will be the character or the degree of sufficiency of the evidence the plaintiff may bring to the support of the representations of fact; but, if the law be as the plaintiff asserts it to be, and the facts are to be treated and considered as stated, it is difficult to resist the conclusion that the plaintiff is entitled to judgment. The judgment appealed from must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the exceptions of no cause of action be overruled, and the cause be reinstated, and remanded to the lower court for trial, at the cost of defendants and appellees in both courts quoad said exceptions.

(46 La. Ann. 849)

STATE v. BATES et al. (No. 11,488.)

(Supreme Court of Louisiana. April 23, 1894.)

CRIMINAL LAW—EVIDENCE OF ANOTHER CRIME.

1. It is a rule, subject to special exceptions, that when a person is on trial for one offense evidence of another and extraneous crime is inadmissible. Such evidence is dangerous, and calculated to lead to convictions, upon a particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses in order to produce conviction for a single one.

2. To make one criminal act evidence of another, a connection between the two must have existed, linking them together. If the court does not clearly perceive the connection between the two offenses (as to the commission of both of which evidence is tendered), it should give in the special case the benefit of the doubt to the prisoner.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; James C. Moise, Judge.

George Bates and Peter Ramp were indicted

ed for larceny. George Bates was convicted, and appeals. Reversed.

Paul W. Roussel, for appellant. M. J. Cunningham, Atty. Gen., and John J. Finney, Dist. Atty., for appellee.

NICHOLLS, C. J. Only one question is presented to us in this case. Defendant was convicted in the lower court upon an information for petty larceny, and sentenced to imprisonment in the penitentiary for six months. He complains in this, as he did in the district, court of the ruling of the judge a quo in allowing, over his objections, the introduction of the testimony of several witnesses, which evidence he claims was to show that he was guilty of another separate and distinct larceny, committed at a different time and place, and of property belonging to a different owner. His position is set forth in the syllabus of the brief of his counsel, as follows: "(2) On trial of an accused, charged with larceny, it is not competent for the state, in order to show the intent with which the act was committed, to prove him guilty of another larceny, committed at a different time and place. *State v. Johnson*, 38 La. Ann 686-688; *State v. Palmer*, 32 La. Ann. 565; *Schaser v. State*, 36 Wis. 429. (3) On the trial of the indictment for larceny, evidence of distinct thefts, committed at other times and places than the one for which defendant is on trial, is incompetent. *Williams v. State* (Tex. App.) 6 S. W. 318; *English v. State* (Tex. App.) 15 S. W. 649. (4) Evidence must be confined to the point at issue, and the facts proven must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner disconnected with the charge. *Hudson v. State*, 3 Cold. 355; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319. (5) The general rule is that, when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that other offenses committed by him are wholly excluded. Therefore, the introduction of collateral evidence of extraneous crimes to show intent, motive, and guilty knowledge are exceptions to this general rule; and, in order that such evidence be admissible at all, it must bear directly and materially upon, and have some connection with, the issue before the jury. *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319; *Hudson v. State*, 3 Cold. 355; *English v. State* (Tex. App.) 15 S. W. 649; *Com. v. Jackson*, 132 Mass. 16, and authorities cited therein." There is no doubt that for certain purposes and under certain circumstances evidence is admissible of the perpetration by the defendant of a crime other than the one with which he is charged. The general rule, however, is against the introduction of such evidence, and the exceptional circumstances which justify a departure from the rule should be clear and very convincing. This

statement of the proposition shows that each case must, to a great extent, be passed upon in view of its own special facts. The subject is treated of at length in 3 Rice, Ev. c. 35, par. 153 et seq., and specially as to larceny in chapter 42, par. 453. The author, in section 157, says: "It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another." And in section 158 he says: "The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of another and extraneous crime is calculated to take the defendant by surprise, and to do him manifest injustice by creating a prejudice against his general character. * * * It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." In the bill of exception reserved by the defendant to the action of the court in permitting the testimony of Domineck, Chaplain, and Kennedy to go to the jury, to show the intent of the accused (Bates) at the time of the larceny of the pool balls charged to have been stolen on the 30th September, 1893, the testimony of those witnesses is stated by him "to have been substantially as follows: That George Bates, in company with one William Daly, alias 'Chickens,' did, on the day previous, enter the place of one J. P. Domineck, and that after their departure five balls were found missing, which balls were subsequently found at Louis Chaplain's, where they had been sold by the said George Bates. That the said five balls, or any of them, were not the ones alleged to have been stolen from the place of M. Schultz on the 30th September, 1893, for which the accused was then being tried, but the property of J. P. Domineck, for which larceny the said George Bates stood charged upon an information pending before the said court." The judge's statement at the foot of the bill is as follows: "Bates was tried alone, his co-defendant, Ramps, having escaped. The following facts were established: That the prisoner, accompanied by his codefendant, entered the billiard room of the prosecuting witness, M. Schultz, and were seen leaning against a billiard table, upon which a set of fifteen pool balls were lying; that after remaining there awhile they took their departure together. Immediately thereafter two balls were missed from the table against which the defendants had leaned, and the proprietor, suspecting them of the theft, pursued and came in sight of the men several squares from his saloon. Ramps fled, while Bates was caught. Three pool balls were found in his possession, two of which

were identified as belonging to the prosecuting witness, and the other unaccounted for and belonging to a different set. Bates' explanation was that the balls were given to him by Ramps, and that he knew nothing of their theft. The state then offered to prove the larceny of other pool balls by this same defendant, under similar circumstances, and within a few days of the larceny charged in this information, to prove system and intent. The evidence was admitted for those purposes. The jury were specially charged that no man should be found guilty of an offense charged against him by proof of his having committed another offense of the same nature; that if they found, beyond a reasonable doubt, that a larceny of other pool balls than those charged in this information had been committed by the prisoner at the bar, such evidence must be confined strictly to the question of intent." This charge was given at the time the evidence objected to was admitted, and afterwards, in the general charge, with explanations to make the principle clear. The objection urged to the testimony was "that it was irrelevant, and formed no part of the *res gestae*; that it formed no connection with the case at bar, and was part and parcel of another crime, for which the accused stood charged and untried, and had happened at a different time and place." We find in the record a statement of facts made by the judge in connection with his action in overruling a motion for a new trial, but it is not embodied in any bill of exceptions, and we do not feel warranted in making use of it. We think it sufficiently appears from the record that the guilt of the accused, Bates, or his guilty connection with the first larceny, referred to in the bill of exceptions, is still a matter in pais; and doubtless, had that case gone first to trial, the evidence bearing upon the larceny charged in the present one would have been sought, with equal propriety, to have been introduced therein, to the great danger, in either case, of "uniting evidence of several offenses in order to produce conviction for a single one." In *Shaffner v. Com.*, 72 Pa. St. 60 (*Agnew, J.*), it was said: "If the evidence be so dubious that the judge does not clearly perceive the connection [between the two offenses], the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jury to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt." The same judge, in the same case, very properly said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish. * * * Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to con-

fuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious that it should not be received unless the mind plainly perceives that the commission of the one tends by a visible connection to prove the commission of the other by the prisoner." We understand that the present case rested entirely upon circumstantial evidence, as would also the first larceny charged. There would be less objection than there is to the testimony which was received had Bates been "convicted," instead of being merely "charged" with the commission, of the first offense. We do not plainly see the connection between the two offenses. The admissibility of the testimony is not clear to us, and we deem it our duty in this special case to give the benefit of the doubt to the accused. It is therefore adjudged and decreed that the verdict of the jury, and the judgment of the court rendered thereon, be annulled, avoided, and reversed, and the case remanded for a new trial.

On Application for Rehearing.

(May 7, 1894.)

McENERY, J. The attorney general and the district attorney for the parish of Orleans have filed an elaborate brief for a rehearing in this case. The evidence as to the larceny of other pool or billiard balls was intended to prove that the defendant had a tendency to steal pool or billiard balls, and, as the brief says, to remove any doubt of his having committed the offense charged. It is stated in the brief that without this evidence no jury would convict the defendant. Mr. Wharton says: "It would be in entire variance with the usual view of the common law if a man's having been guilty of other offenses, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge." *Whart. Cr. Law*, § 640. The only exception to this general rule that we are aware of prevails in the case of forgery, where the prosecutor is allowed to produce evidence of other instances of his having committed the same offense for which he is indicted. There is a fundamental distinction between acts which may be proved to show malice or scienter, and the fact that the defendant had a tendency to commit the particular crime charged. When the scienter or *quo animo* is requisite to, and constitutes an essential part of, the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a dis-

tinct crime. Whart. Cr. Law, § 649. And where several felonies are so connected together as to form an entire transaction, upon an indictment for the one the other may be proved to show the character of the transaction. The offense charged against the defendant had no connection or relation with the other offense. They were entirely distinct and separate acts, and the first could not explain the character of the second.

(46 La. Ann. 875)

BEARD v. LUFRIU.¹ (No. 11,445.)

(Supreme Court of Louisiana. May 7, 1894.)

CONFISCATION—CONVEYANCE OF REVERSION—
ESTOPPEL.

Although the defendant in a proceeding for confiscation had no power of alienating the reversion or remainder, which was still in him after the confiscation and sale, still an alienation of it by him, by a deed of warranty, accompanied by a covenant of seisin or delivery of possession on his part, estops him, and all persons claiming under him, from asserting title to the premises as against the vendee or grantee, or his heirs or their assigns, or from conveying it to any other person whomsoever.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Cornelius C. Beard against Peter Lufriu. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles F. Claiborne, for appellant. Frank L. Richardson, for appellee.

WATKINS, J. This is a petitory action, and the only question for the court to decide is, which has the better title to property in dispute, the plaintiff or defendant? The judge a quo gave judgment in favor of the plaintiff in respect to the property, rejecting the demand for rents and revenues antecedent to the institution of the suit, and giving the defendant judgment against the plaintiff for the sum of \$1,827.25 on his reconventional demand for betterments, and allowing him to retain possession of the property until the allowance shall be paid. From that judgment the defendant has appealed, and the plaintiff and appellee answers the appeal, and, denying that the defendant and appellant was a possessor in good faith, prays an amendment of the judgment appealed from, so as to condemn him to pay rents and revenues during the time of his possession.

Inasmuch as the appellee, in his answer to the appeal, does not ask a revision of the judgment in respect to the amount allowed the defendant for improvements, it is fair to assume that he is contented therewith. Hence there are but two questions for us to deal with, namely: First, title vel non in the plaintiff; second, bad faith vel non in the defendant. The plaintiff's chain of title to

the property in suit is as follows, viz.: (1) By a conveyance from John Arrowsmith to H. M. Hyams on the 7th of January, 1854; (2) by certain proceedings and judgment of the United States circuit court against H. M. Hyams, confiscating his property under the act of congress of date August 8, 1861, and an adjudication by the marshal of the United States to Jotham Potter on the 18th of May, 1865; (3) by a conveyance from Jotham Potter to H. M. Hyams on the 3d of February, 1866; (4) by a conveyance from H. M. Hyams of three-fourths undivided interest to his son, Isaac S. Hyams, on the 4th of May, 1866; (5) by a conveyance from Isaac S. Hyams to the plaintiff, C. C. Beard, of said three-fourths interest, in act of partition and exchange of date June 4, 1870. And in his petition plaintiff alleges that he derived title "from Isaac S. Hyams by act of partition and exchange passed before E. Barnett, late notary, on the 4th of June, 1870,—the act last described." The defendant's title is derived through a judicial partition in kind among the heirs of H. M. Hyams on the 3d of January, 1885,—the latter having died on the 25th of June, 1875,—and, in the partition, the lot containing the property in dispute was drawn by Ingram R. Hyams; and on the 20th of February, 1886, Ingram R. Hyams conveyed the property to the defendant.

The question for decision is whether the plaintiff's title from Isaac S. Hyams is better than the title the defendant derived from Ingram R. Hyams, both titles being derived from H. M. Hyams as a common author, and Isaac S. and Ingram R. Hyams being heirs of H. M. Hyams. In the defendant's answer it is alleged that "Isaac S. Hyams never had any title to transfer to the plaintiff; and that in consequence of the confiscation proceedings against H. M. Hyams, and the adjudication thereunder, there was not left to H. M. Hyams any interest of any kind which he could convey as he did, but that the ownership of said property reverted to the heirs of H. M. Hyams at his death," etc. The defendant's counsel cites and relies on the following decisions of the supreme court sustaining his view, viz.: *Wallach v. Van Risdwick*, 92 U. S. 202; *Chaffraix v. Shift*, Id. 214; *Pike v. Wassal*, 94 U. S. 711; *French v. Wade*, 102 U. S. 132; *Avegno v. Schmidt*, 113 U. S. 293, 5 Sup. Ct. 487. That such was the theory entertained by counsel who had charge of and conducted the proceedings in the partition of the H. M. Hyams property, there can be no doubt, as it appears from the face of the proceedings themselves; but the supreme court has expressed a different opinion in a case more recently decided than either of the cases referred to. *Jenkins v. Collard*, 145 U. S. 547, 12 Sup. Ct. 868. That case, like the instant one, was an action of ejectment, brought by the heirs of Jenkins, the confiscatee, for the recovery of the property which was confis-

¹ Rehearing refused May 14, 1894.

cated, and the life estate in which had been sold, and of which (property) the defendant, Collard, became possessor during the lifetime of the confiscatee; plaintiffs alleging that they had become seised of the legal estate in the premises by reason of the death of their father, and entitled to possession. The facts of that case seem to have been that in 1863 all the estate of Jenkins was confiscated and sold to Bepler, who afterwards conveyed to the defendant, Collard, to whom Jenkins subsequently made a formal deed of conveyance on the 26th of August, 1865. On this state of facts the circuit court held that only the technical life estate of Jenkins was confiscated by the decree of the court in 1863, "but there was left in him the reversion or remainder, which he sold and conveyed to the defendant by deed of August 26, 1865, and that consequently the plaintiff had no interest in the property." The supreme court, in passing upon this question, examined and carefully reviewed all of their previous utterances in reference thereto, and announced their adherence to the doctrine that a confiscation sale only disposed of the life estate of the confiscatee, but at the same time held that Jenkins' deed to Collard of August 26, 1865, operated as an estoppel against him, and all persons under him, from claiming title to the property sold, as against the grantee and his heirs and assigns, or against his conveying it to other parties. The court gave effect to the conveyance by the confiscatee, subsequent to the confiscation sale, and several years antecedent to the president's amnesty proclamation, on the authority of *Van Rensselaer v. Kearney*, 11 How. 297, and *Irvine v. Irvine*, 9 Wall. 617. That decision is exactly applicable to the case at bar, the purchaser at the confiscation sale having executed a reconveyance to the confiscatee, H. M. Hyams, soon after the adjudication, and H. M. Hyams having executed a conveyance to his son, Isaac S. Hyams, on the 4th of May, 1866, prior to the amnesty proclamation. The following quotation from the opinion of the court in the case will be interesting and instructive, viz.: "Of the reversion or remainder of the offending party, no disposition was ever made by the government. It must, therefore, be construed to have remained in him, but, under the ruling in *Wallach v. Van Renswick*, without any power in him to alienate it during his life. That disability was in force when he (Jenkins) executed, with his wife, the deed of the premises, August 26, 1865. The proclamation of amnesty was not made by the president until December 25, 1868. *This deed, however, was accompanied with a covenant of seisin on his part, and that he would warrant and defend the title against the lawful claims of all persons whomsoever.* Admitting that he had no present estate in the premises, and none in expectancy, he was at liberty to add to his deed

the ordinary covenants of seisin and warranty, and *the same legal operation upon future-acquired interests must be given to them as when accompanying conveyances of parties whose property has never been subject to confiscation proceedings. That warranty estopped him and all persons claiming under him from asserting title to the premises against the grantee and his heirs and assigns, or conveying it to any other parties.* When, subsequently, the general amnesty and pardon proclamation was issued, the disability, if any, that had previously rested upon him, against disposing of the remaining estate which had not been confiscated, was removed, and he stood, with reference to that estate, precisely as though no confiscation proceedings had ever been had. The amnesty and pardon in removing the disability, if any, resting upon him, respecting that estate, enlarged his estate, the benefit of which inured equally to his grantee. The removal of his disabilities did not affect the purchaser's right under the decree of confiscation. *The latter remained in the full enjoyment of the property during the life of the offending party, but he had no claim upon the future estate, nor did the heirs of the offending party have any such claim upon it as to preclude the operation of any previous warranties by him respecting it.*" (Our italics.) We have italicized the portions of the opinion that have particular pertinence to the case before us; the deed from H. M. Hyams to Isaac S. Hyams, of date May 4, 1866, being prefaced with the declaration that the said vendor did "grant, bargain, sell, and convey * * * with all legal warranties, and with substitution and subrogation to all his rights and actions of warranty," etc. Following the authority of that case,—and it is unquestionably authoritative,—the conclusion is clear that the warranty clause in the deed of H. M. Hyams to Isaac S. Hyams operated as an estoppel upon the heirs of H. M. Hyams, notwithstanding the fact that the deed was executed antecedent to the president's amnesty proclamation of December 25, 1868, and effectually bars their claim of title by inheritance, and likewise their assignee or vendee. The subsequent general amnesty which relieved the confiscatee of the disability that rested upon him, placed him in exactly the same position he would have occupied with reference to the property had no confiscation proceedings been had, but the benefit of the relief inured equally to his vendee and those holding under him; so that, at the death of H. M. Hyams, his warranty title to Isaac S. Hyams operated against his heirs and their assigns, and defeats recovery by either.

Of all the cases the supreme court has decided, not one is so completely apposite to the case at bar as *Jenkins v. Collard*. The material distinction between that case and *Railroad Co. v. Bosworth*, 133 U. S. 92, 10 Sup. Ct. 231, is that the act of sale that Bos-

worth executed to the railroad company was dated in September, 1871, several years after the issuance of the president's amnesty proclamation. But the case *Wallach v. Van Riswick*, 92 U. S. 202, is quite similar in principle to the instant one, in that the confisatee became the purchaser at the confiscation sale in 1863, and made a conveyance to Van Riswick, the defendant, on the 3d of February, 1866. Of the title in that case the court said: "It has been argued that the proclamation of amnesty, after the close of the war, restored to Charles S. Wallach his rights of property. The argument requires but a word in answer. Conceding that amnesty did restore what the United States held when the proclamation issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or in expectancy. *Semmes v. U. S.*, 91 U. S. 21. Besides, the proclamation of amnesty was not made until December 25, 1868." These three decisions are in line, and perfectly consistent, though dealing with different phases of the same subject.

The conclusions at which we have arrived with regard to the effect of the conveyance from H. M. Hyams in 1866 render it unnecessary for us to give any extended examination to, or discussion of, the intervention of H. M. Hyams in the act of sale from Isaac S. Hyams to the plaintiff on the 4th of June, 1870, for the purpose of relinquishing his rights of mortgage on the property sold. We may pass it with the simple statement that it has, at least, the effect of confirming, after the removal of his disabilities, his contract of sale with warranty during their existence.

With regard to the good faith of defendant, the following facts appear from the record, to wit: (1) That he acquired the property by a deed that is translativ of property on its face, and which contains nothing on its face that tends to show any imperfections in the title of his author, or any illegality in the proceedings through which he acquired it; (2) that, previous to his accepting title, he employed a lawyer to examine it, and the lawyer pronounced it perfect and complete; (3) that his vendor acquired title by and through a judicial partition regularly made and duly homologated; (4) that under his deed he obtained possession, and has since retained it, without question or complaint from any one, and has placed thereon valuable improvements. We are of opinion that the principles of law announced on the subject of good faith in *Montgomery v. Whitfield*, 41 La. Ann. 649, 6 South. 224, are strictly applicable, and bring this case under the operation of articles 503 and 3451 of the Civil Code. The latter declares that "the possessor in good faith is he who has just reason to believe himself master of the

thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." The former declares that "he is a bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer the property, the defects of which he was ignorant." It is quite apparent that the defendant has just reason to believe himself master of the property that he had purchased, and of which he was placed in possession, although he was not in fact. He certainly acquired it by virtue of an act sufficient in terms to transfer the property, the defects of which he was ignorant. In *Montgomery v. Whitfield* we said that article 503 "does not convey, and was not intended to convey, the idea that the defects of title might be made known to [a purchaser] from extraneous sources, previous to the acquisition of the property, and thus deprive him of his good faith at the commencement of his possession." The defendant's title does not rest upon the judgment of a court that is void for want of jurisdiction, or for the lack of citation, as in case *Walworth v. Stevenson*, 24 La. Ann. 251, and authorities cited; nor is the nullity of defendant's title apparent from a simple inspection of it, as in *Heirs of Dohan v. Murdock*, 41 La. Ann. 494, 6 South. 131. We regard the defendant as a good-faith possessor, and not bound for rents and revenues. Judgment affirmed.

NICHOLLS, C. J., recuses himself, having been of counsel for some of the parties to the title in question.

(33 Fla. 495)

BUESING v. FORBES.

(Supreme Court of Florida. May 1, 1894.)

EJECTMENT—PLEADING—"NOT GUILTY."

1. Where a surveyor would have no difficulty in locating the land sued for in an action of ejectment, from the description given in the declaration, such description is sufficient.

2. A plea in an action of ejectment setting up nothing, as a defense, of which the defendant could not avail himself under the plea of "not guilty," may be stricken out by the court on motion.

3. The effect of "not guilty," standing alone, under section 3, c. 3244, Laws 1881, is to admit possession by the defendant; and if the defendant desires to defend on the ground that he is not in possession, or, in case of adverse claimant, that he does not occupy adversely, it must be done by special plea. The two pleas are not inconsistent with each other and may be filed together in the same action; and it is error for the court to refuse the defendant the right to do so, when desired.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; James M. Baker, Judge.

Ejectment by John M. Forbes against August Buesing. Judgment for plaintiff, and defendant appeals. Reversed.

A. W. Cockrell & Son, for appellant. W. B. Young, for appellee.

MABRY, J. The action is ejectment. Forbes, as plaintiff in the circuit court, obtained judgment; and Buesing, the defendant there, appealed.

A demurrer to the declaration was overruled, and this ruling is assigned as error. It is insisted here that the description of the lot of land sued for is not sufficient. The declaration is the ordinary one filed in actions of ejectment, and the lot is described as a certain parcel of land "situate, lying, and being in the county of Duval, and state of Florida, and known and described as beginning at a stake at the southwest corner of a fence of said Buesing, which stake is north, 10 degrees E., 230 feet from a stake which stands 118 feet east of the southeast corner of lot 2 in fractional section 22, township 2 south, range 26 east; thence north, 13 degrees east, 468 feet, to a stake; thence south, 87 degrees east, 214 feet; thence south, 13 degrees west, 468 feet, to a corner of said Buesing's fence; thence north, 87 degrees west, 214 feet, to the place of beginning,—containing one and three-tenths acres." This description is sufficient. Guided by it, a surveyor would have no difficulty whatever in locating the land.

The defendant filed three pleas. The first one alleges that "It is not true, as alleged in said declaration, that the said land embraced within the fence of this defendant, as declared on in said declaration, lies east of said lot two (2) in fractional section 22, township 2 south, range 26 east;" the second sets up that defendant was not in possession of the lot sued for, describing it as in the declaration; and the third is, "not guilty."

On motion of the plaintiff the court struck out the first plea, and this ruling is assigned as error. This plea sets up nothing as a defense of which the defendant could not avail himself under the plea of not guilty, and the court did not err in striking it out. *Wade v. Doyle*, 17 Fla. 522; *Neal v. Spooner*, 20 Fla. 38; *Horne v. Carter's Adm'rs*, Id. 45.

After striking out the first plea the defendant was required by the court, on motion of plaintiff, to elect between his plea denying possession, and the general issue, not guilty, and he elected to go to trial on the latter plea. The ruling of the court forcing this election was excepted to at the time, and is assigned as error. This assignment of error must be sustained. The ruling excepted to was made, doubtless under the impression that the pleas were inconsistent, and that the court had the right to require the defendant to elect between them. The statute of 1828 (section 118, McClel. Dig. p. 838) provided that "in all cases the defendant or defendants may plead as many matters of law or fact as he, she or they may deem necessary to his, her or their defense; and it shall be no objection

to any plea that it is contradictory to any other plea filed by the same party in the same cause." It was held in *Sanford v. Cloud*, 17 Fla. 532, that the fourteenth section of article 6 of the constitution of 1868, requiring all pleas to be sworn to, had the effect to prohibit the filing of inconsistent pleas, and to this extent the statute was repealed. It was also held that, "whenever it plainly appears that a defendant has sworn to inconsistent pleas, the court may and should require the defendant to elect his defense, and upon such election should strike out the other inconsistent pleas." This case was decided under the constitution of 1868. The one now before us arose after the revised constitution of 1885 went into effect, but before the adoption of the Revised Statutes. If it may be successfully contended in this case that inconsistent pleas are prohibited, and, if filed, the court may require of the defendant an election, it is clear that a defendant has the right, under the statute, to file as many pleas not inconsistent with each other as may be deemed necessary for his or her defense, subject only to the discretion of the court in allowing several pleas founded on the same ground of defense. Under the provision of the statute of 1859 (section 2, McClel. Dig. p. 481) that "the plea of not guilty, put in by the defendant, shall put in issue the title of said land in controversy," it was held, in *Jones v. Lofton*, 16 Fla. 189, that the plea of not guilty also put the allegation of defendant's possession in issue, and it was necessary for the plaintiff to prove such possession before he could recover. Subsequent to this decision, an act of the legislature was passed, providing that "the plea of not guilty in ejectment shall be held to admit the possession of the defendant, or in case of an adverse claimant, the adverse claim of the defendant. Should defendant wish to deny possession, or that he claims adversely, it shall be done by special plea." Section 3, c. 3244, Acts 1881. The effect of the plea of not guilty, which puts in issue the title to the land in controversy, standing alone, is to admit possession by the defendant, since the passage of the act mentioned; and if the defendant desires to defend on the ground that he is not in possession, or, in case of a claimant, that he does not occupy adversely, he must do so by special plea. The statute simply provides that the plea of not guilty, unaccompanied with a special denial of possession, "shall be held to admit the possession of the defendant, or in case of an adverse claimant, the adverse claim of the defendant;" but authority is expressly given the defendant to avoid the effect of such admission by specially pleading nonpossession. The court erred in restricting the defendant to the plea of not guilty, as the two pleas were not inconsistent, and the defendant had a right to have the issue under the special plea of nonpossession sub-

mitted to the jury. As this error in the making up of the issues in the cause will necessitate a reversal of the judgment, the subsequent assignments of error are not considered by us.

For the error pointed out the judgment is reversed for further proceedings not inconsistent with this opinion.

(23 Fla. 470)

WINTER et al. v. PAYNE.

(Supreme Court of Florida. March 27, 1894.)

DEDICATION OF STREETS BY PLAT—DESCRIPTION
IN DEED.

1. Where the owner of a tract of land makes a town plat of it, with spaces for roads or streets laid out thereon, and conveys lots with reference to, and bounded by, such roads or streets, he thereby dedicates the said roads or streets to public use, as such; and the grantees in the conveyances acquire the right to have said roads or streets kept open for the benefit of light and air, as well as passageways.

2. Where a street, although laid off on a town plat in a certain course, is opened up by the owner, on the ground, in a course varying from the exact lines as indicated on the plat, and the street, as opened up on the ground, is thrown open to public use as a street before lots abutting on the same are conveyed by the owner, the descriptions in deeds subsequently made, and referring to the street as a boundary, will relate to the street as opened up on the ground, and used at the time such deeds are executed.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; James M. Baker, Judge.

Action by Jane A. Payne, administratrix of W. L. Payne, against James M. Winter and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. B. Young, for appellants. R. B. Archibald, for appellee.

MABRY, J. W. L. Payne, appellee's intestate, filed a bill in January, 1887, against appellants, James M. Winter, Robert H. Winter, Teresa O. Sedgwick and husband, William Sedgwick, praying for a mandatory injunction requiring them to remove a certain obstruction in an alleged street mentioned in the bill.

Complainant's case is that, some 25 years before the filing of the bill, Miles Price, then deceased, was the owner of a certain tract of land, known as the "Winter Tract," situated at the time of filing the bill in Brooklyn, a suburb of Jacksonville, Duval county, Fla.; that the said Miles Price, during the time he owned said tract of land, laid it off into lots and blocks, and at convenient distances, as he saw proper, laid out streets through and across said tract of land, and named them, and dedicated the said streets to the use of the public; that among the streets so laid out and dedicated by the said Price while he was the sole owner of the land through which they run was Duval street, which runs from Commercial street to the St. Johns river, between

blocks 15 and 21, as designated on Le Baron's map of the city of Jacksonville and its suburbs. Further, that the said Price, after he had laid out the Winter tract, and had dedicated Duval street to the use of the public, as a public street or highway from Commercial street to the St. Johns river, as alleged, sold lots on each side of said street, and in designating the boundary lines of said lots, in deeds conveying them, bounded the lots on the southeast side of said street by Duval street on the east or northeast, and also designated said street as the western boundary of lots lying on the east side of the same; that said Price showed to the purchasers of the lots on the west side of said street, or to some of them, at the time of purchase, where to put their fences so as to conform to the west line of said street, and the fences were located exactly as indicated by Price; that for a period of more than 20 years said street was open to the public, and used as a public street, or highway, after it had been so laid off, and during that time the boundaries were well defined by fences on either side, and its course during the whole of said time had not been changed; that on the 8th day of June, 1868, Miles Price sold and conveyed to James Pence lot 8 in block 15, which lot is bounded on the south by the St. Johns river and on the east by said Duval street, the deed of conveyance to Pence being attached as Exhibit A to the bill; that Pence and wife conveyed said lot to Myra Mitchell on August 24, 1868, this deed being attached as Exhibit B; that Myra Mitchell and husband conveyed the same lot to complainant W. L. Payne April 14, 1886, and this deed is made Exhibit C.

It is further alleged that, at the time complainant purchased said lot, Duval street ran in the same direction, and was located where it had been laid off by Miles Price, and the west side of said street was the eastern boundary of his said lot, and he had no knowledge that it ever was or would be claimed that said street was not in its proper place; that the land on the east side of said Duval street is owned by the defendants jointly, the same having been deeded to them by Miles Price; that some time in the fall of 1886 said defendants wrongfully and unlawfully moved their fence, which ran along the east side of said street, out into, and diagonally across, said street, in such manner as to entirely cut off complainant from the use of the same, as indicated by a plat attached as an exhibit to the bill. The placing of said fence across the street is alleged to be a great injury to the whole neighborhood, but the greatest and more special injury done by the said acts of the defendants in obstructing the said streets falls upon complainant, as it deprives him of the use of said street in front of his said lot, and if said fence is allowed to remain the injury to him will be irreparable, and the value of his said property will be greatly

lessened, and made comparatively worthless; also that the action of defendants in thus obstructing the said street was without the consent, and contrary to the wishes, of the entire neighborhood, and against the protest of complainant; and that, since said fence was moved out into and across said street, the said Miles Price said that defendants had no business to do so, and that the fence was just where it ought to be before it was moved, and where he authorized it to be placed years ago. The special prayer is that defendants be required to remove the said obstruction, and that they be forever enjoined from moving the fence out into said street, or from putting any obstruction across or in the same.

A demurrer to the bill, on the ground that it did not make such a case as entitled complainant to any relief in equity, was overruled, and defendants answered. The answer admits that Miles Price owned the Winter tract of land, and that during his ownership he laid the same off into lots and blocks, and had a plat made. It is alleged that the plat so made was recorded in the public records of Duval county, in Book P, p. 379, and that it was the map used by Miles Price in his lifetime, and by which he sold all the lots sold by him in Brooklyn, and is the one referred to in the deeds of Pence, Mitchell, and complainant, W. L. Payne, and made exhibits to the bill. A copy of the map is made an exhibit to the answer. It is admitted that among the streets laid out on the map is Duval street, and that it runs between blocks 15 and 21, from Commercial street to St. Johns river; but it is alleged that said street runs as is designated upon said map as recorded, and it is denied that it runs according to Le Baron's map, which, it is alleged, was not made until 1885. The allegations of the bill in reference to platting the Winter tract, the dedication of Duval street to the use of the public, the sale of lots on said street by Price, and the designation of the boundary lines of the lots sold as alleged, are admitted; but it is alleged that, in each of the deeds so made, Price referred to the map as recorded, and that he sold the said lots, and bounded them, as laid out on said map, and used no other map in making sales of said lots. On information and belief, it is denied that Price indicated to complainant or his grantors the line of fence as located by them; but he at all times maintained that the fence was not where it should be, or where he told them to put it, and he always maintained that Duval street as laid down on the map used by him in his lifetime, and recorded as aforesaid, indicated the true lines of said street, and that said map indicated correctly where said fence should be placed. The sale to Pence, and from Pence to Mitchell, and from Mitchell to complainant, Payne, are admitted; but it is alleged that they bought said lot as laid out upon

said map, and with the boundaries thereto as therein defined. It is denied that the said Duval street ran in the same direction, and was located in the same place, when complainant purchased said lot 8, as said street was laid out by Miles Price when platted by him. Defendants allege that they are the owners of the land on the east side of said Duval street; that Teresa O. Sedgwick is owner of part of the premises on the east side of said street during her natural life, with reversion to her sons, James M. and Robert H. Winter, aged 27 and 24 years, respectively, and part of said land was deeded to the said James M. and Robert H. Winter in the fall of 1886, as shown by deed from Miles Price and wife, a copy of which is made an exhibit to the bill; that after the last-named purchase from Price, and upon consultation with him, they fenced in the land they bought, and employed the county surveyor to run their west line in accordance with their deeds and the plat of said Price, and after the survey of the county surveyor they placed their fence on the line indicated by him as the correct east line of Duval street, and the fence was then located on the line so laid out by said county surveyor. It is denied that said fence is across the street, or in the street, or causes any obstruction to the same, but is upon the correct east line of Duval street, and that, if any obstruction exists in said street, it is caused by the act of complainant, in putting his fence forming the west line of Duval street in the wrong place. Upon information and belief, it is denied that Miles Price said that defendants had no business to move their fence out, and that the fence was just where it ought to be before it was moved, and where he authorized it to be placed years ago. It is alleged that, when spoken to in reference to the removal of said fence, Miles Price said that the fence was never on the right line, and that the place where it had been put was the proper place, and in accordance with the map by which he had sold all the lots on said street. Further, that said Duval street was not much used by the public, and no particular attention had ever been paid to the exact line bounding said street from Commercial street to the St. Johns river, and during these years James M. and Robert H. Winter were infants, and had no present interest in said premises, their interest being reversionary, to take effect upon the death of their mother; but upon examination, finding that the fence forming their western boundary was not on the correct line according to their deed and said map, and upon a survey of the correct line by the county surveyor, they put their fence upon said line, and that it is not in or across said street.

After replication filed and testimony taken, the court decreed in favor of complainant, and that defendants be perpetually restrained

from keeping and maintaining any fence or other obstruction upon or across the said Duval street, as the same had been used and defined during the past 15 or 20 years, and that they be restrained from building or placing any fence inclosing their land described in the bill upon the southwest side, fronting on Duval street, outside of or beyond where the fence had been located before its removal by defendants, in the fall of 1886.

After the decree was rendered, W. L. Payne died, and the suit was revived in the name of his administratrix, and an appeal taken from the decree entered.

Counsel for appellants insists that the testimony does not sustain the decree, and this is the only question presented for our consideration. In disposing of the case, we will confine ourselves to the question presented.

As shown by the pleadings before us, Miles Price owned the Winter tract of land, subsequently called Brooklyn,—a suburb of the city of Jacksonville,—and laid it off into lots and streets. A map of Brooklyn, with a recital on it that it was drawn for Miles Price, was filed with the clerk of the circuit court for Duval county, and recorded by him, on the 18th day of December, 1868. Duval street is plainly delineated on this map, and the figures "33" are marked in it. On the 8th day of June, 1868, Price and wife sold and conveyed to James Pence a lot or parcel of land situated in Duval county, Fla., and described as follows, viz.: "Being a part of the tract of land situated near the western end of the city of Jacksonville, known as the 'Winter Tract,' and upon the plan or map of said tract as lot number (8) eight in square number (15) fifteen, and bounded as follows, to wit: On the south by the river St. Johns, on the east by Duval street, on the north by lot number (1) one, and on the west by lot number (7) seven, all in the aforesaid square number (15) fifteen, and measuring from north to south one hundred and thirty-three (133) feet, more or less, and from east to west one hundred and five feet." Pence subsequently sold and conveyed this lot by the same description to Myra Mitchell, and in April, 1886, Myra Mitchell and husband conveyed it by the same description to William L. Payne, who filed the bill in this case. The deed to Pence was executed some six months before the map of Brooklyn, referred to, was filed; but the description of the lot conveyed refers to the map of the Winter tract, and the lot is bounded on the east by Duval street. The testimony of C. C. Collins shows that the map of Brooklyn, as recorded, was the one used by Miles Price in selling lots owned by him in that locality. It also appears from the evidence that before the conveyance to Pence a street known as "Duval Street," extending through the Winter tract, was in use by the public, and that a house and fence had been constructed

on the Pence lot west of this street. The fence, it appears, ran immediately west of the street, and parallel with it. This is a sufficient showing that Price dedicated the said street as a public highway. Where the owner of a tract of land makes a town plat of it, with spaces indicating the dedication of roads or streets, and conveys lots with reference to, and bounded by, said roads or streets, he thereby dedicates them to public use; and the grantees in such deeds acquire the right to have them kept open in front of their lots for the benefit of light and air, as well as a passageway. *Kittle v. Pfeiffer*, 22 Cal. 485; *Rowan v. Town of Portland*, 8 B. Mon. 222; *Livingston v. Mayor of New York*, 8 Wend. 85; *Davis v. Judge*, 46 Vt. 655; 2 Wait, Act. & Def. 712, § 6; *Guthrie v. Town of New Haven*, 31 Conn. 308. It is not questioned by either party that Duval street was dedicated by Price to the public as a street, but the contention arises over the proper location of the street. Appellants insist that Duval street runs at right angles with Commercial street from the latter to the St. Johns river, and that according to this course the fence in question would not be in the street. Before building this fence, which extends diagonally across Duval street, as it had been used for many years prior thereto, appellants had the county surveyor to run out Duval street according to the recorded map of Brooklyn, and by this survey the fence would not be in the street. For appellee, it is contended that, long before the Winters purchased, Duval street had been laid out with a well-defined course from Commercial street to the St. Johns river, and, as laid out, had been dedicated to the public by Miles Price, and it had also, during said time, been recognized and used by the public and the adjoining lot owners as a public street, and that the fence erected by appellants extended diagonally across said street, as thus laid out and dedicated. The decree, on the testimony, was in favor of complainant below, and our conclusion is that it must be affirmed. It may be admitted that where an owner, by a town plat, lays off a tract of land into lots bounded by streets, and sells the lots by descriptions bounding on the streets, in the absence of any opening or tracing of the street on the ground before deeds made, the plat will control the course of the street. But, while this proposition may be correct, it is also true that, where a deed calls for a line of a street as a monument, the line of the street, as it is opened and built upon at the time, will be held to be the line intended. *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Haring v. Van Houten*, 22 N. J. Law, 61; *Jackson v. Perrine*, 35 N. J. Law, 137; *O'Brien v. King*, 49 N. J. Law, 79, 7 Atl. 34; *Tebbetts v. Estes*, 52 Ma. 566; *Water-Power Co. v. Tibbetts*, 31 Conn. 165; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. El. 150; *Ang.*

& D. Highw. § 149. The application of this rule to the testimony before us will result in the affirmance of the decree. In 1868, Price sold to Pence lot 8 in block 15, bounded on the east by Duval street; and in 1871 it appears that Price sold all the land north of the Pence lot to Commercial street, and bounded on the east by Duval street, to William A. Jones, who located his west fence along Duval street, as directed by Price. The fence erected by Jones connected south on Duval street with the fence in front of the Pence lot, and in line with it. The two fences mentioned were parallel with, and along the entire west side of, Duval street, from Commercial street to the river, as it had been used by the public certainly since 1867, a period antedating the conveyance to Pence. Price gave specific directions where Jones should locate his west fence with reference to Duval street, and informed Jones that this street was located where it should be. A wharf was located at the foot of Duval street, and it is certain that the public used it as a public road going to and from the wharf before Price sold any lots bordering on it.

Price made two deeds to the Winters. The first was made on the 26th day of February, 1876, to Teresa O. Winter (now Sedgwick), and the second one was made to James M. and Robert H. Winter on the 10th day of July, 1886, a short time before the fence in question was erected. At the time of the conveyance to Mrs. Winter, as appears from what has been stated, Price had sold all the abutting lots on the west side of Duval street, and this side of that street was then used, and, as it had been used for a long time prior thereto, was bounded by a fence. The property conveyed to the Winters is situated on the east side of Duval street; and it is shown, we think, that, at the time of the first conveyance to Mrs. Winter, Duval street, from Commercial street to the river, was opened and built upon as a public street of the dimensions and shape as claimed by complainant. The house on the Pence lot, as shown by the testimony of the county surveyor, would be in the street, as laid out by him at the request of appellants; and yet this house was built, as it appears, before the map was filed. Certainly, Pence bought his lot before the map was filed. The street, as actually laid off on the ground, and opened up, will control, and the descriptions in deeds referring to streets will relate to the streets as thus located. We do not mean, of course, that after an owner has platted a tract of land, and conveyed lots according to such plat, he can thereafter change the location of streets dedicated on the plat, to the detriment of purchasers. But where a street, although laid off on a plat, is opened up and laid off on the ground by the owner in a certain course, it will be deemed the street referred to in deeds bounding lots thereon. Before Price conveyed any

lots on Duval street, it ran where complainant contended that it did; and the deeds subsequently made to appellants, describing lots bounded on Duval street, had reference, we think, to the street as located at the time of the execution of such deeds. The right to maintain the street as claimed by complainant does not rest on prescription, as insisted on by counsel for appellee. The complainant's case rests upon a dedication of the street by Miles Price, the owner, and not upon a prescriptive right by user, and hence it is not necessary to discuss what are the essentials of such a right.

There is considerable testimony in the record as to what Price said about the location of the street after the fence had been erected across it in 1886. Objections were noted to this testimony before the master, but it does not appear that such objections were urged or insisted on before the chancellor at or before the trial. Counsel for appellants insists that this testimony is incompetent, as Price had no right to bind them by his declarations after their rights were acquired. In reaching the conclusion we have, no importance has been given to the recent statements of Price in reference to the location of the street; but what he did and said in reference to the location of the street while he was the owner, and before conveying to the Winters, has been considered.

In disposing of the case on the point presented, we have treated—as counsel for appellants has done—the remedy as being proper.

The decree must be affirmed, and it is so ordered.

(23 Fla. 429)

COLLINS v. STATE.

(Supreme Court of Florida. April 24, 1894.)

CRIMINAL LAW — TIME OF SUING OUT WRITS OF ERROR—BANKING — SPECIAL AND GENERAL DEPOSITS—USE OF DEPOSITS—CRIMINAL LIABILITY.

1. The purpose of section 2972, Rev. St., providing that writs of error in criminal cases shall be issued and made returnable as the like writs in civil cases, was not to adopt for criminal cases the period of limitation prescribed by section 1271, *Id.*, for the suing out of such writs in civil cases. The former section intended only to provide that the mode and manner in which such writs are issued and made returnable shall be the same, in both civil and criminal cases, as is provided for by section 1270, *Id.* There is not now, and has never been, any limitation of time within which writs of error to this court from judgments of the circuit courts can be sued out in criminal cases.

2. Deposits by the customers or clients of a commercial bank therewith are of two classes, viz. special or specific, and general. When the identical money or other thing deposited is to be restored, or is given to the bank for some specified and particular purpose, as to pay a certain note or other indebtedness, or is received by the bank as a collecting agent, such collection to be remitted, such deposits are special or specific, and the property in the deposit remains in the depositor. The bank in such cases becomes the bailee, trustee, or agent for the depositor. General deposits in a commercial bank comprise all moneys that are simply

deposited therewith on account of the depositor, without being complicated by any other transaction than that of the depositing and withdrawing of the moneys by the customers from time to time. Such a deposit transfers the ownership of the money to the bank, and the relationship with reference thereto, as between the bank and the depositor, is simply that of debtor and creditor at common law. The original and every subsequent general deposit is, in strict legal effect, a loan by the customer to the bank.

3. Section 27, p. 362, McClel. Dig., that inhibits the use, concealment, or willful withholding by any banker of the money or property of another that may have been received by such banker on deposit, was not intended to annul the rules of law fixing the status between bankers and their customers, or to prohibit the use in his business by the banker, in a legitimate way, of moneys deposited generally with him, and for which he becomes the debtor of the depositor. When the banker uses the moneys deposited generally with him by his customers, and for which he becomes the debtor of such patrons, in his legitimate business, his subsequent failure or inability to repay the amounts of such indebtedness, brought about by legitimate but injudicious speculations, loans, or investments, without other fault upon his part than want of good judgment, energy, or enterprise, he cannot be reached criminally under this statute. The purpose of this statute was not to interfere with the well-settled right on the part of the banker to deal with his general deposits as though they were his own, but was intended to prohibit and prescribe punishment for the use, concealment, or willful withholding by the individual or private banker of any money or property that may have been deposited with him as a special or specific deposit under such circumstances as will continue the ownership of the deposit in the depositor, and that constitute the banker the bailee, agent, or trustee thereof for the depositor.

4. Under said section 27 of the statute, the officer, agent, clerk, or servant of any incorporated company, or the clerk, agent, or servant of any private person or copartnership, or the officer of any incorporated bank, cannot be reached for the wrongful use or conversion of the property either of his corporation or employer, or of property that his corporation or employer holds in special deposit as bailee, trustee, or agent; sections 28, 29, p. 362, McClel. Dig., being particularly applicable to them.

(Syllabus by the Court.)

Error to circuit court, Columbia county; John F. White, Judge.

Noyes S. Collins was convicted of embezzlement, and brings error. Reversed.

R. W. & W. M. Davis, B. Putnam Calhoun, Blackwell & Reese, and W. M. Ives, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, J. The writ of error in this cause was applied for and issued after the lapse of six months from the judgment of conviction from which it was taken. Upon a motion to dismiss before this court on behalf of the state, it was contended that, under section 2972 of the Revised Statutes, that provides as follows: "Writs of error in criminal cases shall issue as of right, and shall be issued and made returnable as the like writs in civil cases,"—the writ should be dismissed because it was not sued out and taken within six months, that being the time limited by section 1271 of the Revised Stat-

utes within which such writs can be sued out in civil actions. The motion was denied, the court being satisfied that the said section 2972 of the Revised Statutes intended to provide, as its language expresses, only for the mode and manner in which such writs in criminal cases shall be issued and made returnable, viz. in the same manner as the like writs are issued and made returnable in civil cases, as provided for in section 1270 of the Revised Statutes; and that it was not intended thereby to adopt the period of limitation provided by section 1271 for the suing out of such writs in civil actions, or any period of limitation whatever. Said section 1271 does not undertake to prescribe the mode or manner of issuing such writs in civil cases, or for their return, but is an independent section, prescribing a period of limitation alone in which such writs can be sued out in civil causes, and is not applicable to like writs in criminal cases. There is not now, and has never been, any limitation of time within which writs of error to this court from judgments of the circuit courts in criminal cases can be sued out.

Noyes S. Collins, the plaintiff in error, was indicted at the spring term, A. D. 1892, of the circuit court of Columbia county, as follows, omitting the formal introductory part of the indictment: "That N. S. Collins, late of said county, laborer, on the 8th day of July, A. D. 1891, at and in the county, circuit, and state aforesaid, being then and there a banker, to wit, the president of the Lake City Bank, in said county and state, did then and there receive on deposit money, to wit, the sum of forty-three dollars and fifty cents, belonging to another, to wit, to William Watts and J. S. Taylor, partners at that time doing business under the firm name and style of Watts & Taylor, and did then and there use, conceal, and willfully withhold the same from the said Watts & Taylor, so as to prove a defaulter therein, and did then and there become a defaulter therein, contrary to the form of the statutes in such cases made and provided."

Under this indictment the defendant was tried at the spring term of the court, A. D. 1893, and convicted, and, upon the overruling of his motions in arrest of judgment and for a new trial, was sentenced to imprisonment in the county jail of Columbia county for a period of six months, and from such judgment takes error here.

From the evidence furnished us in the record it becomes apparent that the indictment was framed, and that the trial and conviction of the defendant were had, upon an entire misconception of the law applicable to the relations existing between bankers and their depositors, and of the scope, purpose, and intent of our statutes relative to the crime of embezzlement or misappropriation of moneys by persons doing the business of bankers; and it therefore becomes unnecessary for us to discuss the particular errors

assigned, since none of them point out specifically the errors of the conviction had. The evidence, in full, was as follows: W. F. Watts, for the state, testified that he resided in Lake City, Columbia county, Fla., in the year 1891, and was a depositor in the Lake City Bank, as a member of the firm of Watts & Co. "This firm was composed of myself and J. S. Taylor. The firm was advertised as W. F. Watts & Co.; that was the style of the firm. We had it on cards and letterheads and papers. There was no other firm in town composed of W. F. Watts and J. S. Taylor. I do not know that it was known to N. S. Collins that J. S. Taylor was the member of the company. He was generally known as such. I made the deposit of \$43.50 in person in the Lake City Bank in the name of W. F. Watts & Co., between 1 and 2 o'clock on the day the bank closed, which was the 8th day of July, 1891. The bank closed at 2 p. m., and never opened again. It was nearer 2 o'clock than 1 o'clock when I made the deposit. I made out a slip or ticket of the deposit, and handed it to Mr. Collins, who received it at the window. The ticket is in my handwriting. The ticket which is read in evidence I identify as the one I made out and handed to N. S. Collins. I left my bank book at the bank afterwards, and got it a day or two afterwards,—after the bank failed,—and in it I found entered to my credit \$43.50, July 8, 1891. My balance when the bank failed I found to be \$104.83,—I mean due W. F. Watts & Co." The deposit slip testified about is as follows: "Deposited in the Lake City Bank, by W. F. Watts & Co., July 8th, 1891: bank notes, 20 dollars, — cents; gold, —; silver, 23.50; checks, —: \$43.50." The entries in the bank book testified about are as follows:

"Lake City Bank, Lake City, Fla., in account with W. F. Watts & Co., Dr. Lake City Bank in account with W. F. Watts & Co.	
1891 July 6.....	\$ 55 00
July 8.....	43 50
To balance.....	59 70
	<hr/>
Balance	\$158 20
	<hr/>
Cr.	
July 6.....	\$ 10 00
July 7, \$4.37, \$39.00.....	43 37
July 10, '91. Balance.....	104 83
	<hr/>
	\$158 20

"I did not make demand for my money until some time after the bank failed. I made demand of N. S. Collins. He replied that he had nothing to do with it, as the bank was in the hands of Capt. A. B. Hagen as receiver. This was in Columbia county, Florida. I have never been paid my money." A. B. Hagen, for the state, testified as follows: "I was duly appointed receiver of the Lake City Bank several days after its failure. I did not find in the bank sufficient funds to pay the indebtedness of

the bank. I was in the bank on the 8th day of July, 1891,—the day it closed,—between 12 and 2 o'clock. I was there to inquire about a collection of Sharp & Perkins. While there some person came in to draw some money. It was Miss Annie Porter. She was offered silver. She objected to taking it in silver; said, 'No.' Mr. Collins said: 'You had better let me send it home to you.' She still insisted on having her money, and said she would stay till she got it. Mr. Collins said he would go to Mr. Porter's store and get some currency. I left Miss Porter in the bank, and did not see whether Mr. Collins came back or not. When I took charge of the bank as receiver there was \$171.06, only, in money in the bank. Mr. Collins was present at different times. I cannot now recall all that Mr. Collins said and did. Cannot say that he admitted anything about the liabilities of the bank. Cannot say that he admitted anything about the deposits, or admitted anything specially. He was about there. I knew of parties making deposits in the bank the day it failed. Collins did not tell me that the bank would close that day." James E. Young, for the state, testified as follows: "I knew the liabilities of the Lake City Bank by the books. The bank closed its doors and refused to do further business on the 8th of July, 1891. I don't know any one who was paid since the doors closed. I was never in charge of the bank. I was vice president of the bank and one of its directors. Mr. Collins managed the bank, and was its president. Thomas J. McNeill was cashier. Deposits were received in the bank up to the time it closed. I live in Lake City. After the bank closed, Mr. Collins called on me that night, and told me the bank would not open in the morning. Mr. Collins never called on me at any time for an assessment as a stockholder. My place of business is about 300 yards from the bank, and I passed there daily. I went into the bank at times, and asked questions. Never been refused access to the books by Mr. Collins nor any one else before the bank closed. There was a meeting of the board of directors of the bank in April, 1891. Do not know how often the board of directors met. Do not know how often the by-laws required them to meet. I had implicit confidence in Noyes S. Collins, and left it all to him. Collins told me the bank could run through the summer without any more money. I went with John V. Brown, who was a stockholder, in April, 1891, who asked N. S. Collins if he needed any more money, and he said not. I held \$10,000 stock, and paid in \$2,000; Brown \$10,000, paid in \$3,000; Edge and Bigelow each held \$2,500 stock, on which they paid nothing. Mr. Collins then said there was due from other banks to the Lake City Bank about \$47,000, which I understood to be assets. He said the bank was in good condition; had been hard up, but was in better condition than ever; had

more money. He never asked me for any payment of any assessment on stock, or to pay in any money as a stockholder, nor to call a meeting of directors." W. F. Watts, recalled for the state, testified further as follows: "I deposited \$43.50 in the bank, of the value of \$43.50,—\$23.50 in silver, and \$20 in paper. Don't remember the denominations." John V. Brown, for the state, testified as follows: "Noyes S. Collins was president of the Lake City Bank, and he managed its affairs. I was one of the directors. The directors were James E. Young, A. G. Bigelow, J. B. Edge, N. S. Collins, and myself. Collins never told me that the bank was going to close. The bank had stockholders. They were James E. Young, N. S. Collins, J. B. Edge, A. G. Bigelow, and myself. There never was an assessment asked for before the failure of the bank. There was no meeting called before the bank failed. I last visited the bank April 5 or 10, 1891, and Collins told me that the bank could get through the summer without any more money being needed; that it was the hard times which made money matters close, and that the people had very little money in the country. I never insisted on calling a meeting of the stockholders or directors, because Collins, who managed the bank, never notified the directors that there was a necessity for more funds, nor did he ever notify the directors to meet and assess the stockholders to furnish additional means for the bank. Mr. Collins told me in April that there was \$48,000 deposit liabilities of the bank. I held \$10,000 stock of the bank, and paid in \$3,000; Young \$10,000, and had paid in \$2,000; A. G. Bigelow held \$2,500, and had paid in nothing; J. B. Edge \$2,500, and had paid in nothing. Since the bank closed, none of the stockholders have been assessed or paid anything. Collins had put in the building, safe, and furniture. Mr. Collins then said the bank was in good condition; had been hard up, but was in better condition than ever. I had asked him if he needed any money to run through the summer. He never asked me for payment of an assessment of stock, nor to call a meeting of directors, nor to pay in any money as a stockholder." Thomas J. McNeill, for the state, testified that he was cashier of the Lake City Bank, elected by the board of directors. "The cash of the bank balanced after the bank closed, and on the day the bank closed, with receipts, disbursements, and deposits as shown by the scratch book of that day, and the books of the bank in my keeping. The bank closed on July 8, 1891, and did not open again. The trial balance of the books showed, on the day the bank failed, \$19,000 at that date." This comprised the whole of the state's evidence.

The only evidence for the defendant was his own statement under oath, in which he asserts his innocence, and in connection with which he exhibited to the jury the va-

rious books of entry of the bank, that showed that the deposit alleged to have been embezzled was regularly entered in said books to the credit of the depositors, W. F. Watts & Co., which statement it is not necessary to set out at length. The three sections of our statute applicable to the embezzlement or misappropriation of property by banks or their officers, or by bankers, in force at the time of the commission of the alleged offense (sections 27-29, p. 362, McClell. Dig.), provide as follows: Section 27: "Any person whose legitimate business requires him or her to receive the money or property of another, or any banker or broker who shall receive on deposit money belonging to another, or any municipal, county or state officer whose duty requires him to receive public money or property, or the property or money of another, who shall use, conceal, or willfully withhold any of said money or property so as to prove a defaulter therein, shall be guilty of larceny, and upon conviction thereof shall be punished according to the laws punishing larceny." Section 28: "If any officer, agent, clerk or servant of any incorporated company, or if a clerk, agent or servant of any private person or copartnership (except apprentices and other persons under the age of sixteen years), embezzles or fraudulently converts to his own use, or takes, or secretes, with intent so to do, without consent of his employer or master, any property of another which has come to his possession, or is under his care by nature of such employment, he shall be deemed guilty of larceny, and punished accordingly." Section 29: "If any officer of any incorporated bank, or any person in the employment of such bank, fraudulently converts to his own use, or fraudulently takes and secretes, with intent so to do, any bullion, money, note, bill, or other security for money, belonging to and in possession of such bank, or belonging to any person and deposited therein, he shall, whether intrusted with the custody thereof or not, be deemed guilty of larceny in said bank, and be punished by imprisonment in the state penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars."

Under the laws governing banking, deposits by the clients or customers of a bank therewith are divided into two classes, viz., special or specific deposits, and general deposits. When the identical money or other thing deposited is to be restored, or is given to the bank for some specified or particular purpose, as to pay a certain note or other indebtedness, or to act as agent for the collection of bills or notes deposited for collection, such collections to be remitted, such deposits are special or specific, and the property in the deposit remains in the depositor; the bank, in such case, becoming bailee, trustee, or agent for the depositor. The simple deposit of money in a commercial bank on account of the depositor, with-

out being complicated by any other transaction than that of the depositing and withdrawing of the moneys by the customer from time to time, is a general deposit; and it is now well settled, both in England and America, that such a deposit transfers the ownership of the money to the bank, and that the relationship with reference thereto, as between the bank and the depositor, is simply that of debtor and creditor at common law. The original and every subsequent general deposit by the customer is, in strict legal effect, a loan by the customer to the bank. *Morse, Banks*, §§ 567, 568, and numerous authorities there cited; *Foley v. Hill*, 2 H. L. Cas. 27; *State v. Clark*, 4 Ind. 315; *Marsh v. Bank*, 34 Barb. 298; *Downes v. Bank*, 6 Hill, 297. In *Bank v. Jones*, 42 Pa. St. 536, the court says: "Money, when paid into a bank, ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him, when he is asked for it. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it. He is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. The trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character. A banker is, therefore, in relation to his customer, neither a trustee nor a quasi trustee, but simply a debtor to him for a loan. The relation thus established is that of debtor and creditor merely, unaccompanied by any fiduciary connection." *Bank v. Hughes*, 17 Wend. 94; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Bank v. Millard*, 10 Wall. 152; *People v. Wadsworth*, 63 Mich. 500, 30 N. W. 99.

Another well-settled principle of law is that, where several individual men are authorized and empowered by law to act in a corporate capacity, their natural and individual capacity as to all matters respecting the subject of their incorporation becomes totally extinct. If A., B., and C. are granted a charter as an incorporated company, having a designated corporate name, to carry on the business of banking or any other enterprise, then, in respect to all of the business of such corporation, the natural and individual capacity of A., B., and C. becomes wholly extinct. *Rex v. Patrick*, 1 Leach, 253.

In recognition of these established principles of law, the sections of our statute above quoted were enacted; not for the purpose of overturning or contravening them, but for the purpose of providing punishment for those crimes that might otherwise find a safe refuge behind the rules announced. When section 27 of our statute, above quoted, inhibits the use, concealment, or willful withholding, by any banker, of the money or property of another that may have been received by such banker on deposit, it was not intended to break up the established banking customs of the country, or to annul the rules of law fixing the status between the banker and his customer, or to prohibit the use in his business by the banker, in a legitimate way, of moneys deposited generally with him, and for which, as before shown, he becomes the debtor of the depositor, the money so deposited generally to the credit of the depositor being commingled with, and becoming a part of, the general funds of the banker. The purpose of this section of the statute was not to interfere with this well-settled right on the part of the banker in dealing with his general deposits, but is intended to prohibit and prescribe punishment for the use, concealment, or willful withholding, by the individual or private banker, of any money or property that may have been deposited with him as a special or specific deposit under such circumstances as will continue the ownership of the deposit in the depositor, and that constitutes the banker the bailee, agent, or trustee thereof for the depositor. When, therefore, the individual or private banker uses the moneys deposited generally with him by his customers, and for which he becomes the debtor of such patrons, in his legitimate business, his subsequent failure or inability to repay the amounts of such indebtedness, brought about by legitimate but injudicious speculations, loans, or investments, without other fault upon his part than want of good judgment, energy, or enterprise, then he cannot be reached criminally under this statute. In consonance, also, with these principles, and in recognition of the other principle announced,—that the individuals composing an incorporated company lose their individual and natural capacity in all matters that they deal with in their corporate capacity,—sections 28 and 29 of the statute quoted were enacted to punish any officer, agent, clerk, or servant of any incorporated company or of any private person or copartnership, or any officer of any incorporated bank, or any person in the employment of such bank, for any fraudulent conversion to his own individual use of any property belonging to such bank or to his employer, or belonging to any other person, and deposited specially in such bank or with his employer. Section 27, above quoted, that, from the charges of the court to the jury, seems to be the one under which the indictment was attempted to be framed, is aimed at the indi-

vidual or private banker, and is intended, as before stated, to prohibit and punish the use, conversion, or willful withholding by the individual or private banker of any special or specific deposit that continues to be and remain, while in his custody, the property of another or of the depositor. Under this section of the law the officer, agent, clerk or servant of any incorporated company, or the clerk, agent or servant of any private person or copartnership, or the officer of any incorporated bank cannot be reached for the wrongful conversion of the property, either of his corporation or employer, or for the conversion of property that his corporation or employer holds in special deposit as bailee or trustee; sections 28 and 29 being applicable to them, and section 29 applicable particularly to the wrongful conversion by the officer of any incorporated bank, prescribing a different and much severer penalty. The indictment in this case attempts to blend the provisions of sections 27 and 29 together, undertaking to ground the offense charged under both sections at the same time. In it the defendant is alleged against as an individual banker, and at the same time he is charged as being the officer of a bank, to wit, as president of the Lake City Bank. When we come to the proofs there is not a word of evidence that tends to show that he was an individual or private banker, or that he conducted any banking business whatever in his individual capacity; but all the proofs show that the banking business, in the conduct of which he received the alleged deposit, was carried on either by an incorporated company, or by a joint stock copartnership, of which, and for which, he acted in the official capacity of president. There is no express proof that the Lake City Bank, of which the defendant was president, was a legally incorporated body; but the proof does show that it had shareholders and a board of directors, a president and vice president,—concomitants that usually belong to regularly incorporated companies. If it was an incorporated company, then the indictment should have so alleged, and should have been framed under section 29 of the statute quoted, and the defendant therein should have been alleged against as the officer, to wit, the president of the incorporated bank known as and doing the business of banking under the corporate name of the "Lake City Bank." If the Lake City Bank was not incorporated, but was a joint-stock copartnership, with the defendant as its managing president, and he conducted the banking business, not in his own individual capacity or on his own individual account, but as a member of, or as the clerk, agent, or servant of, the copartnership or joint-stock company, then he should have been charged under section 28 of the statute, and his status towards such company or copartnership should have been alleged. He could not at the same time transact the same piece of banking business

in his individual capacity and on his own individual account as a private banker, and also as the officer or member of an incorporated company of bankers, or as the clerk, agent, or servant or member of a copartnership. Again, the proof here shows clearly that the money alleged to have been used or withheld by the defendant was a general deposit by the depositors to their credit on general account with the Lake City Bank, and not with the defendant as an individual banker, which general deposit, as before shown, constituted the Lake City Bank the owner of the money, and made it, whether an incorporation or a copartnership, the debtor of the depositors; yet the indictment alleges that the money alleged to have been misappropriated by the defendant was the property of the depositors,—a variance between the allegation and proof that is fatal. Under the proofs as to the making of the deposit, the indictment should have alleged the money to be the property of the Lake City Bank; and, if there was a misappropriation thereof by the defendant as an officer of such bank, it being incorporated, he should have been alleged against as such under section 29, or, if he was the clerk, agent, or servant of an unincorporated copartnership, he should have been alleged against as such under section 28, and the money, under the proofs, should have been alleged to be the property of such copartnership.

The state's witness Thomas J. McNeill, who was cashier of the Lake City Bank at the time of its failure and cessation of business, testified that the trial balance books of the bank showed, on the day the bank failed, \$19,000 at that date; and A. B. Hagen, who was appointed receiver of the bank's assets within a few days after its failure, testified that when he took charge as receiver there was only \$171.06 in money in the bank. We do not understand from McNeill's testimony, however, whether the \$19,000, as shown from the trial balance books of the bank, represented cash on hand at the date of failure, or whether it was made up of cash and debits due by others to the bank. If, however, it is to be understood as representing cash on hand at the time the bank closed and ceased to do business, then there is no proof to fasten the responsibility for its disappearance upon the defendant between the time of the closing of the bank and the assumption of control thereof by the receiver. If there was \$19,000 in cash on hand when the bank closed, there is no proof to show whether the defendant or some other person made way therewith between that time and the appointment of the receiver, when there was only \$171.06 left. The proofs are absolutely deficient in this respect. From what has been said it is evident that the facts in proof do not sustain the allegations of the indictment, and that the indictment itself contains such an in-

congruity of allegation as to the statement of the offense sought to be charged that it becomes impossible legally to convict under it with the facts in proof. The judgment of the court below is reversed, and a new trial ordered.

(33 Fla. 446)

COLLINS v. STATE.

(Supreme Court of Florida. May 1, 1894.)

PERJURY—EXTRAJUDICIAL OATH.

One of the vital essentials of the crime of perjury, under section 5, p. 371, McClell. Dig., that provides: "Whoever, being authorized or required by law to take an oath or affirmation, willfully swears or affirms falsely in regard to any material matter or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury," etc.,—is that the oath or affirmation alleged to have been taken falsely must be one that is authorized or required by law to be taken under the circumstances or for the purposes for which it is taken. The taking of a mere voluntary or extrajudicial oath, that is nowhere either authorized or required by any law to be taken for the purposes or under the circumstances in which it is taken, is not perjury under this statute, though never so falsely and willfully taken.

(Syllabus by the Court.)

Error to circuit court, Columbia county; John F. White, Judge.

Noyes S. Collins was convicted of perjury, and brings error. Reversed.

R. W. & W. M. Davis, B. Putnam Calhoun, Blackwell & Rees, and W. M. Ives, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, J. In the circuit court of Columbia county, at the fall term, 1892, Noyes S. Collins, the plaintiff in error, and W. J. Winegar, were jointly indicted for perjury as follows: "That Noyes S. Collins and W. J. Winegar, late of said county, bankers, on the 11th day of June, A. D. 1891, at and in the county and state (Columbia county, Florida) aforesaid, desiring then and there to procure, as a pretended deposit in the Lake City Bank, in said county and state, a large amount of money, to wit, ten thousand dollars, from one Geo. B. Ellis, then county treasurer of said county, and to induce the said Geo. B. Ellis to deposit said money in said bank, and a pretense to secure him against all loss therefrom, the said Collins and Winegar then and there made and executed their certain bond in words and figures as follows, to wit: 'State of Florida, Columbia County. Know all men by these presents that we, William J. Winegar, of Palatka, Florida, and Noyes S. Collins and James E. Young, of Lake City, Florida, are held and firmly bound unto Geo. B. Ellis, county treasurer of Columbia county, Florida, in the sum of twenty thousand dollars, lawful money of the United States of America, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, adminis-

trators, jointly and severally firmly by these presents. Signed and sealed this 11th day of June, A. D. 1891, at Lake City, Florida. The condition of this obligation is such that whereas it is desired that the said Geo. B. Ellis, as county treasurer as above stated, deposit the money of the said Columbia county now in his hands as such treasurer, at his option, in the Lake City Bank, a corporation duly established and existing under and pursuant to the laws of the state of Florida, and doing business in Lake City, Columbia county, Florida; and it is the intention of these presents that the said William J. Winegar and Noyes S. Collins and James E. Young, above bounden, shall guaranty that the Lake City Bank will pay back any and all such sums of money as may be so deposited, upon the order of the said Geo. B. Ellis. Now, therefore, if the said Lake City Bank shall well and truly pay back all such sums as may be deposited therein at this time, or may hereafter be deposited on account of Geo. B. Ellis, as treasurer as aforesaid, when thereto requested, then this obligation to be void; otherwise to remain in full force and virtue. William J. Winegar. [Seal.] Noyes S. Collins. [Seal.] James E. Young. [Seal.] Signed, sealed, and delivered in presence of, the name of James E. Young inserted before signing, A. J. Henry.' And to further induce the said Geo. B. Ellis, county treasurer as aforesaid, to make said deposit as aforesaid in said Lake City Bank, the said William J. Winegar and Noyes S. Collins, being then and there duly authorized and required by law to take an oath and affirmation, not then and there in a judicial proceeding, were duly sworn, and took their corporal oaths, before A. J. Henry, a notary public in and for said county, the said A. J. Henry then and there having competent power and authority to administer the said oath to the said William J. Winegar and Noyes S. Collins in that behalf; and that the said William J. Winegar and Noyes S. Collins, being so sworn, did then and there willfully and knowingly, corruptly and falsely swear and affirm, each for himself, that he was worth the sum of ten thousand dollars over and above his debts and exemptions under the laws of the state of Florida, which said oath and affirmation are in words and figures, to wit: 'State of Florida, Columbia county. Before me personally came William J. Winegar and Noyes S. Collins, who, being sworn, say, each for himself, that he is worth the sum of ten thousand dollars over and above his debts and exemptions under the laws of the state of Florida. William J. Winegar. Noyes S. Collins. Sworn and subscribed to before me this 11th day of June, 1891, A. D. A. J. Henry [Seal.] Notary Public.' Said oath then and there being taken by the said Winegar and Collins in regard to a material matter respecting which said oath is by law authorized and required, to wit, as an inducement to the said Geo. B. Ellis to deposit said sum of money in said

bank, which said oath so taken by the said Winegar and Collins was then and there false; and that the said Winegar and Collins, at the time they took said oath, well knew it was false, and well knew that they each were not worth ten thousand dollars over and above his debts and exemptions under the laws of the state of Florida, contrary to the statute in such cases made and provided," etc.

Under this indictment the parties were tried. William J. Winegar was acquitted, but Noyes S. Collins was convicted, and sentenced to 10 years in state's prison. From this judgment he takes writ of error here.

Many errors are assigned, but, as the consideration of one of them effectually disposes of the case, we will notice that one alone. The defendants moved the court below to quash the indictment upon divers grounds, the sixth ground thereof being: "That there is no law in the state of Florida requiring or authorizing such oath as is alleged to be taken." According to the first instruction of the court to the jury, and from the allegations of the indictment itself, it was predicated upon and charges a violation of the provisions of section 5, p. 371, *McClell. Dig.*, that is as follows: "Whoever, being authorized or required by law to take an oath or affirmation, willfully swears or affirms falsely in regard to any material matter or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury, and shall be imprisoned in the state penitentiary not exceeding twenty years." The crime of perjury, under this section of the statute, can only be made out in those cases where the oath or affirmation taken falsely is one that "is authorized or required by law to be taken." There are many oaths authorized or required by different provisions of law to be taken, that if sworn or affirmed to willfully, and falsely, will subject the affiant to indictment under and to the penalties of this provision of the law; such, for example, as the affidavits required by law for the issuance of the various writs of attachment, garnishment, replevin, claims to property levied upon, for injunction, for the proof of deeds and other writings for record, and in divers other cases wherever the law either expressly authorizes or requires the particular oath to be taken. So, too, whenever security is required by any law to be taken,—such, for example, as attachment, replevin, claim, injunction, and bail bonds,—where the person or officer taking same is not acquainted with the situation of the sureties tendered, he is authorized by law to require such sureties to justify on oath (section 10, p. 440, *McClell. Dig.*), and in such cases the oath taken by such sureties would be such an oath as is authorized by law to be taken, and, if taken willfully and falsely, would subject them to indictment under this section of the statute; but, in order to fall

within this provision of the law, the bond or security to which the justification is made must be one that is expressly required by law to be taken in any given case. We know of no law that either authorizes or requires the treasurers of counties to exact a bond or other security from banks or any one else for the guaranty of their deposit with them of the funds of their counties in their hands as such treasurers. Sections 21 and 22 of chapter 3864, approved June 7, 1889, (an act for the incorporation of banking associations, etc.,) provide, in substance, that all banking associations organized under that act that shall be designated by the state comptroller for such purpose, shall be depositaries of public money under such regulations as the comptroller may prescribe; and that the comptroller shall require the associations thus designated to give satisfactory security for the safe-keeping and prompt payment of the public moneys deposited with them. Sheriffs, tax collectors, county treasurers, etc., are thereby permitted, but not required, to deposit with such banking associations the moneys in their hands; but nowhere does this or any other law authorize or require a county treasurer to exact a bond or other security for his deposit of the county funds in his hands, and nowhere does the law authorize or require the principals or sureties upon any such bond that may be so voluntarily given to justify or take an oath as to their property worth. The bond, therefore, and the oath thereto, alleged to have been falsely taken in this case, were entirely voluntary, extra judicial, and neither authorized nor required by any law to be taken by the parties charged with having taken the same willfully and falsely. One of the vital essentials of the crime to be alleged and made out under this section of the statute is that the oath charged to have been falsely taken must be such an oath as is authorized or required by law to be taken under the circumstances by which it is surrounded when taken. The indictment here, though it alleges that the oath it charges to have been falsely taken was authorized and required by law to be taken, shows upon its face, as matter of law, that such oath was not in fact either authorized or required by any law to be taken for the purposes and under the circumstances set forth in the indictment. *State v. McCarthy*, 41 Minn. 59, 42 N. W. 599; *Langford v. State*, 9 Tex. App. 283; *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662; *Steber v. State*, 23 Tex. App. 176, 4 S. W. 880; *Collins v. State*, 78 Ala. 433; *State v. Boland*, 12 Mo. App. 74; *U. S. v. Babcock*, 4 McLean, 113 Fed. Cas. No. 14,488; *Mahan v. Berry*, 5 Mo. 21; *Linn v. Com.*, 96 Pa. St. 285; *State v. Byrd*, 28 S. C. 18, 4 S. E. 793; *Lamden v. State*, 24 Tenn. 82.

From what has been said it is apparent that the indictment here was fatally bad,

and that the conviction of perjury thereunder was illegal and unauthorized. The judgment of the court below is reversed, with directions to quash the indictment.

(33 Fla. 453)

MILLER v. MILLER.

(Supreme Court of Florida. April 11, 1894.)

ALIMONY WITHOUT DIVORCE—RESIDENCE OF PARTIES—JURISDICTION—ALIMONY PENDENTE LITE.

1. Where alimony is sought, without divorce, solely under the provisions of section 1485, Rev. St., upon the ground of the existence in favor of the wife of some one or more of the legal causes for divorce, then the applicant must allege and prove that she has legally been a bona fide resident and citizen of this state for two years continuously next prior to the filing of her application. The prerequisite two-years residence here is jurisdictional; and no "cause for divorce," such as our courts could recognize, can properly be said to exist, in this state, in favor of any applicant, until she has, bona fide, resided here the requisite period of two years.

2. Where the application for alimony, without seeking divorce, is predicated, under the provisions of section 1485, Rev. St., upon the ability of the husband to maintain the wife, and his failure so to do, then it is not necessary for the wife to allege or prove that she has resided here for two years; but in such case, in so far as the question of the jurisdiction of the court to entertain the cause is concerned, it is only necessary for her to show that either she or her husband has, in a proper and legitimate manner, become, at the time of the application, a bona fide resident and citizen of this state. It is immaterial, in the latter case, how long such residence and citizenship shall have continued here prior to the application. But it is not within the spirit or intent of either of these provisions of the statute to confer upon our courts the power to interfere in any respect with the marital status of citizens of other states, who may be here only on a temporary visit, either to pass upon such status, or to enforce any of the rights and duties that depend thereon.

3. Where an issue is raised by the pleadings, in a proceeding for alimony without divorce, as to the jurisdiction of the court, on the ground that neither the applicant wife nor the defendant husband is a resident or citizen of this state, such jurisdictional question is no bar to the granting of temporary alimony and suit money pendente lite; but in such case it is within the sound judicial discretion of the court to award temporary alimony, pendente lite, until such jurisdictional issue, with others material to the proper determination of the controversy between the parties, can be finally heard, and disposed of upon the proofs.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Bill by Jennie Miller against Isaac Miller for alimony. From an order granting complainant's petition for alimony pendente lite, for attorney's fees, and for suit money, defendant appeals. Affirmed.

John W. Price, for appellant. Scott & Broome, for appellee.

TAYLOR, J. The appellee, Jennie Miller, filed her bill in the circuit court of Volusia county on the 18th day of December, 1893, against her husband, Isaac Miller, the appel-

lant; praying therein, not for divorce, but for alimony, and the custody of their infant son, one of the age of 12 years, and for an allowance for the maintenance of said child, and for a writ ne exeat, to prevent the defendant from departing the state, and to furnish security for his compliance with the order for alimony.

The bill alleges, in substance: That the complainant, Jennie Miller, is a resident and citizen of the state of Florida. That she and the defendant, Isaac Miller, are husband and wife. That they were married in the state of New York in 1879, and that afterwards they removed to the town of Franklin, in the state of New Jersey, at which place they resided until July, 1892, when the defendant kissed her, and bade her good-bye; promising to return in three weeks' time; telling her that the object of his trip was to establish a syndicate of some kind some where in Texas. That the defendant continued to write to her until some time in November, 1892, when he ceased his letters, and she has never heard directly from him since. That defendant left her without a cause, and has from the said July, 1892, willfully, obstinately, and continuously deserted her; leaving her in the mean time entirely unprovided for, and without means of support, other than what she was able to earn by her own labor and industry. That she has borne one child for the defendant, a boy, now about the age of 12 years, named Isaac Harry Miller, who is now with her, and who has been supported and maintained by her since the desertion of her by the defendant. That she has been informed and believes, and upon such information and belief charges, that the defendant has avowed his purpose and intention to procure possession of this child, even at the cost of blood, if necessary. That since his desertion of her the defendant has resided in the state of Texas. That she has inherited by the death of a sister, Elizabeth C. Bodine, late of Volusia county, Fla., who died intestate in said county in 1893, the one-fifth interest in certain real and personal property belonging to her said deceased sister's estate. That, by the consent and at the request of three of the heirs of the said estate, she has applied for and obtained a grant of letters of administration upon said estate, and that Charles Delamater, a son of a deceased sister of the said Elizabeth C. Bodine, deceased, has been appointed as her coadministrator upon said estate. That the defendant, having ascertained that she has inherited, in the manner aforesaid, the one-fifth interest in the estate aforesaid, and desiring and intending to harass and wrong her, by attempting to exercise the right of a husband over the estate of his wife given to the husband by the laws of Florida, has left his home and business in Texas, and has come to Florida, recently, with the purpose and intention of taking possession of her property and of the said child,

Harry Miller, with the intent to carry beyond the limits of the state of Florida all of her personal property that he can lay his hands upon, and also to take from her, and carry out of the state of Florida, her said child. That she is advised she has good cause of divorce against her said husband, upon the ground of his willful, obstinate, and continued desertion of her for one year, and that she has the legal right, under the laws of Florida, to obtain alimony without seeking a divorce. That the defendant has ample means, and is fully able, to maintain and contribute to her maintenance and that of his said child, and has without any fault of hers, and wholly without excuse of any kind, utterly failed to do so. That the said estate in which she has a one-fifth interest, aforesaid, is still unsettled, the debts have not yet all been paid, nor has the said estate, as yet, been divided; and she is therefore still dependent upon her own industry for the means of maintenance for herself and her said child. That the defendant will very soon, and may at any time, remove himself beyond the limits of the state of Florida, and beyond the reach of process of this court.

Personal service of the subpoena in chancery was made upon the defendant in Volusia county, Fla.

The defendant interposed a demurrer to the bill upon the grounds that there was no equity in the bill; that it was not legally sworn to, in order to obtain an injunction; that it was multifarious, in seeking relief of several kinds; and that the court of chancery was without jurisdiction to adjudicate the subject-matter of said bill. This demurrer the court overruled, and such ruling is claimed to be error. The defendant then answered the bill, in substance, as follows: He admits his marriage to the complainant, as alleged. He admits that he left Franklin, N. J., about the 20th of July, 1892, but says that complainant knew where he was going, and the business upon which he was going; that the matter had been talked over between them before leaving for Texas, she having examined all his correspondence. He admits that he remained in Texas, but says that it was for the purpose of saving and securing a large sum of money, to wit, about \$105,000. That he kept up a correspondence with the complainant, and sent her money as often as she needed it, until November following, when she, suddenly, and without any cause known to him, stopped answering his letters, and for reasons hereafter stated, to wit, that previous to his going to Texas the said Jennie Miller received from him about \$1,700, with the request from him to deposit the same in bank to her own credit, she thereafter took a portion of that money, and went to California, without his consent, or any knowledge on his part where she was going, and remained away for a long time. That she

came back, and acknowledged her error, and begged forgiveness. That, previous to his going to Texas, she had left her home, where every comfort was provided for her, and went away, leaving him, without any cause or excuse whatever, and came back, and her crime was condoned by him. That when she stopped writing to him he naturally supposed that she had left her home, and refused to correspond with him. That, failing to hear from her, he did not write to her, but tried to ascertain from others where she and his child had gone, but failed to find out for a long time, and, when he did ascertain where she was, he found that she was in Albion, Mich., where she now lives. That she took and carried with her to Michigan all the furniture belonging to him, of about \$7,000 in value, which is still in her possession, and used by her, as he is informed and believes, in keeping a boarding house. He emphatically denies that he has ever failed or refused to provide for, support, and maintain her in a comfortable manner, having plenty of means himself. That he has now, and always had, a good and comfortable home for her, as long as she remains with him, and still has, so long as she behaves herself as a wife should do towards her husband. That it is no fault of his that she did not come to him at his present temporary home in Texas, but, of her will, she has remained away. He admits her inheritance of property in Florida from her sister, and her administration on her sister's estate, but which administration was without his knowledge or consent, and which, he is advised, is illegal and void, and to which he will not give his consent. He emphatically denies that he came to Florida for the purpose of obtaining possession of the property that she inherits from her said sister's estate, but that he came here to collect a bill due him by said estate, and which he proposes to collect. He denies that he came to Florida to take possession of his child, Isaac Harry Miller, but to see him, and to provide for him as a parent would for a child, and says that he does propose to take said child whenever he is large enough to go to a proper school. He emphatically denies that he ever deserted her, and left her to her own resources, except when produced by her own acts, she always having a home whenever she thought proper to remain there, which she has failed and refused to do. That he is informed and believes that she went to California, and remained there, with objectionable persons, as long as she saw proper, and returned to him, and that, for the sake of her peace and happiness, he condoned and forgave her bad conduct.

Upon the filing of the defendant's answer the court made an order for an injunction to restrain the defendant from interfering with the property inherited by the complainant, and for the issuance of a writ ne exeat against the defendant; the defendant to be

released from custody thereunder upon his giving a bond, with surety to be approved by the sheriff, in the sum of \$1,000. The order for, and issuance of, this writ is also assigned as error.

Under the writ *ne exeat* the defendant was arrested, and gave the required bond.

The complainant then presented her petition for alimony *pendente lite*, and for attorney's fees, and for suit money, upon which the court made an order requiring the defendant to pay to the complainant, until the further order of the court, the sum of \$25 per week, the first payment to be made on the 3d day of January, 1894, and weekly thereafter, and also the sum of \$100, solicitors' fees, and suit money, to be paid on January 3, 1894. From this order the defendant appeals.

It is contended for the appellant here that the court had no jurisdiction to entertain the cause, because neither of the parties were residents or citizens of Florida, but were here only temporarily. Our statute (sections 1485 and 1486, Rev. St.) provides that "if any of the causes of divorce set forth in section 1480 (except in the ninth paragraph) shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce, upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife." Section 1486 provides: "If any husband having ability to maintain or to contribute to the maintenance of his wife or minor children, shall fail to do so, the wife, living with them, or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes, and the court shall make such orders as may be necessary to secure to her such maintenance or contribution." Section 1487 provides that "a decree of alimony granted under sections 1484 and 1485 shall release the wife from the control of her husband, and she may use her alimony, and acquire, use and dispose of other property, uncontrolled by her husband, and when the husband is about to remove himself or his property out of the state, or fraudulently convey or conceal it, the court may award a *ne exeat* or injunction against him or his property, and make such order or decree as will secure the wife's alimony to her." While we do not think that it is within the spirit and intent of these statutes to confer upon our courts the power to interfere in any respect with the marital status of citizens of other states who may be here only on a temporary visit, either to pass upon such status, or to enforce any of the rights and duties that depend thereon, yet where either of the parties, in a proper and legitimate manner, becomes a *bona fide* resident

and citizen of this state, then our courts become clothed with power to enforce and protect all of the rights of such citizen, and to compel, to the extent of their jurisdictional powers, the performance of all duties due to or from such citizen, including those that grow out of the marital status, except that when a total dissolution or severance of such status, by divorce, is sought, then our statute requires that the residence here must have continued for two years before the application therefor can be made. Where one of the parties, however, is actually, legally and *bona fide* domiciled in this state, as a citizen thereof, then we think that, under section 1486 of this statute, our chancery courts have jurisdiction to enforce the duty of maintenance and support due from the husband to the wife, by awarding alimony, particularly where personal service is made upon the husband within this jurisdiction, as has been done here. *Keerl v. Keerl*, 34 Md. 21. It is contended for the appellant that the provision of our divorce statute requiring two years' residence in the state, before an application for divorce can be entertained, applies to the granting of alimony under all of the provisions of the statutes quoted. Where the application for alimony is predicated solely and entirely upon "the existence of a cause for divorce," as provided for in section 1485, first quoted above, then we think that the bill therefore should allege, and it should also be proved, that the complainant wife has in fact resided in this state continuously for two years next prior to the exhibition of her bill, because, under our statute requiring two years' residence on the part of the applicant for divorce before the doors of our courts are open to his or her complaint, no "cause for divorce" can properly be said to exist in this state in favor of such applicant—at least, none such as our courts could recognize—until he or she shall have completed the requisite two years' residence here. The reason for the requirement of the two years' residence before a divorce can be applied for is to prevent citizens of other states from committing a fraud upon the law, by taking up a temporary residence here solely for the purpose of obtaining divorces that they could not secure in the jurisdiction to which they belong. But where the application for alimony, as in the case before us, can be rested upon the provisions of section 1486, above, that is a general provision of law to enforce the marital duty due from the husband, having the ability so to do, of maintaining and supporting his wife, regardless of the existence of any cause for divorce, then the reason for the requisite two-years residence does not apply; and in such case it becomes necessary, in so far as the jurisdiction of the court to entertain the cause is concerned, only to show that the applicant wife or the defendant husband is in fact properly and *bona fide* domiciled here as a citizen of this state. Because of the fact

that the bill can be rested upon the provisions of the latter section of the statute, we think it was within the power and discretion of the court to grant alimony thereon. The bill alleges expressly that the complainant wife here is a resident and citizen of Volusia county, Fla. The answer denies this to be true, and asserts that she is a resident and citizen of Michigan, and that she is here only temporarily, for the purpose of securing an interest inherited by her in the estate of a deceased sister. Whether she is in truth a bona fide resident and citizen of Florida, or of the state of Michigan, then, is one of the material questions at issue between the parties, to be ultimately settled from the proofs to be furnished at the final hearing. The order appealed from grants temporary alimony only until all of the material issues between the parties can be finally determined by further orders and decrees of the court. And even though the answer raises the issue as to the jurisdiction of the court, on the ground that both parties are residents and citizens of other states, still it is within the sound judicial discretion of the court below to award temporary alimony to the wife until that issue, with others material to the proper determination of the controversy between the parties, can be finally heard and determined. 2 Bish. Mar. & Div. § 934; Bradstreet v. Bradstreet, 6 Mackey, 502. Indeed, it may be said to be well settled that where the fact of marriage, the wife's necessities, and the husband's faculties are shown by adequate pleadings, temporary alimony will be allowed, in accordance with the facts of each case, within the sound discretion of the court. Methvin v. Methvin, 15 Ga. 97; 2 Bish. Mar. & Div. § 929 et seq., and authorities cited. We do not see that the discretion of the court below has been abused, either in ordering the payment of temporary alimony and suit money here, or in the amount required to be paid, in view of the admission from the defendant husband of the possession of abundant means.

It is also urged here, as error, that the granting of the writ ne exeat was improper. As there is no appeal from this order, we cannot consider same.

The order appealed from is affirmed.

(33 Fla. 464)

THOMAS v. STATE.

(Supreme Court of Florida. April 11, 1894.)

EMBEZZLEMENT BY AGENT—INSTRUCTIONS—AGENCY TO SELL LAND—DURATION.

In the trial of an accused indicted as an agent or attorney for embezzlement, where there is an issue and conflicting evidence with reference to the fiduciary relationship of the accused to the thing embezzled, it is error for the court to instruct the jury, as matter of law, that, "if defendant was constituted the agent of the prosecutor to sell lands, such agency continued until the full payment of the purchase money; and, if defendant had originally the right to collect the money as agent,

such agency continued until payment to his principal." The continuance or length of duration of an agency to sell lands, collect money, or to perform any other act for or in the stead of another depends entirely upon the facts and circumstances in proof touching such agency.

(Syllabus by the Court.)

Error to criminal court of record, Marion county; W. S. Bullock, Judge.

Franklin C. Thomas was convicted of embezzlement, and brings error. Reversed.

Isaac L. Purcell and R. B. Bullock, for plaintiff in error. The Attorney General, for the State.

TAYLOR, J. The plaintiff in error, upon information filed by the county solicitor, was tried and convicted in the criminal court of record in Marion county of the crime of embezzlement, and was sentenced to imprisonment in the penitentiary for one year, and asks a reversal here upon writ of error.

The first error assigned is the overruling of the defendant's motion to quash the information as to the first and second counts. The information is as follows: "In the Name and by the Authority of the State of Florida. R. A. Burford, county solicitor for the county of Marion, prosecuting for the state of Florida, in the said county, under oath, information makes that Franklin C. Thomas, attorney at law, of the county of Marion and state of Florida, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-three, in the county and state aforesaid, then and there being the attorney and agent of one Charles Brown, did embezzle and fraudulently convert to his own use, without the consent of the said Charles Brown, two certain promissory notes,—one for the sum of three hundred dollars (\$300), made at Ocala, Florida, and dated March 4, 1892, due and payable to the order of said Charles Brown on or before September 4, 1892, said note being signed by Saml. W. Teague, of the value of three hundred dollars, of the goods and chattels of the said Charles Brown; and the other of said notes being for the sum of four hundred dollars (\$400), made at Ocala, Florida, and dated May 5, 1892, due and payable to the order of the said Charles Brown ninety days after date, signed by Samuel W. Teague, of the value of four hundred dollars, of the goods and chattels of Charles Brown,—which said two promissory notes came into the possession of the said Franklin C. Thomas by nature of his employment as an attorney and agent aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"Second Count. And the county solicitor aforesaid, who prosecutes as aforesaid, in manner and form aforesaid, further information makes that one Franklin C. Thomas, attorney at law, of the county of Marion and state of Florida, on the first day of January, in the year of our Lord one thousand

eight hundred and ninety-three, in the county and state aforesaid, then and there being the attorney and agent of one Charles Brown, seven hundred dollars (\$700), lawful money of the United States of America, the denomination of which and a more particular description thereof are to the county solicitor unknown, of the money and property of the said Charles Brown, of the value of seven hundred dollars, which came to the possession and under the care of him, the said Franklin C. Thomas, by nature of such employment as an attorney and agent aforesaid, did embezzle and fraudulently convert to the use of the said Franklin C. Thomas, without the consent of his employer, the said Charles Brown, against the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"Third Count. And the county solicitor aforesaid, who prosecutes as aforesaid, in manner and form aforesaid, further information makes that the said Franklin C. Thomas, of the county of Marion and state of Florida, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-three, in the county and state aforesaid, being then and there an attorney at law, whose legitimate business required him to receive the money or property of other persons, did, by virtue of his said business and profession as an attorney at law, then and there receive for one Charles Brown, whose attorney and agent he, the said Franklin C. Thomas, then and there was, the sum of seven hundred dollars (\$700), lawful money and currency of the United States of America, the denomination of which and a more particular description thereof are to the county solicitor unknown, of the value of seven hundred dollars, of the money and property of the said Charles Brown, so as to prove himself, the said Franklin C. Thomas, a defaulter therein, against the form of the statute," etc.

Without specifying the various grounds of the motion to quash, as none of them are urged or argued here, we find no error in the court's ruling upon such motion. The court correctly quashed the information as to its third count, as it charges no offense known to our law; but as to the first and second counts the motion to quash was properly overruled, because both of such counts charge the offense substantially in the language of the statute (section 2457, Rev. St.) defining embezzlement, under which the information was laid, which is sufficient. *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 509.

The second error assigned is the ruling of the court in permitting the following question to be propounded by the counsel for the state to the prosecuting witness: "Brown, I understood you to say yesterday that you never sold or transferred to F. C. Thomas the notes given you by Mr. Teague; that, if you did make such a transfer of these notes, you

did so for the purpose of having Thomas collect your money for you from Mr. Teague, and pay the same over to you. Is that so?" The objection was that the question was leading. The question as framed does rather too fully and minutely put the words in the mouth of the witness; but in view of the evident illiteracy of the witness, and the wide discretion vested in the trial court over the interrogation of witnesses, we cannot say that it was reversible error.

The third error assigned is the admission in evidence of the two notes alleged to have been embezzled; the objection to their admission being that they had not been identified, before being offered in proof, as the notes alleged to have been embezzled. There is no merit in this assignment. The notes offered carried upon their face the evidence of their identity as being the same instruments described in the information.

The fourth, fifth, and seventh assignments of error, to the effect that the court erred in overruling the defendant's motion for a new trial and in arrest of judgment on the ground that the verdict was contrary to the evidence, and not supported thereby, and contrary to the charge of the court, we will not discuss, because the conclusion we have reached upon another error assigned necessitates a reversal and another trial of the cause.

The sixth assignment of error is the giving of the second, sixth, and seventh instructions. When considered in connection with all the instructions given, we do not think the second and sixth instructions were improper. The seventh instruction was as follows: "If you find from the evidence, beyond a reasonable doubt, that the defendant was constituted the agent of Brown to sell lands, such agency continued until the full payment of the purchase money; and, if defendant had originally the right to collect the money as agent, such agency continued until payment to Brown." The error of the seventh instruction, above, is evident. The continuance or length of duration of an agency to sell lands, collect money, or to perform any other act for or in the stead of another depends entirely upon the facts and circumstances in proof touching such agency; therefore, it was erroneous for the court to charge, as a matter of law, that an agency to sell land continued until the full payment of the purchase money therefor, and that an authority to collect money for another continued until payment was made to the principal. In view of the evidence in the cause, this instruction was material error, and because of it there must be a reversal.

The ninth assignment of error is the refusal by the court to give defendant's charge No. 4, as requested, viz.: "Where one places his money in the hands of another, relying on his honesty or responsibility for its return with stipulated interest, then a failure of the party to properly account for the money so received will not subject him to a criminal

prosecution for embezzlement." Under the facts in proof, this charge was not applicable.

The tenth assignment is the omission by the court, in giving the following charge requested by defendant, of the words embraced therein in brackets, viz.: "Intent to embezzle and convert to one's own use is a necessary element in embezzlement, and therefore, before the offense can be made out, it must distinctly appear that the defendant has acted with a felonious intent, and made an intentionally wrong disposal [including a design to cheat and defraud the owner]. Therefore, if you believe from the evidence the defendant used the money and appropriated the same, without any felonious intent [and without any design at the time to cheat and deceive the owner], he is not guilty, and it is your duty to so find." The charge was given, omitting the words embraced in brackets, and this omission is the error assigned. We do not think that the omitted words were necessary to the making out of the offense, in view of the other language used in the charge, that conveyed fully the necessary idea that the conversion must be proved to have been made with a wrongful and felonious intent.

The eleventh and last assignment of error—the overruling by the court of the defendant's motion for rehearing of his motion for new trial on the ground of newly-discovered evidence—it becomes unnecessary to consider.

For the error found, the judgment of the court below is reversed, and a new trial ordered.

(23 Fla. 482)

STATE ex rel. PATTON v. BLOXHAM,
Comptroller.

(Supreme Court of Florida. April 10, 1894.)

TAX COLLECTOR — FAILURE TO REPORT TO COMPTROLLER — FORFEITURE OF COMMISSIONS — MANDAMUS — RETURN TO WRIT.

1. A return to an alternative writ of mandamus should state the facts relied on in confession and avoidance with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass judgment upon the sufficiency of the return.

2. By the second section of chapter 1977, Laws 1874, collectors of revenue were required after receiving the annual tax list of books, to make, on the 16th and last days of the months of November, December, and January, and on the last day of all other months, returns under oath to the comptroller and county judge, and at the same time pay over to the proper officers all sums collected on account of state and county taxes, and for licenses and other purposes. The fifth section of this act provided that, for any failure on the part of any collector to make reports or pay over any money as required by the act, he shall forfeit for every week's delay one-fifth of his commissions, and, if the delay extends beyond 30 days, he shall forfeit all commissions on amounts to which the forfeiture applies, as well as on all future amounts collected. To an alternative writ of mandamus, seeking to compel the comptroller to audit and

issue a warrant on a claim for commissions alleged to be due a collector of revenue on sums of money collected for taxes, it is not sufficient, under said act, to simply allege that relator failed and refused persistently to make reports to the comptroller, and pay over to the treasurer, as required by law, the moneys collected by him as such collector, and by so doing he forfeited all commissions claimed by him. The forfeiture attaches, under the statute, to a failure to make reports and pay over moneys collected for every week's and 30 days' delay, and not for a failure to report and pay over on the days specified in the statute.

3. The statutory conditions upon which a forfeiture is made to depend should be alleged, as without them the court cannot assume that there was a forfeiture.

4. The neglect and failure on the part of a collector of revenue to collect taxes on the tax list or books that are due and collectible may amount to a failure to perform an official duty, but such neglect or failure was not made by statute a forfeiture of commissions on amounts of taxes collected.

5. No question involving the official discretion of the comptroller as to auditing claims for commission on tax collections is considered in this case; all matters involving such question having been expressly waived, and withdrawn from the determination of the court.

(Syllabus by the Court.)

Mandamus, on the relation of George Patton, against W. D. Bloxham, comptroller. Motion to quash return to alternative writ sustained.

This is an original proceeding by mandamus instituted in 1890 against Comptroller Barnes, and by agreement the proceedings have been continued against his successor, W. D. Bloxham, who has approved the official acts brought in question in the suit of his predecessor, and adopted the answer filed by him in the cause.

The alternative writ alleges, substituting the name of W. D. Bloxham for W. D. Barnes: That the relator, Patton, was duly appointed and commissioned on the 14th day of July, 1887, as collector of revenue for the county of Franklin, and held said office from the date of his appointment until he was removed by the governor of the state, on the — day of March, 1888. That, as such collector, he received from the assessor of said Franklin county, at the times fixed by law, the assessment rolls of said county for the years 1886 and 1887, respectively, with the warrant of said assessor, in due form of law, thereto attached, and collected \$1,624 of the taxes assessed for the state of Florida on said assessment roll for the year 1886, and \$1,292 of taxes assessed for the state on said roll for the year 1887; and, besides, he collected \$1,558.52 for state license taxes for the year 1886, and \$394.66 for such taxes for the year 1887. That he paid the said several sums of money to the proper officer of the state of Florida at the times and in the manner required by law, and has fully paid and accounted for the same.

Further, that he is entitled to a commission of \$131.20 on the said state taxes collected for the year 1886, and a commission

of \$114.60 on said taxes collected for the year 1887, and a commission of \$74.75 on the said license taxes collected; making, in the aggregate, \$320.55 as compensation for his services as such collector of revenue. That the comptroller is required by law to audit and allow to relator said commissions for collecting said taxes, and to draw a warrant therefor in his favor on the treasurer of the state of Florida. That W. D. Bloxham is comptroller of the state of Florida, and relator has applied to him, as such comptroller, and requested him to audit and allow said commissions to relator for collecting said taxes, and to draw a warrant therefor in his favor on the treasurer of the state, as required by law, but he, as comptroller, has refused, and still refuses, to do so, and by reason of such refusal relator is deprived of his said compensation which is justly due him, and is remediless in the premises, unless it is afforded him by a writ of mandamus.

The return admits that relator was collector of revenue for Franklin county, as stated in the writ, and that, as such collector, he collected the said several sums of money as alleged in the alternative writ. The return denies, however, that relator paid over the said sums of money collected by him to the proper officer of the state of Florida at the times and in the manner required by law; and it is alleged that he failed and refused, persistently, to make reports to respondent, as comptroller, and to pay over to the treasurer, as required by law, the moneys collected by him as said collector, though he was repeatedly requested and urged so to do; that there was then due by relator to the state, and unaccounted for, as appears from the books of the comptroller's office, the sum of \$271.37 of the taxes of 1886, and the sum of \$1,162.61 of the taxes of 1887; that relator failed to make returns, as required by law, to respondent, as comptroller, of all sums collected on account of state taxes for the years 1886 and 1887, and that he failed to make report and pay over moneys collected by him, as required by law; and that by so doing he forfeited all commissions now claimed by him.

The return further denies that there is due to relator by the state the sum of \$325.55, as compensation for his services as collector of revenue, or that there is due to him any sum whatever for his said services; and it is alleged that full commissions have been paid to relator on all moneys collected by him, except on the sum of \$2,602.77, and that the commissions on this sum amount to \$92.73. It is further alleged that the failure and delay of relator to make report of taxes collected by him extended from February, 1887, to March, 1888, the termination of his office, — a period of more than one year; that is, he failed to make returns of taxes collected by him on the last days of the months of

March, April, May, June, July, August, September, October, November, and December, 1887, and on the last days of January and February, 1888, which are the days required by law on which returns are to be made, — and that this delay applied to a larger sum of taxes collected for the state than the amount stated, upon which commissions have not been paid, and that respondent, under the power given him in section 5, c. 1977, Laws Fla., withheld the commissions on the same, amounting to the said sum of \$92.73.

Motion was made by relator to quash the return, and for a peremptory writ of mandamus.

A written stipulation has been filed on the part of the comptroller, waiving all questions in the case regarding his official discretion, and withdrawing them from the consideration of the court.

John W. Malone, for plaintiff. William B. Lamar, Atty. Gen., for defendant.

MABRY, J. (after stating the facts). The return in the case before us admits that the relator was collector of revenue for Franklin county during the time alleged in the alternative writ, and as such collected \$1,624, taxes assessed for the state for the year 1886; the sum of \$1,292, taxes assessed for the state for the year 1887; \$1,558.52, state license tax for 1886; and the sum of \$394.66, state license tax for the year 1887. It is denied, however, that relator paid over the said moneys collected by him to the proper officer at the times and in the manner required by law; and it is alleged that he failed and refused, persistently, to make reports to defendant, as comptroller, and to pay over to the treasurer, as required by law, the moneys collected by him as such collector, and by so doing he forfeited all commissions claimed by him. The return does not allege, nor was it the purpose of defendant, so far as we can see, to allege, that relator did not in fact pay over to the proper officers the moneys alleged to have been collected; but the allegation is that he did not pay at the times and in the manner required by law. It is also denied that there is due the relator by the state the sum of \$325.55, or any sum whatever, for his services as collector of revenue; but this denial is coupled with the statement that full commissions had been paid to him on all moneys collected by him, except the sum of \$2,602.77, and that the commissions on this sum amounted to \$92.73. How the commissions on the sum mentioned are fixed at \$92.73 is not alleged.

The theory of the return is that relator forfeited the commissions to which he was entitled under the statute, on that part of the collections made by him on which commissions had not been paid, by reason of his failure to make reports to defendant, as comptroller, and pay over the amounts collected to the treasurer, at the times and in

the manner required by law. By the second section of chapter 1977, Laws 1874, it is enacted that "every collector of revenue, after receiving the annual tax-list or books, shall make, on the sixteenth and last days of the months of November, December and January, and on the last days of all other months, a return under oath to the comptroller and county judge, of all sums collected on account of the state and county taxes, and for licenses and other purposes. In this return he shall state the names of the person or persons paying the tax, license, or other sum, the amount thereof, as well as the character of the funds in which paid, whether in scrip or cash, and if in scrip, the number and amount thereof, and to whom issued, by the state or county, as the case may be, and at the same time he shall pay all moneys in his hands to the proper officers, as provided by law." The fifth section of this act provides "that for any failure on the part of any collector of revenue to make reports or pay over any money as required by this act and the act of which it is an amendment, he shall forfeit for every week's delay one-fifth of his commissions, and if the delay extends beyond thirty days he shall forfeit all commissions upon all amounts to which such failure applies, and all future commissions upon collections to be made; provided, that the comptroller for good cause shown to him may suspend the force and operation of this section with regard to such defaulting collector of revenue."

Does the return allege such a state of facts as shows a forfeiture of commissions under the statute? While the stringency of the old rule relating to pleadings in mandamus proceedings has been considerably relaxed, great strictness is still required in returns setting up matter in confession and avoidance. The rule, as stated in a decision of this court, is that the return shall state the facts relied on with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass judgment upon the sufficiency of the return. *Commissioners v. Johnson*, 21 Fla. 578; *State v. Mayor, etc., of Jacksonville*, 22 Fla. 21. The forfeiture declared by the statute is one-fifth of the commissions for every week's delay in failing to make the reports or pay over the moneys collected as required by the act; and, if such delay extends beyond 30 days, all of the commissions on amounts to which such failure applies, and all commissions on future collections, are declared forfeited. The reports or returns are required to be made, and the collections paid over to the officers named in the act, on the 16th and last days of the months of November, December, and January, and on the last days of all other months. The allegations in the first paragraphs of the return, standing alone, to the effect that relator failed and refused, persistently, to make reports to defendant, as comptroller, and to pay over

to the treasurer, as required by law, the moneys collected by him, and that he failed to make returns, as required by law, of all sums collected on account of state taxes for the years 1886 and 1887, and by so doing he forfeited all commissions claimed by him, are clearly insufficient to show any forfeiture of commissions under the statute. It is here simply stated that relator failed and refused to make reports or returns, and to pay over moneys collected, as required by law. The forfeiture attaches, as to one-fifth of the commissions, upon every week's delay in making the required reports, or paying over the money collected, up to 30 days' delay, and then to all commissions on amounts collected to which the failure applies, as well as future commissions. It may be true that relator failed and refused to make reports, and pay over moneys collected by him as collector, as required by law, and still such failure or delay on his part may not have extended the length of time necessary to work a forfeiture of any commissions under the statute. The statutory conditions upon which the forfeiture is made to depend are not alleged in this part of the return, and without them the court cannot assume that there was any forfeiture.

In addition to the allegations referred to, it is alleged in another part of the return that the failure and delay of relator to make report of taxes collected by him extended from February, 1887, to March, 1888, the termination of his office; but the return explains this allegation as follows, viz. that relator failed to make returns of taxes collected by him on the last days of the months of March, April, May, June, July, August, September, October, November, and December, 1887, and on the last days of January and February, 1888, and that this delay applied to a larger sum of taxes collected for the state than the amount stated, upon which commissions had not been paid. It is also stated that defendant withheld the commissions on the amount mentioned by virtue of section 5, c. 1977, Laws Fla. How relator could be in default in making reports before August, 1887, is not perceived, as it is admitted that he was not appointed collector of revenue for Franklin county until the 14th day of July, 1887. All of the allegations in reference to a forfeiture of commissions on account of a failure to make reports or to pay over collections, when taken together, do not, in our judgment, relieve the return of a fatal uncertainty and insufficiency in the necessary particulars to enable the court to pass judgment upon the merits as a defense under the statute. A failure to make return on the last days of the months mentioned did not work a forfeiture, unless such failure extended one week, when one-fifth of the commissions became forfeited; and, if it extended 30 days, all commissions to which the failure applied, as well as future commissions, were forfeited, under the statute. It

is true that collections made before the 16th days of November, December, and January are required to be reported on said days, and that a failure to report such collections on the last days of the three months mentioned would be a delay to report for a period of two weeks, but the return does not allege any failure to report on the 16th days of said months. The failure alleged is to make returns on the last days of all the months mentioned. The most that can be made of the return is that it alleges a failure and delay of relator to make reports, and to pay over taxes collected by him, as required by law, on the last days of the months from February, 1887, to March, 1888, and that such delay applied to a larger sum of taxes collected than the amount collected, upon which commissions had not been paid. It is not alleged, as already stated, that relator did not in fact make returns, or pay over taxes collected, or that he did not make such returns or payments after the days fixed by law for returns and payments to be made, and before the expiration of the periods prescribed, when a forfeiture of commissions is declared. When returns and payments of taxes collected were made, or the amounts thereof, are not stated, and the forfeitures of commissions is made to depend, according to the allegations of the return, solely upon the failure to make reports and payments of taxes collected at the times required by law. The confusion and inconsistency of the return, in alleging a failure to report from February to August, 1887, before relator was collector of revenue, as is admitted, are apparent. But, independent of this feature, the return is defective in failing to allege the conditions upon which the forfeiture of commissions is made to depend under the statute.

While it is admitted that relator, as collector of revenue, collected the state taxes alleged in the alternative writ, it is stated that full commissions had been paid to him on all moneys collected by him, except the sum of \$2,602.77, and that the commissions on this sum amounted to \$92.73. For state collections on assessments for 1887, relator was entitled to 10 per cent. on the first \$1,000, 5 per cent. on the next \$2,000, 2 per cent. on the next \$10,000, and 1 per cent. on the balance. For state collections on 1886 assessments, he was entitled to 10 per cent. on the first \$1,000, 5 per cent. on the next \$1,000, 3 per cent. on the next \$2,000, and 1 per cent. on the balance. The commissions were required to be audited and allowed by the comptroller, and paid by the treasurer upon warrant therefor. The relator alleges definitely that he, as collector of revenue, collected specified sums of the state taxes for each of the years 1886 and 1887; and the answer to this is that full commissions had been paid to relator on all moneys collected by him, except on the sum of \$2,602.77, and that the commissions on

this sum amounted to \$92.73. It is denied, it is true, that any commissions were due relator from the state, but such denial cannot control, in the presence of admitted facts showing commissions to be due. How the commissions on all collections made by relator, except on the amount mentioned, were paid, is not alleged; nor is it alleged when the said amount upon which commissions had not been paid, was collected. Whether it was on the collections for 1886 or 1887, or whether it was the first thousand dollars collected, the next one or two thousand dollars, or the balance of the collections of any one of the two years mentioned, we do not know. The return is so indefinite as to make it impossible for the court to determine anything certain in reference to the position of defendant as to the forfeiture of commissions claimed by the relator; and such pleading, as we have seen, is not permissible in a return to an alternative writ of mandamus. The facts should be stated with such precision and certainty that the court may be fully advised of all the particulars necessary to enable the court to pass judgment upon its sufficiency.

While the principal defense attempted to be set up in the return relates to the supposed forfeiture of commissions by reason of relator's failure to make returns as required by law, there is an allegation in one paragraph that at the time of the institution of the suit there was due from relator to the state, and unaccounted for, as appeared from the books of the comptroller's office, the sum of \$271.37 of the taxes of 1886, and the sum of \$1,162.61 of the taxes of 1887. It is not here asserted that the sums mentioned were in fact collected by relator, nor is it alleged that he was derelict in duty in not collecting them. They simply appeared upon the comptroller's books unaccounted for. The forty-third section of chapter 3681, Laws 1887, provides that "when any collector discovers that any land has been assessed more than once the same year, he shall collect only the tax justly due thereon, and shall make return of the balance as a double assessment, and shall be credited therefor by the county commissioners and the comptroller. He shall also report to the county commissioners the errors, double assessments and insolvencies for which he is to be credited under different heads, giving in every case the names of the parties on whose account the credit is to be allowed." The neglect and failure on the part of the collector of revenue to collect taxes that are due and collectible may subject him to a suit on his official bond for a violation of official obligation, but the statute did not make such neglect and failure a forfeiture of commissions on collections made. Such forfeiture attaches, under the statute, as we have seen, to a delay, for the periods therein mentioned, to report and pay over collections made. The theory of the defense

sought to be made is that relator had forfeited his commissions, and that none were due him. In our judgment the return fails to exhibit such a defense, under the statute, and fails to present any sufficient defense to the alternative writ.

All questions that may exist in the case in reference to the official discretion of the comptroller in such matters have been expressly waived, and withdrawn from the consideration of the court; and we have passed upon the legal phases of the return, without reference to such questions. Counsel for relator has argued that, should it be considered by the court that the return be held sufficient to make a case of forfeiture of commissions under the statute, it is unconstitutional, on the ground that it would deprive relator of his property without due process of law. The conclusion forced upon us makes it unnecessary to consider this point. The judgment of the court is that the motion to quash the return is sustained, and an order will be entered accordingly.

(33 Fla. 499)

McGEE v. ANCRUM.

(Supreme Court of Florida. March 27, 1894.)

JUDGMENT — ENTRY DURING VACATION—REFUSAL OF NEW TRIAL—EXECUTION — AFFIDAVIT OF ILLEGALITY.

1. Motion for a new trial, made upon the return of a verdict, and continued, by special order entered upon the minutes, to a day beyond the term when the verdict was rendered, can be heard and disposed of by the judge in vacation, and upon such disposition a final judgment can be entered by the clerk under the order of the judge, though not on a rule day. On the hearing of such a motion the judge is holding a term of court as to that case, and the entries of the clerk made in obedience to the orders of the court are the entries of the judge himself.

2. On a writ of error without a bill of exceptions the appellate court is confined to assignments of error based upon the record proper.

3. A motion to set aside an affidavit of illegality of the issuance of an execution, and for execution against the defendant and the sureties on his bond, where the ground of illegality in the affidavit is that there was no judgment upon which said execution issued, and that what purports to be a judgment entered in the judgment record by the circuit clerk was entered without any authority, involves the legal sufficiency of said judgment as disclosed by the record proper, and a ruling denying the motion is, in effect, a decision that the judgment was illegal and void.

4. M. obtained a verdict in the circuit court against A., and a motion for a new trial was made, but not disposed of during the term. Without entering final judgment on the verdict, an order was entered upon the minutes, continuing the hearing of the motion to a day beyond the term, and on the adjourned day the court overruled the motion, and directed the clerk to enter final judgment upon the verdict, and the clerk entered the judgment on a day other than a rule day. Execution emanating from the judgment was levied upon property of defendant in execution, and affidavit of illegality was made on the ground that the judgment was entered without authority, and was void. A motion to set aside the affidavit of illegality, and that execution issue against defendant and sureties on his bond, was denied. Held, that

the ruling was error, and that the judgment was properly entered by the clerk under the order of the judge.

(Syllabus by the Court.)

Error to circuit court, Hamilton county. John F. White, Judge.

Action by H. T. McGee against J. H. Ancrum. A judgment was entered on a verdict for plaintiff. Execution was issued on the judgment, and levied on defendant's property. A motion to set aside defendant's affidavit of illegality of the execution was overruled, and plaintiff brings error. Reversed.

A. W. Cockrell & Son, for plaintiff in error.
B. B. Blackwell, for defendant in error.

MABRY, J. Plaintiff in error, as assignee of W. B. Williams & Son, instituted an action of assumpsit in the circuit court for Hamilton county against J. H. Ancrum, defendant in error, and at a term of said court held on the 29th day of April, 1887, a verdict was rendered in favor of plaintiff and against defendant for the sum of \$800, with interest for two years. The following recital appears in the record, made the same day that the verdict was rendered, viz.: "A motion was made for a new trial by counsel for defendant, and by consent of counsel in open court was adjourned to Wednesday, May 4, 1887, at Live Oak, Fla." The court then, on the same day, without entering judgment on the verdict, adjourned the court for the term. On May 7, 1887, an order was made, after reciting the facts stated in the previous order in reference to the adjournment of the motion, and that it had, by consent of counsel, been adjourned from the 4th to the 7th of May, "that said motion be denied, and that judgment be entered by the clerk upon the verdict, to which ruling defendant, by his counsel, excepted, which is accordingly noted." This order, signed by the judge, was entered by the clerk on the judgment docket on May 9, 1887, and immediately followed by the following entry, viz.: "Whereupon it is considered, ordered, and adjudged that said plaintiff, H. T. McGee, assignee," etc., "do have and recover of and from said defendant, J. H. Ancrum, the sum of nine hundred and twenty-eight dollars for his damages, principal and interest, and the further sum of fourteen and 89-100 dollars as his costs in this behalf expended, and the defendant in mercy," etc. "Witness: Jno. M. Caldwell, clerk of said court, and the seal of said court, this May 9th, 1887," and signed by the clerk. June 20, 1887, the clerk issued an execution on the foregoing entry of judgment, and it was levied upon property of the defendant. Thereupon the defendant filed an affidavit of illegality of the issuance of the execution, and the ground of illegality alleged therein is the following, viz.: "That there is no judgment upon which said execution issued, and that what purports to be a judgment entered in the judgment record of Hamilton county by the

clerk against this affiant was entered without any authority, and is wholly void." Defendant also filed a bond, as provided by the statute in such cases. The following order also appears in the record, to wit:

"In the Circuit Court, Hamilton County, Florida. H. T. McGee, Assignee of W. B. Williams & Son, vs. J. H. Ancrum. Motion to set aside affidavit of illegality, and that execution issue against defendant and sureties on bond. The above motion coming on to be heard, and was argued by counsel for plaintiff and defendant. Upon consideration, said motion is overruled, with costs. Done and ordered at chambers, the 30th day of January, 1888. John F. White, Judge.

"To the judgment overruling said motion counsel for plaintiff excepted, and his said exception is accordingly noted. John F. White, Judge. 30th January, 1888."

We find copied into the record a notice by counsel for plaintiff in execution, to the effect that a motion would be made, and was thereby made, before the judge at chambers, to set aside the affidavit of illegality, and that execution be ordered against defendant and the sureties on the bond filed with the affidavit of illegality; and also an agreement, signed by counsel of both parties on the 30th day of January, 1888, that the said order of the judge of that date is "a final judgment in said matter, finally sustaining said affidavit, and adjudging that said execution issued illegally." Service of the notice was acknowledged by counsel for defendant in execution on January 22, 1888, and, as appears by an indorsement on the notice, it was filed with the clerk on February 2, 1888, after the order of the judge was made.

The errors assigned relate to the ruling of the judge on the affidavit of illegality. The case is before us on writ of error, without a bill of exceptions, and in disposing of the errors assigned we are confined to the record proper. *Columbia Co. v. Branch*, 31 Fla. 62, 12 South. 650.

What the judge decided will be ascertained from his own language above his signature, and entered of record, and no importance will be attached to the agreement of counsel filed in the cause. There is really no proper record evidence that the notice of motion referred to was before the judge when the order mentioned was made, but, as this order recites that it was made on motion to set aside the affidavit of illegality, and that execution issue against the defendant and the sureties on the bond, the same result would follow if we were to consider the notice as a formal motion made before the judge at the hearing. What is the effect of the decision of the judge on the affidavit of illegality? The statute (section 19, p. 524, *McClell. Dig.*) provides that "in all cases where an execution shall issue illegally, and the person against whom such execution is directed, his agent or attorney, shall make

oath thereof, and shall state in the affidavit the cause of such illegality, the sheriff, or other officer, shall return the same to the next term of the court from which the same issued, and the court shall determine thereon at such time: provided, that the party making the affidavit be required to state whether any part of said execution be due, and where the party so making the affidavit shall admit a part of the execution to be legally due, the amount so acknowledged shall be paid before the affidavit is received; and provided, also, that the person claiming the benefit of this section shall execute to the sheriff, or other officer levying said execution, a bond with sufficient security, in at least double the amount of said execution, or that part thereof suspended by the affidavit." The next section provides that, "if the affidavit of illegality be set aside, execution may issue against the party making the same, and against his securities on the bond." In *Matthews v. Hillyer*, 17 Fla. 498, it was, in effect, decided that, where the grounds in an affidavit of illegality are sufficient, if true, to show that the execution illegally issued, it is the duty of the court, upon the compliance with the other provisions of the statute, to hear the proofs of the parties as to the facts stated in the affidavit, and determine thereon; and that it is error to dismiss the affidavit upon motion on the ground that the matters stated therein had already been adjudicated, and without evidence being produced or facts admitted by either party, and an opportunity given to be heard thereon. The motion was to dismiss the affidavit for causes dehors the record, and the affidavit was dismissed on the grounds stated in the motion. In the case now before us the sole ground alleged in the affidavit why the execution was illegally issued is that the judgment entered in the cause by the clerk was without authority, and is wholly void. The statute provides that, "if the affidavit of illegality be set aside, execution may issue against the party making the same, and against his securities on the bond." A motion to set aside the affidavit and grant execution against defendant and the sureties on his bond involves the legal sufficiency of the issuance of the execution. The issue presented in the present affidavit is restricted to the legal sufficiency of the judgment, as shown by the record in the cause, and the decision of the judge was necessarily confined to this issue, and a ruling denying the motion was, in effect, a decision that the judgment was void, and hence the execution illegally issued. Had the ground of illegality rested upon matters in pais, in the absence of the testimony upon which the judge acted, we could not review his ruling; but that is not the case here, and we think the effect of the ruling is as stated. This being the case, we must determine whether the conclusion reached by the court was correct.

The judgment entered by the clerk of the circuit court in this case was in vacation, not on a rule day, and was upon a verdict rendered during a former term of the court. There was no statute authorizing the clerk, by virtue of the powers conferred on him as clerk, to enter judgment after the expiration of the term upon a verdict rendered in term. It was held in *Sedgwick v. Dawkins*, 16 Fla. 198, that, should a judgment be entered by the clerk on the verdict of a jury after the expiration of the term, but placed in the minutes as if rendered during the term, it may be inquired into by the court at a subsequent term and corrected. Such an entry has no legal force, and cannot be protected by interposing the sanctity of a judicial record. It is claimed here that the authority of the clerk to enter the judgment is derived from the order of the judge, made in vacation, in overruling the motion for a new trial. The power of the court to make such an order is based upon the act of 1879 (chapter 3121). This statute had not been enacted when the case of *Sedgwick v. Dawkins* arose. The motion for a new trial in the present case was made during the term of the court, and by consent of counsel was adjourned for hearing to a day in vacation, and, being overruled, an order was made by the judge that judgment be entered by the clerk upon the verdict. The act of 1879, *supra*, provides: "That the judges of the circuit courts of the state of Florida be, and they are hereby, authorized and empowered to exercise in vacation any jurisdiction or power they are now authorized and empowered to exercise in term time, except in cases requiring the intervention of a jury, and the said judges are also authorized and empowered, in cases requiring the intervention of a jury, to exercise the same jurisdiction and powers in vacation as they are now authorized and empowered to exercise in term time: provided, the parties agree in writing to waive a jury; provided further, that this act shall not be construed to require any such judge to go out of the county in which he may be during vacation." The construction put upon this act in *Myrick v. Merritt*, 21 Fla. 799, was that it gave the judge the same power in vacation as in term; "that is, the same power as if at the time of applying for the order the court was in session. For the purpose of the application or motion it is virtually a term of the court. * * * The proper construction of the statute is that the making a motion in vacation is to be considered as though made at a subsequent term to the last adjourned term." Under this statute the judge cannot, as was held in the case just referred to, undo what he has already done at a previous term, as this would be the exercise of greater power than he possessed at a subsequent term. The motion for the

new trial in the case before us, while made at a previous term, was postponed for a hearing to a day in vacation; and the action of the court on the motion in vacation did not undo anything that had already been done in the case during the term. The solution of the question before us depends upon whether the judge had the power to dispose of the motion for a new trial in vacation; for, if he did, so far as the case then before him was concerned, he was holding a term of court, and, upon overruling the motion, could direct the clerk to enter the proper judgment. Under section 10, c. 1938, Laws 1873, demurrers can be heard and disposed of in vacation as well as in term, and the judge may, "in vacation, make any order in regard thereto, and consequent upon his determination of the issues of law presented, that he could in term time." In construing this statute and the rule of practice on the same subject it was decided in *L'Engle v. L'Engle*, 19 Fla. 714, that where a demurrer to a plea was heard and sustained in vacation, and there was no proper application to amend or plead further, the proper judgment to be entered is a final judgment against the defendant, and that the judge should, under the rule and statute, order, where the action is upon a contract in which the clerk can assess the damages, a formal final judgment sustaining the demurrer, and that the damages assessed should be entered upon the hearing upon the demurrer without waiting for a rule day. In our judgment, the act of 1879 (chapter 3121) empowered and authorized the circuit judge to hear and dispose of the motion for a new trial made during the term of the court, and postponed, by special order then made, to a day in vacation for consideration. The judge can exercise the same powers in vacation as if, at the time of applying to him, the court was in regular session. The powers thus granted are very broad, and were conferred for the reason that at common law such powers appertain to the court only in regular or special session. *Forcheimer v. Tarble*, 23 Fla. 99, 1 South. 695. What the judge does in vacation in cases properly brought before him is considered, as to such cases, as done in term; and the entries of the clerk, made in pursuance of directions then ordered, are the entries of the judge himself. The clerk does not derive his powers in such cases from the statutes authorizing him, without special judicial discretion for that purpose, to enter judgments in vacation on certain contingencies, but he acts for and as the amanuensis of the judge.

The court erred, in our judgment, in overruling the motion to set aside the affidavit of illegality, and the judgment entered therein will be reversed for further proceedings not inconsistent with this opinion.

(71 Miss. 497)

BERRY v. WATERMAN.

(Supreme Court of Mississippi. Jan. 1, 1894.)

SALE—EXECUTORY CONTRACT—VESTING OF TITLE.

A contract for the purchase of an entire cotton crop for the year, to be delivered by the seller at the buyer's place of business, and paid for according to the weights, as delivered, when partly executed by delivery of and payment for part of the crop, does not vest in the buyer such title to the undelivered balance as to enable him to replevy it from another, to whom the seller had sold and delivered it.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Replevin by C. M. Waterman against Ferdinand Berry. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action of replevin brought by appellee, Waterman, against appellant, Berry, to recover possession of 83 bales of cotton. The facts relied on by Waterman to support his claim, as testified to by him, and corroborated by other witnesses, are that about the last of October, 1892, he purchased from one W. H. Cox his entire cotton crop for the year 1892, and that about the 1st of November, 1892, 39 bales of the cotton were delivered, and paid for by him. The cotton was to be delivered by Cox at Greenwood, Miss., where Waterman did business, and was to be paid for according to the weights as delivered. The cotton seized was a part of Cox's 1892 crop, but had not been paid for, nor had the purchase price been tendered. The contract of purchase was not in writing. The cotton in controversy was sold to appellant, Berry, and was in his possession when seized under the writ of replevin. The cause was tried in the court below before the judge, a jury having been waived. There was a judgment for Waterman, from which Berry appealed.

Rush & Gardner, for appellant. A. H. Longino, for appellee.

CAMPBELL, C. J. Conceding the validity of the contract of sale between Cox and Waterman, the latter acquired nothing but the right to claim a performance of the contract, and to damages for nonperformance. He did not acquire title to the cotton, but a right to get the title by performance, until which he had no ownership of the cotton, and therefore could not maintain an action for it. The statute of frauds has reference only to the "contract for the sale," and has no influence whatever on a sale. The two are totally distinct. Waterman had a contract for the sale, but, until its terms are complied with by delivery of the cotton, there was no sale; hence, no right of action for the cotton, the maintenance of which depends on title. This disposes of the case, which is too plain for dispute. Nothing but zeal obscuring judgment could give rise to litigation in so plain a case, and the wonder is how the learned judge was misled about it. All concerned must have been mystified by

the statute of frauds, which has nothing to do with the case. Reversed and remanded for a new trial.

(71 Miss. 473)

SEVIER v. MINNIS et al.

(Supreme Court of Mississippi. Jan. 1, 1894.)

MORTGAGES—PAYMENT OF TAXES—REDEMPTION.

One who has bought in land under a deed of trust, being entitled to the income, is bound to pay the taxes; and if he allows these to become delinquent, and by his consent his intended devisee buys in the land at the tax sale, her tax title is not good, against an unexpired right of redemption from the trust deed.

Appeal from chancery court, Monroe county; Baxter McFarland, Chancellor.

Bill by Josephine Sevier against R. A. Minnis and others to remove cloud from title, etc. Bill dismissed. Complainant appeals. Reversed.

The appellant, Mrs. Josephine Sevier, filed her bill in the chancery court of Monroe county against R. A. Minnis and others, in which she alleges that she was, in 1872, the owner of nearly all of block 76 in Aberdeen, Miss., and borrowed \$500 from one W. S. Vestal, and gave her note for that amount, with her husband as surety, and gave a trust deed on said block 76 to secure it; that the block was sold in 1879 under the trust deed, and said Vestal bought it, taking a conveyance from the trustee thereto; that said Vestal died in 1887, having previously made a will devising all his property to Mrs. E. A. Minnis, wife of appellee R. A. Minnis, and mother of other appellees; that Mrs. E. A. Minnis died in 1889, leaving appellees her heirs at law; that, for about 10 years before his death, the health of said W. S. Vestal was not good, and he was blind; that during this time he lived with Minnis and his wife; that R. A. Minnis was during all this time the agent and manager of said Vestal, whose afflictions incapacitated him from attending to his business; that from the purchase, in 1879, Vestal, through Minnis, paid all the taxes, insurance, and repairs, and all other disbursements required about the property; that for the year 1883 the taxes were not paid on that block, and these lands, in consequence, were sold for the taxes of that year in March, 1884, when they were bid in by R. A. Minnis and a collector's deed made to Mrs. E. A. Minnis, who afterwards paid the taxes regularly. The bill charges that this was done purposely by Minnis and wife, and that the sale and conveyance were made by them so that the title could be got out of said Vestal, and into Mrs. Minnis; all of them being well aware that by the provisions of the will of said Vestal the complainant could, by paying off the mortgage debt, secure the reinvestment of the title of the valuable town property into her, desiring to prevent the same, and also desiring to so manage as to prevent the redemption of the property by Mrs. Sevier, which could be

effected by Mrs. Sevier by paying off the trust debt, or allowing the rents to pay it off, or in some way forever prevent, finally, any redemption of the trust sale. The bill also charges that the rents and profits have been sufficient to pay off the mortgage debt. The bill asks that the tax deed be set aside and vacated, as a cloud on complainant's title to said block 76, and that the land be placed in the hands of a receiver, to attend to it, collect rents, pay taxes, repairs, etc., and generally care for the property to the best advantage of all parties. The answer admits most of the averments of the bill, but denies that the income had paid off the debt, and that Mrs. Minnis' tax purchase was fraudulent or collusive, and that she did not, by her tax deed, secure a good and perfect title. By way of cross bill they charge that the original title of Mrs. Sevier, a deed from her husband in 1869, was invalid because he was then owing debts to various persons, and the deed was voluntary, and made with intent to defraud then existing and future creditors. They charge that the \$500 borrowed from Vestal by her was used in buying other land, and asked that the \$500 be decreed to be a vendor's lien on the land so purchased, and that the heirs of Vestal be subrogated to the rights of Vestal. Complainant demurred to the cross bill, and the demurrer was sustained. On the final hearing the court rendered a decree dismissing complainant's bill, with costs, and from this decree she appealed.

E. H. Bristow, for appellant. Clifton & Eckford, for appellees.

CAMPBELL, C. J. Mr. Vestal, by his purchase under the deed of trust, became entitled to the income arising from the estate; and it was his duty, while in the enjoyment of the estate, to pay the taxes, and he could not free himself from this obligation by relinquishing to another the land, or permitting it to be sold for taxes, and bought by another. It is manifest that, by agreement with Vestal, Robert Minnis purchased the land at the sale for nonpayment of taxes, and put the title in his mother, who had expectation of acquiring the land by devise under the will already made, and which, though subject to be revoked, was not likely to be. All the family felt sure that she would get it, and it seems strange that the taxes were not paid, and the expense of sale saved, and a conveyance obtained from Vestal, if he was determined to abandon the land. He consented to the sale and purchase for Mrs. Minnis, and in December, 1885, when applied to by Dr. Minnis, declined to redeem, and consented to the holding and improving the land by Mrs. Minnis. She held the land just as Vestal did, and could not set up her tax title, acquired under the circumstances, against the complainant. We fully concur with counsel for the appellees in their eloquent

strictures on the "married woman's law," and its being the prolific source of unnumbered rascalities during the period of evolutions, by successive stages, from the barbarism of her former condition, as a feme covert, to her complete emancipation by the Code of 1880, but do not feel authorized, because of that, to overturn correct principles of law in order to prevent what may be a moral wrong. We would gladly seize upon anything affording a just ground for enforcing the contract originally made between Sevier and Vestal, according to their understanding of it, if we felt justified. *McDougal v. Bank*, 62 Miss. 663; *Cross v. Hedrick*, 66 Miss. 61, 7 South. 496. Reversed and remanded for further proceedings in the chancery court in accordance with this opinion.

(71 Miss. 438)

GOYER COLD-STORAGE CO. v. WILDBERGER et al.

(Supreme Court of Mississippi. Jan. 1, 1894.)

TRANSFER OF CORPORATE STOCK—EQUITABLE RELIEF IN LAW COURT.

1. Prior to Code 1892, § 844, relating to the transfer of corporate stock, a transfer of stock by an insolvent in payment of a just debt is valid as against other creditors, though not made on the books of the corporation, as required by its by-laws.

2. Since courts of law may administer equitable, and courts of chancery legal, relief (Const. § 147), a judgment at law will not be reversed merely because equitable principles were involved.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

To property levied on under execution, at the suit of the Goyer Cold-Storage Company, as that of J. E. Blake, the Memphis National Bank and R. H. Wildberger filed a claim of ownership. From a judgment for claimants, plaintiff in execution appeals. Affirmed.

On the 1st day of October, 1892, appellant obtained a judgment in a justice's court against one J. E. Blake. Execution issued, and was levied on 20 shares of building and loan association stock which were in the name of said Blake. The secretary of the association filed his answer under the statute, saying that Blake did not own any stock in the association, having withdrawn it and assigned the fund on June 2, 1892; and R. H. Wildberger and the Memphis National Bank made affidavits and bonds, each claiming to own all the shares levied on, by assignment. In the court below, the cause was submitted to the judge without a jury by agreement. On the trial, plaintiff in execution introduced the docket and record of the justice of the peace, which showed the proceeding to judgment by appellant against Blake and the execution, levy, and return of same. The return on the execution showed that the levy was made November 2, 1892. For claimants it was shown that on the 2d day of June, 1892, J. E. Blake filed with the secretary of the building and loan

association an application, under the by-laws of the association, for the withdrawal of his stock in said association, and directed the payment of the withdrawal value to the claimants herein, and drew his drafts on said association in favor of claimants for their withdrawal value on the 2d day of June, 1892, and these drafts were accepted by the secretary of the association. R. H. Wildberger testified that Blake was indebted to him, and, knowing that Blake owned the building and loan stock, he suggested that he would purchase this stock at par value, or enough to satisfy his debt, and that Blake agreed to this, and made the assignment to him, Wildberger making out the application for a withdrawal. The withdrawal proceedings had not been completed. There was also some evidence to the effect that at the time Blake assigned his stock he was insolvent, and was being pressed by some of his creditors. From a judgment to the effect that the property levied on was the property of claimants, and was not subject to the execution against Blake, and that plaintiff in execution pay the costs, plaintiff appealed.

Butt & Butt, for appellant. Cook & Anderson, for appellees.

CAMPBELL, C. J. Section 844 of the Code of 1892 has no influence on the transaction in reference to the shares of the building and loan association, assuming that such are within its contemplation, because the transaction took place before the Code took effect. By the law in force when the transfer was made, a right was vested in Wildberger, by the action of Blake with reference to the shares, paramount to the claim of creditors of Blake to subject them to execution. It matters not that the transfer was not fully consummated, so far as relates to the action of the building and loan association, according to its by-laws. They are for the benefit of the association, and not for creditors, who have no right to complain on this ground. It is enough to defeat creditors of the transferor of shares that the right of another has attached before subjection to the process in behalf of creditors, and that was the case here. The transaction between Wildberger and Blake was a perfectly legitimate one and unassailable. Even if he knew that Blake was heavily involved, and hard pressed by creditors, and insolvent, he had a perfect right to obtain payment of what was due him by purchasing the shares in the building and loan association, and in doing so acquired a right in them superior to subsequently levied executions. The law is very tolerant of the efforts of a creditor to obtain payment of his dues from a failing debtor, and does not condemn his successful efforts, where that is his sole object in any dealing for that purpose. One has no right to lend himself or his means to a debtor to help him defraud his creditors, but the creditor who seeks nothing but his own

payment or security will not be deprived of the fruits of his success.

The criticism of counsel on the misjoinder of parties and issues, and on the impossibility of the truth of the claim of two different parties to the ownership of the shares in dispute, however just, cannot avail the appellants, since it is manifest that they have no right to subject them to their execution, and that is an end of their claim, for, if they have no right to them, it does not concern them who has.

The objection that, if Wildberger had any right, it was equitable, and unavailing in a court of law, is unavailing if it is only equitable, for now courts of law may administer equitable relief, and courts of chancery legal relief, and no complaint can be made of it. Under the new constitution, we have practically a complete blending of law and equity, and only maintain separate courts to administer them. The necessary effect of section 147 of the constitution is to produce this result, for it would be absurd for this court to reverse a judgment because equity had been administered by a court of law, and remand the case to a chancery court with directions to do what the court of law had already done; and so where chancery had entertained a purely legal demand, and disposed of it correctly. Affirmed.

(71 Miss. 478)

COHEN v. GAMBLE.

(Supreme Court of Mississippi. Jan. 1, 1894.)

ATTACHMENT—AGAINST PARTNER—NONRESIDENCE.

Code 1892, § 127, making any ground for attachment against any partner of a firm, except nonresidence, ground for attachment against all, does not forbid an attachment against one partner, on a partnership debt, on the ground of his nonresidence, the other partners being residents, under Id. § 2353, which permits several actions on partnership contracts and liabilities.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Attachment by P. Cohen against Tip Gamble. Dismissed, and new trial denied. Plaintiff appeals. Reversed.

This is an attachment suit by P. Cohen against Tip Gamble, begun in the circuit court of Leflore county, Miss. Defendant is a nonresident of the state. The affidavit charges, as grounds for attachment, nonresidence of defendant, and removing himself or his property out of the state. The writ was levied on the separate property of said Gamble. At the return term, Gamble appeared in person and by attorney, and filed a plea to the jurisdiction of the court on the ground of nonresidence, setting up that the claim on which the attachment was based was in fact against the firm of McLean Bros. & Gamble, of which firm defendant was a partner, and not against him individually, and that the McLeans were residents of the state, and that the partnership still existed,

and he was therefore not liable to attachment in that behalf, and filed a traverse to the second ground alleged. Plaintiff demurred to the plea to the first ground. Defendant then asked and obtained leave of the court to withdraw the traverse to the second ground of attachment. The court overruled plaintiff's demurrer, and sustained defendant's plea. Plaintiff refused to answer defendant's plea, and the court dismissed the attachment suit on the plea, and damages were assessed against plaintiff for the wrongful suing out of the attachment. Plaintiff then moved for a judgment on the merits, because of the failure of defendant to plead. This motion was resisted by defendant in person and by attorney, but was overruled by the court. Plaintiff's motion for a new trial was overruled, and he appealed.

A. H. Longino and Rush & Gardner, for appellant. Somerville & McLean, for appellee.

CAMPBELL, C. J. Section 127 of the Code of 1892 is an enabling act, and does not abridge any right. It makes any ground for attachment against any of the partners, except the first ground, which is nonresidence, ground for attachment against all the partners, as if all were parties to the ground. It makes the act of one the act of all, so far as to subject partners and partnership property to attachment, on every ground for attachment except nonresidence. A creditor of a partnership may pursue any member of the partnership individually, and is not hindered by section 127. This right exists by virtue of section 2353, Code 1892.¹ Section 126² has no influence on the question, and, indeed, is useless, except to declare the law existing independently of it. Reversed, and demurrer to the plea sustained, and leave to defendant to answer over.

(71 Miss. 345)

THOMAS v. STATE.

(Supreme Court of Mississippi. Jan. 1, 1894.)

HOMICIDE—INSANITY AS DEFENSE.

Though defendant, apparently without motive, and without provocation, shot deceased while the latter was disputing with a third person, the fact that he was subject to temporary, uncontrollable impulses to injure any one in front of him, is not available as a defense, his condition at the time not being shown.

Appeal from circuit court, Marion county; S. H. Terral, Judge.

John Thomas was convicted of murder, and appeals. Affirmed.

¹ Code 1892, § 2353, provides that on joint, or joint and several, obligations or contracts, or on a contract or liability of copartners, it shall be lawful to sue any one or more of the parties liable, or their representatives.

² Code 1892, § 126, permits the creditor to sue out an attachment against one or more or joint debtors, or joint and several debtors, whether primarily or secondarily liable, without affecting his rights as against the others.

The evidence for the state conclusively shows that Sam McLendon, the deceased, was standing in a restaurant, disputing with some one, when Thomas, apparently without motive, and entirely without provocation, drew his pistol, and shot him down, killing him. The defense was temporary insanity. Under this defense, it was shown that the defendant was subject to a peculiar infirmity or malady which rendered him temporarily irresponsible for his acts. The evidence was that defendant was so constituted that a sudden touch from behind, or a whistle or a chuck, would so overthrow his reason and will that he would strike or throw, with whatever weapon he happened to have in his hands at the time, at any one who happened to be standing in front of him, or near him, or he would violently beat time with his hands, and that while these paroxysms lasted he had a wild and foolish look. He called this "being goosed." One witness was introduced who testified that one Willson Patrick had admitted to him that he had touched Thomas in the back just before the killing, but Patrick denied that he ever made such an admission.

D. M. Watkins and T. S. Ford, for appellant. Frank Johnston, Atty. Gen., for the State.

CAMPBELL, C. J. The fatal defect in the case of the appellant is that there is no evidence that he was "goosed" when he killed his victim; and however effective this strange defense might be, if sustained by evidence, it is of no avail in the absence of any such evidence. The complaint about venue is without merit. The instructions are all right. The penitentiary is the proper place for one so easily, and liable to be so frequently, incited by uncontrollable impulse to do violence to one in front of him. Affirmed.

(71 Miss. 372)

STATE v. JONES.

(Supreme Court of Mississippi. March 19, 1894.)

EXTORTION BY OFFICER—INDICTMENT.

Extortion by an officer, declared an offense by Code 1892, § 1081, having been an offense at common law, may, under section 1453, be described according to the common law or the statute; and, by common law, it is sufficient that the indictment charge that it was committed "unlawfully, corruptly, deceitfully, extorsively, and by color of office," without alleging that it was knowingly done.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Tom Jones was indicted, under section 1081 of the Code of 1892, by the grand jury of Washington county, Miss., for extortion in office. The indictment charges that Tom Jones, being a legally elected and qualified and acting constable in and for district No. 3 of Washington county, Miss., did unlawfully arrest one Minerva Moore, by color of

a certain warrant which he (Jones) alleged to be in his possession, and unlawfully, corruptly, deceitfully, extorsively, and by color of his office, extort, receive, and take from said Minerva Moore the sum of seven dollars. The defendant demurred to the indictment because it failed to charge that the act was knowingly done. The demurrer was sustained, and the indictment quashed. The state appealed. Reversed.

Frank Johnston, Atty. Gen., for the State.
J. H. Wynn, for appellee.

WOODS, J. The misdemeanor for which appellee stands charged in this indictment was an offense at common law, and under section 1453, Code 1892, may be described according to the common law, or according to the statute. The indictment charges that the offense was committed "unlawfully, corruptly, deceitfully, extorsively, and by color of office," etc. Reference to common-law authorities will show at once that the offense is sufficiently charged and described according to the common law. Reversed, demurrer overruled, and cause remanded.

(102 Ala. 610)

MILLER v. GRIFFIN et al.

(Supreme Court of Alabama. April 5, 1894.)

MORTGAGES—PRIORITY—CHATTEL MORTGAGE ON FIXTURES.

1. After land had been sold, but before it was conveyed, the vendee brought from another county, where a mortgage of them was on record, an engine, boiler, and sawmill, attached them to the land, and included them in his mortgage back to the vendor, reciting, however, that this was the second mortgage on them. Before it was recorded, the owner of the first mortgage, without notice of it, agreed with the vendor on the balance due him, released the other mortgagor, who had sold out to the vendee, and took from the vendee, and duly filed, a new chattel mortgage for said balance. *Held*, that this was no payment, but a renewal, and had priority over the vendor's mortgage.

2. The attachment of an engine, boiler, and sawmill to land does not divest the lien of a prior chattel mortgage on them.

Appeal from chancery court, Shelby county; S. K. McSpadden, Chancellor.

Bill by Thomas G. Griffin, Sr., and others, against J. W. Miller and others, to foreclose a mortgage. Decree for complainants. Said Miller appeals. Reversed.

The mortgage was given by J. M. Anderson & Co. to the heirs of Paul H. Nabor, deceased, to secure the payment of the purchase money for certain land which had been sold by said heirs to J. M. Anderson & Co. The bill recited, and the mortgage which was made and executed to the appellee showed, that it was given, not only upon certain real estate, but also upon one sawmill, which was situated upon the land at the time of the execution of the mortgage. The mortgage, however, also recited that this was a second mortgage on the sawmill. J. W. Miller, one of the defendants to the original bill,

filed his answer, and asked that the same be taken as a cross bill, alleging therein that, at the time of the execution of the mortgage by J. M. Anderson & Co. to the Nabor heirs, the sawmill, engine, boiler, and other appurtenances thereto were under a mortgage lien to him, which was given to him by one Hamlet and J. M. Anderson on June 12, 1884, to secure the purchase price of said sawmill, engine, boiler, etc., and that at the time of the execution of the mortgage to the Nabor heirs there was a balance due upon said mortgage made by Hamlet and Anderson, and that the said complainants knew of the existence of this mortgage at the time Anderson & Co. executed the mortgage to them. The prayer of the cross bill was that the said J. W. Miller be decreed to have a lien prior to the lien of the original complainants, sought to be enforced by the bill. The other facts of the case are sufficiently stated in the opinion. On the final submission of the cause on the pleadings and proof, the chancellor decreed that the mortgage of the original complainants covered, not only the land and other property embraced thereon, but also the sawmill, engine, boiler, and appurtenances thereto, and that J. W. Miller's mortgage was subordinate to that of the original complainants.

J. M. Martin, for appellant. Henry Wilson, for appellees.

COLEMAN, J. The appellees filed their bill to foreclose a mortgage executed by Anderson & Co. upon certain real estate described in the bill. The bill avers that there was a boiler and engine and sawmill on the land, which was a part of the realty, and included in the mortgage. This mortgage was executed June 19, 1889, and filed for record on the 18th day of August, 1889. J. W. Miller was made one of the parties defendant. He answered and filed a cross bill, setting up a prior mortgage executed to him by one A. B. Hamlet and J. M. Anderson on the 12th day of June, 1884, on the engine, boiler, and mill and fixtures. This mortgage was duly recorded in probate court of Bibb county, in which county the property, at that time, was situated. The answer and cross bill also set up a subsequent mortgage, executed on the same property to Miller by Anderson & Co. on the 22d of July, 1889, which was duly recorded on the 24th of July, 1889. It will be seen from this statement of facts that the mortgage to complainants, though prior in point of date to the second mortgage to J. W. Miller, was not filed for record nor recorded with 30 days from its date, and that the second mortgage to Miller was executed and recorded before the registration of complainants' mortgage. Section 1810 of the Code provides that mortgages to secure a debt created at the date thereof are void as to purchasers for a valuable consideration, mortgagees, and judgment creditors having

no notice thereof, unless recorded within 30 days from their date. According to the evidence, J. W. Miller had no notice of the existence of the mortgage to complainants at the time of the execution to him of this mortgage of July 22d by Anderson & Co. Under the foregoing section of the Code, J. W. Miller was entitled to priority. Independent of this principle, the mortgage of complainants upon boiler, engine, and mill is secondary to that of Miller. The evidence shows that Miller sold this property to Hamlet and Anderson, and took the mortgage of 1884, to secure the payment of the purchase money. Subsequent to this time, Hamlet sold his interest to Anderson & Co., of course subject to the mortgage to Miller. On the 22d of July, 1889, there was ascertained to be due on this debt \$715. On that day J. W. Miller released Hamlet, and took from Anderson & Co., the purchasers from Hamlet, their note for the balance of the purchase money, and extended the debt, and took from them the mortgage of July 22, 1889, on the same property. We do not think, under the evidence, that the taking of the second mortgage was either a payment of the debt or a discharge of the lien of the first mortgage to Miller. It was rather intended as a renewal and extension of the same debt; and this, notwithstanding the indorsement on the mortgage "settled by renewed note and mortgage." The use of the word "settled" renders the meaning somewhat obscure, but we are of opinion the meaning and intention of the parties was to have a settlement with Hamlet, and then to renew and extend the debt, and this was done by the new note and mortgage, signed by Anderson & Co., the purchasers from Hamlet. Anderson was one of the original debtors. Anderson and Miller both swear it was intended as a renewal and extension of the old debt, and there is no evidence to the contrary except a mere inference from the word "settled." *Boyd v. Beck*, 29 Ala. 705. The evidence is positive that complainants had actual notice of the existence of the mortgage of 1884, or of facts calculated to put them on inquiry which would have led to knowledge of its existence at the time of the execution of the mortgage to them. It is expressly stated in the mortgage that "this is the second mortgage on the same mill," and the evidence shows that Anderson stated to them that the property was incumbered.

There is no merit in the contention that the boiler and engine were a part of the freehold. The mill was not on the land when the agreement for the sale and purchase of the land was made between plaintiffs and Anderson & Co. The entire plant at that time was in Bibb county. The engine, boiler, and mill fixtures were under mortgage at the time of its removal to Shelby county. Although a building, machinery, or mill may be so attached to land as to become a part of the realty, parties by contract may sever it,

and convert such property into a chattel; and, where a mortgage is given upon a chattel, the mortgagor cannot, by annexing or attaching such property to land, defeat the mortgage lien. *Foster v. Mabe*, 4 Ala. 402; *Vann v. Lunsford*, 91 Ala. 576, 8 South. 719; *Wood v. Manufacturing Co. (Ala.)* 13 South. 948. The court erred in decreeing that the mortgage of Miller was subordinate to that of complainants. As to the property embraced in the mortgage to Miller, he was entitled to priority. The liability of complainants for the use of the mill and engine is not raised by the pleadings, and it is unnecessary to consider this question. Reversed and remanded.

(102 Ala. 403)

LUNSFORD v. BUTLER.

(Supreme Court of Alabama. April 5, 1894.)

DOCUMENTARY EVIDENCE.

1. When the complaint alleges that the account sued on is verified by affidavit, such account is admissible in evidence, unless defendant files an affidavit denying its correctness, under Code, § 2773, providing for indorsement "on the summons and complaint, or other original process," that the account is verified.

2. Testimony that the entries in an account book were made at the time the items transpired renders such book prima facie admissible in evidence.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Marcena Butler, administratrix of the estate of Daniel Butler, against George Lunsford on an account. From a judgment for plaintiff, defendant appealed. Affirmed.

The first count of the complaint was in the following language: "The plaintiff, as administratrix as aforesaid, claims of the defendant ninety-one & 62/100 dollars, due from defendant by account on, to wit, the — day of October, A. D. 1890, which account is verified by affidavit." The remaining counts were the common counts in assumpsit. Upon the trial of the cause, as is shown by the bill of exceptions, the plaintiff offered in evidence the verified account sued on. The defendant objected to the said account as evidence, on the ground that there was no indorsement on the summons and complaint of the fact that the account was verified by affidavit, as required by section 2773 of the Code. The bill of exceptions recites: "The court, upon inspection of the complaint, said that in the first count of the complaint it was mentioned that the suit was on a verified account, and that as to that count of the complaint the objection was overruled, but was sustained as to the other counts, and the said verified account was admitted as evidence of the correctness of the account. To this ruling of the court the defendant excepted." The plaintiff, being examined as a witness in her own behalf, testified that she was the widow and administratrix of Daniel Butler, and that she had made the affidavit to the account

sued on; that she knew her husband had done the work charged in the account, and that the account was contained in a memorandum book kept by her husband, and had been copied from that book; that she had not seen her husband make the entries in this book, but knew they were in his handwriting, but that she did not know the value of the items charged. The plaintiff here introduced the memorandum book, and particularly the page on which were the entries and items of the account sued on. The defendant objected to this book being introduced in evidence, and to the particular page referred to, because the book was mutilated, in that several leaves were torn out, as the book showed. The defendant exhibited the book to show this; but there was no proof tending to show that said book was torn after the entries were made. Upon this subject, Martin Butler, a son of Daniel Butler, testified that his father made the items in the book at the time of the respective transaction to which they referred; that he saw his father make the entries as to the several items, "and that the work charged in the account was done in 1889." The account introduced in evidence had a statement as to some of the items, "Act. for 1890;" and when Martin Butler's attention was called to this entry he said that he did not know about that, but that the entries were made when the work was done. The court allowed the introduction of the book in evidence, and the defendant duly excepted. There was no other evidence as to the correctness of the account, except from the account itself, and that of the two witnesses above referred to. On the part of the defendant the testimony tended to show that the plaintiff's intestate went into the possession of his (the defendant's) property as his tenant, and under said contract of tenancy he was to do certain work, which was charged against the defendant in the account sued on; and that the defendant was not indebted to the plaintiff's intestate, but that he died being in debt to the defendant. The cause was tried without the intervention of a jury, and, upon the hearing of all the evidence, the court rendered judgment for the plaintiff; and the defendant now assigns as error the rulings of the court upon the evidence, and the judgment rendered.

Ward & John, for appellant. Dickinson & Kerr, for appellee.

MCLELLAN, J. We are of opinion that the statement in the first count of the complaint, that the account therein sued upon "is verified by affidavit," is a substantial compliance with section 2773 of the Code in respect of the requirement that the fact of verification shall be indorsed "on the summons and complaint or other original process," and that the trial court properly admitted the account thus referred to in evi-

dence under that count of the complaint. The defendant not having within the time allowed for pleading, or at all, filed in the cause an affidavit denying, on information and belief, the correctness of this verified account, it was, on the trial, competent evidence of the correctness of the items set down in it. *Id.* There were some discrepancies in the testimony of Martin Butler to the effect that the plaintiff's intestate made the entries in the book at the time the work for which charges were made was performed; as, for instance, he said these entries were made in 1889, when most of the items entered are put down as constituting the account of 1890; but, notwithstanding these, his evidence was sufficient—being in terms that the entries were made when the items transpired—to render the book *prima facie* admissible in evidence. Considering the verified account and this book of original entries along with all other evidence adduced before the judge of the city court, the case being tried without jury, we reach the same conclusion as was reached below as to the fact and amount of defendant's indebtedness to the plaintiff, and the judgment of the city court is therefore affirmed.

(102 Ala. 519)

RYALLS et al. v. MOODY et al.

(Supreme Court of Alabama. April 10, 1894.)

CONTRACT—WAIVER OF CONDITIONS.

The retention, for an unreasonable time, of a conditionally accepted draft, by one who had agreed to turn over his business to another if the draft should be accepted, raises the presumption of waiver of the conditional character of the acceptance, and, in action for breach of the agreement, the burden is on him to overcome such presumption.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action by Ryalls & McCrae against Moody & Sapp for breach of contract. From a judgment for defendants, plaintiffs appeal. Reversed.

The contract sued on was as follows: "Received of Ryalls & McCrae one draft to the amount of seven thousand dollars (\$7,000) for entire interest in the turpentine business at Ashford, Ala., known as the 'Moody & Sapp Business;' and we agree to turn over entire interest in the business within a reasonable length of time to get what scrape and dip we already have in the woods out, providing the above draft is accepted within a few days. We include in the above agreement lands with improvements, horses and mules, wagons, harness, etc., leases of timber, commissary goods, and everything owned by Moody & Sapp in the turpentine business at Ashford, Ala., according to the present invoice of the business. This October 9th, 1890. [Signed] Moody & Sapp." The draft which was given by the said Ryalls & McCrae, in accordance with the agreement of said contract, was drawn upon J. P.

Williams & Co. It was shown by the testimony of one of the members of J. P. Williams & Co. that Moody & Sapp wrote to said firm on October 9th, and inclosed in their letter the said draft, which was drawn by Ryalls & McCrae for \$7,000 in favor of said J. P. Williams & Co.; that on October 10th the said firm of Williams & Co. returned the draft to Moody & Sapp, after they had accepted it by writing on the face thereof the following words: "Accepted. Payable when possession is given Ryalls & McCrae, and making papers between all parties given. J. P. Williams & Co." This witness further testified that the said draft was inclosed in a registered letter, addressed to Moody & Sapp, and that the same was received by Moody & Sapp, as was shown by their receipt for the registered letter, which was attached to his deposition. During the trial of the case the plaintiffs called upon the defendants to produce the draft which had been delivered to them, and, after the same was produced, the plaintiffs offered to read it to the jury as evidence. The draft was in the following language: "\$7,000.00. Ashford, Ala., Oct. 9th, 1890. At sight pay to the order of Moody & Sapp seven thousand dollars, value received, and charge the amount to Ryalls & McCrae. To J. P. Williams & Company, Savannah, Ga." There was written across the face of this draft the words which are above copied; and it was proved that this was the identical draft given by the plaintiffs to the defendants. The defendants objected to the introduction of said draft in evidence. The court sustained their objection, and refused to allow the plaintiff to read the draft to the jury as evidence, and to this ruling the plaintiffs excepted, and "took a nonsuit, with leave to set aside in the supreme court." On this appeal, prosecuted by the plaintiffs, the court's ruling upon the evidence is assigned as error.

R. H. Walker and W. D. Roberts, for appellants. John Foster and G. L. Comer, for appellees.

HEAD, J. The court erred in refusing to admit in evidence the draft of appellants on, and accepted by, J. P. Williams & Co. That the draft was such as the parties contracted should be given is conclusively shown by the fact that appellees received it and presented it to Williams & Co. for acceptance. By the terms of the contract, appellees were entitled, in order to bind them to the trade, to have the unconditional acceptance of the draft by Williams & Co. within a few days. It was accepted within time, but the acceptance was not absolute, but conditional or qualified. This authorized appellees to reject it if they had seen proper to do so. But, so far as appears, they did not reject it. On the contrary, they received the draft, with the acceptance there-

on, in due season, and retained it in their possession until the trial of this cause, when they produced it in court on demand. It was competent for them to waive the conditional character of the acceptance, and this they did by retaining the draft in their possession an unreasonable length of time, unless, in some other efficacious way, they duly made known their repudiation of it on account of the irregularity. The record discloses nothing of the kind on their part. Their retention of the draft until the trial raises the presumption of waiver of the irregularity which it is upon them to overcome. Reversed, nonsuit set aside, and cause remanded.

(101 Ala. 245)

EVANSVILLE, P. & T. R. PACKET CO.

v. SLATER.¹

(Supreme Court of Alabama. May 25, 1893.)

APPEAL—BILL OF EXCEPTIONS—PRESUMPTIONS.

Where the bill of exceptions does not purport to set out all the evidence, it will be presumed that there was other evidence sufficient to support the judgment.

Appeal from district court, Colbert county; W. P. Chitwood, Judge.

Action by Mary W. Slater against the Evansville, Paducah & Tennessee River Packet Company to recover the value of goods placed in a warehouse for shipment, and destroyed by fire. From a judgment for plaintiff, defendant appeals. Affirmed.

The Evansville, Paducah & Tennessee River Packet Company is, and has been for a number of years, a common carrier by water, operating a line of steamboats in the Ohio and Tennessee rivers between Evansville, Indiana, and Florence, Ala. Sheffield, Ala., being situated opposite Florence, on the Tennessee river, is practically one of the terminal points of the aforesaid carrier. R. D. Morrow was superintendent of the said packet company from 1886 to 1889 and during this time appointed H. H. Brumbach as collecting agent or landing keeper for the packet company at Sheffield, Ala., which position he has held to and including this date. Brumbach's authority as agent of the packet company was limited to receiving freights from the boat, collecting the boat's charges on same and soliciting patronage. During the continuance of the aforesaid agency, Brumbach was operating a drayage or transfer business in and about Sheffield, doing a commission business in salt and hay, and engaged in forwarding and shipping goods; in which business he made use of a warehouse situated on the bank of the river below the regular landing. This warehouse was in no wise connected with the packet company nor did the packet company have any interest in, or control over it, but the same was obtained by Brumbach from the officers of the Birmingham, Sheffield & Tennessee River Railway Company to an-

¹ Rehearing pending.

swer his individual purposes. Under the foregoing condition of things, the appellee, on or about February 29, 1892, had her household goods hauled by Brumbach and deposited in said warehouse at Sheffield, Ala., for the purpose of having them transported by appellant company to Evansville, Ind. On the morning of March 1, 1892, the said warehouse and contents, including the household goods of appellee, was destroyed by fire, the origin of which is unknown. Appellee seeks to hold appellant liable for the value of her goods under its common carrier liability. The case was tried without a jury, and the court gave judgment in favor of appellee.

Wilhoite & Harris, for appellant. J. B. Moore and Roulhac & Nathan, for appellee.

HARALSON, J. We have carefully examined the evidence in this cause, as we find it set out in the bill of exceptions in the transcript. Without more, it is not sufficient to support the judgment of the court below. Unless Brumbach was an agent of the defendant at Sheffield, authorized to make a contract of affreightment for defendant with the plaintiff, to transport her goods to Evansville, and having such authority, made such a contract, and the goods were accordingly delivered to the defendant for carriage, the plaintiff was not entitled to recover. The evidence, as we find it in the transcript falls far short of establishing such an agency, such a contract and such a delivery. So far as appears, Brumbach was not an agent for any such purpose, he made no contract of any kind to bind the defendant, and the goods were never delivered to him as agent for defendant. But, be this as it may, the bill of exceptions does not contain a statement that the evidence therein set out was the evidence on which the trial was had, or was all the evidence introduced on the trial, and we are committed by the uniform rulings of this court, to presume in such case that there was other evidence in the cause sufficient to support the judgment of the court below, and the cause must be affirmed. *Hood v. Manufacturing Co. (Ala.)* 11 South. 10; *Hunt v. Johnson*, Id. 387; 3 Brick. Dig. p. 406, § 43; Id. p. 81, § 47.

Affirmed.

(97 Ala. 59)

GREEN v. STATE.

(Supreme Court of Alabama. Nov. Term, 1892-93.)

CRIMINAL LAW—INSTRUCTIONS—MURDER.

1. It is not enough that the jury "believe from the evidence" certain facts in order to convict; they must be "convinced beyond a reasonable doubt."

2. It is error to charge that the jury may convict if they believe that certain things happened, "as shown by the evidence."

3. It is error to charge that if, while defendant was going to the alleged place of the crime, he intended to kill deceased there, and

did kill her there, he is guilty of murder; it should have been added that the killing was done pursuant to the intent.

4. The hypothesis of a charge must not be inconsistent with any conclusion of fact which there is the slightest evidence to establish.

On rehearing. Reversed.

For former reports, see 12 South. 416; 13 South. 482.

STONE, C. J. Since we announced a decision in this case (February 6, 1893), our attention has been specially directed to the charge given at the instance of the state, and which was excepted to. That charge is in the following language: "If the jury believe from the evidence that the defendant went with Harriet Marr for over one mile, no one with them except themselves, until they reached the spot on the road near the five-mile post, as shown by the evidence, and during the time he was going there, or during any portion of the time he was going there, had the intent to kill her there, and did kill her there, the jury are authorized to find him guilty of murder in the first degree." It will be seen that this charge authorizes the jury to find the defendant guilty of murder in the first degree if they "believe from the evidence" certain hypothesized facts. In a criminal prosecution it is not enough that the jury "believe from the evidence" that the constituents of the offense have been proved; they must be convinced, beyond a reasonable doubt, of the existence of every material element of the offense before they are authorized to find a verdict of guilty, and that conviction must be produced by testimony. This rule applies to every species of prosecution known to the criminal calendar. *Childs v. State*, 58 Ala. 349; *McAnnally v. State*, 74 Ala. 9. It is not necessary that we decide the sufficiency or insufficiency of the clause we are now considering. The identical language was employed in the following cases, and we made no comment on it, but, on the contrary, treated the charges as free from error: *Cagle v. State*, 87 Ala. 38, 6 South. 300; *Keith v. State*, 91 Ala. 2, 8 South. 353. See, also, *Bowdon v. State*, 91 Ala. 61, 8 South. 694; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457. Possibly, the language could only tend to mislead, and, at most, would call for an explanatory charge, if injury was apprehended. 1 Brick. Dig. p. 344, § 129, and cases cited. It would always be safer to adopt the long-established phrase that, to convict of crime, the testimony must convince beyond a reasonable doubt. *Newton v. State*, 92 Ala. 33, 9 South. 404.

The charge is objectionable in other respects. The subphrase "as shown by the evidence" should have been omitted. *Marble v. Lypes*, 82 Ala. 322, 2 South. 701; *Joyner v. State*, 78 Ala. 448; *Herges v. State*, 30 Ala. 45. And the last clause of the hypothesis is faulty. It declares that if defendant, "during the time he was going there [the place where it is alleged the homicide was

committed], or during any portion of the time he was going there, had the intent to kill her [deceased] there, and did kill her there, the jury are authorized to find him guilty of murder in the first degree." The language should have been "and, pursuant to such intent, did kill her there."

The charge is objectionable in yet another respect. One of its postulates is "that the defendant went with Harriet Marr for over one mile, no one with them except themselves." All the testimony bearing on this feature of the inquiry was that of Emma Marr. She testified that she was with them during most of the time, and was at no time far from them. To justify the postulate that "no one [was] with them except themselves" would necessarily require that her testimony that she was with them should be disbelieved; and, if her testimony be disbelieved, there was an entire absence of proof of any previously formed intent to kill the deceased. The hypothesis of a charge should never include as a predicate a proposition which is unsupported by any testimony, or which is inconsistent with any conclusion of fact there is testimony tending to establish, no matter how slight that testimony may be. *Henderson v. Marx*, 57 Ala. 169; *Cummins v. State*, 58 Ala. 387; *Boddie v. State*, 52 Ala. 395; *Wise v. Falkner*, 51 Ala. 359. The last-mentioned imperfection would probably not call for a reversal if it stood alone. It was enough, however, to justify the refusal to give a charge otherwise unobjectionable. Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

(108 Ala. 532)

BEADLE et al. v. SEAT.

(Supreme Court of Alabama. April 10, 1894.)
TRUSTS IN LAND—STATUTE OF FRAUDS—PLEADINGS—LIMITATION OF ACTIONS.

1. In an action to establish a trust in land, the objection that the contract is within the statute of frauds because in parol cannot be raised by demurrer, unless the bill shows that fact on its face.

2. Where land is purchased by several persons, each paying a definite portion of the price, and title is conveyed to one only, a trust is created by operation of law, and the statute of frauds does not apply to the original contract between them.

3. The allegation in a bill to enforce a trust in land, that "until 12 or 18 months before suit defendant never disclaimed plaintiff's right to share in the rents," is sufficient, on demurrer, to take the case out of the 10-years limitation, though the contract between the parties was not made within that period.

Appeal from chancery court, Madison county; Thomas Cobbs, Chancellor.

Bill by James E. Seat against Joshua H. Beadle and another to enforce a trust in land. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

Humes, Sheffey & Speake, for appellants. Lawrence Cooper, for appellee.

PER CURIAM. A tract of land of some 228 acres was sold under order of the probate court of Madison county, and was bid off in the name of Joshua H. Beadle at the price of \$800. In December, 1874, the purchase money being reported paid, the court ordered title to be made, and it was made accordingly. Of the \$800 purchase money Beadle paid \$400, Seat paid \$179, and one James Johnson paid the balance, \$221. These are the averments of the bill filed in this case. The bill is by Seat, filed against Beadle and the heirs at law of Johnson. Its purpose is to establish a resulting trust in the land to the extent Seat's money entered into the purchase. The bill and amended bill charge, in substance, that the lands were let to rent, and that during Johnson's lifetime the rent money was divided among the three purchasers, Beadle, Johnson, and Seat, in the proportion of their several payments of purchase money; that Johnson died June 27, 1882, and that since that time Beadle has received all the rent money, but has refused and failed to pay any part thereof to Seat, or to Johnson's estate. In the original bill is this averment: "The said Joshua H. Beadle has continuously since [the death of Johnson] so recognized the rights of your orator and the estate of the said James Johnson, until within the last few months. The said Joshua H. Beadle now disclaims any right or title that your orator has in and to said land, alleging that he is liable, as your orator's surety on an administrator's bond, in a sum equal to your orator's interest in said land." In an amendment to the bill the following language is employed: "Since the death of said James Johnson said Beadle has taken charge of said land, and collected the rents thereof. He has paid to your orator nothing, but has constantly recognized your orator's rights in the premises, until within the last twelve or eighteen months, by promises of payment and settlement. Said Beadle never disclaimed your orator's rights to said rents until twelve or eighteen months ago, and then only upon the statement that he was liable as surety for your orator, as hereinbefore set forth. On the contrary, said Beadle directed your orator to find a purchaser for said land, and promised and offered to make a deed of conveyance to the purchaser, and divide the proceeds between the estate of said Johnson, himself, and your orator; but for some reason, unknown to your orator, he now disclaims that your orator has any interest in said land." We state the grounds of demurrer assigned, to which we intend to make special reference in this opinion: "(2) Said cause of action is barred by the statute of limitations of ten years. (3) The bill on its face shows that complainant's claim is a stale demand. (4) The bill fails to show how, or in what way, the defendant Beadle recognized the claim of complainant to said land. (5) The bill in this cause fails

to allege or make any legal excuse for not bringing this action in a reasonable time from the date of the alleged appropriation of the entire rents of said place by said J. H. Beadle." "(7) Said bill fails to show that there was any written agreement or understanding that complainant had any interest in said land, or that said Beadle held the title thereto for the complainant's benefit, as well as his own. (8) Said bill fails to allege any facts which show that said Beadle recognized complainant's right. The allegations of complainant's bill are conclusions of law, and not statements of facts from which conclusions may be drawn." To amended bill: "(9) Said bill, as amended, fails to allege any facts which show a recognition by said Beadle of complainant's alleged rights." The chancellor overruled the demurrer, and each ground thereof, and from that decretal order the present appeal is prosecuted.

The original bill in this case was filed August 30, 1892, 10 years and about 2 months after June 27, 1882, when it is alleged Mr. Johnson died. It should be stated that the bill charges that Mr. Johnson, throughout his lifetime, collected the rents, and distributed them between Beadle, Seat, and himself in the proportion that they had severally contributed to the payment of the purchase money. There is nothing in the record to show to what uses the lands in controversy were applied or were susceptible of application. If they were agricultural lands, we feel safe in affirming, from common knowledge, that rents for any given year would not be expected to be realized until after August 30th. Johnson having accounted, as the bill avers, for the rents which accrued during his lifetime, this will include the rents for the year 1881; for his death occurred in June, 1882. It follows that the first rent Mr. Beadle is charged with appropriating was the rent for the year 1882, which we cannot presume or suppose came to his hands until after August of that year. This brings this first act of appropriation of the rents by Beadle within 10 years of the institution of this suit. This is an answer to the second and third grounds of demurrer assigned.

We will next consider the seventh ground of demurrer. That ground erroneously assumes it was the duty of the complainant to aver that the contract or agreement he seeks to claim the benefit of was in writing, signed, etc. Contracts falling within the statute of frauds are not necessarily void. They are, generally, voidable only. If this defense be sought to be availed of, it must be pleaded, unless the complaint shows on its face that the agreement is oral. In the absence of such showing, demurrer will not raise the question. 2 Brick. Dig. p. 30, § 221; Gafford v. Stearns, 51 Ala. 434; 8 Am. & Eng. Enc. Law, 745. It is proper to add that to the case made by the bill in no event is the statute of frauds applicable. The

equity asserted is a trust resulting by operation of law, because of the payment by the complainant of a definite part of the purchase money of the land, the conveyance being taken in the name of the defendant. 1 Perry, Trusts, § 132. The statute of frauds extends to and embraces only trusts created or declared by the parties, and does not affect trusts arising by operation of law. 1 Perry, Trusts, § 137.

The remaining grounds—fourth, fifth, eighth, and ninth—we will consider together. The bill charges expressly that until 12 or 18 months before it was filed Beadle never disclaimed complainant's right to share in the rents, and "then only upon the statement that he [Beadle] was liable as surety" for complainant on an administration bond. It charges also that he (Beadle) has constantly recognized complainant's rights in the premises, and directed him to find a purchaser for the land, and offered to sell and convey, and divide the proceeds between the three, Beadle, Seat, and the heirs of Johnson. If these averments are true, they were a clear admission by Beadle that Seat was part owner of the land. The decretal order of the chancellor must be affirmed.

The foregoing opinion was prepared by the late chief justice, and was adopted as the opinion of the court.

(101 Ala. 665)

GOLDSMITH et al. v. McCafferty.

(Supreme Court of Alabama. Dec. 21, 1893.)

INSTRUCTIONS NOT BASED ON EVIDENCE.

Defendant purchased from plaintiff a bale of Havana and a case of leaf tobacco at the same time. He claimed that the leaf tobacco, which was represented as natural-sweat leaf, was resweated, but wrote plaintiffs that he would accept it if they gave him longer time, and they accepted his offer. Thereafter he gave separate notes for each item. *Held*, in an action on the note given for the Havana tobacco, it was reversible error to instruct that defendant might set up a failure of consideration, though he obtained an extension of time, if he did not know, when he gave the note, that the tobacco was resweated, where there was no evidence that he asked for an extension of time in which to pay for the Havana tobacco, and no claim was made that it was not as represented.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by Goldsmith & Davis against H. J. McCafferty. From a judgment in their favor, plaintiffs appeal. Reversed.

This was an action of assumpsit on a promissory note. The defendant pleaded the general issue, want of consideration, and failure of consideration. Upon the trial of the cause, as is shown by the bill of exceptions, the plaintiffs introduced the note sued on, which was in words and figures as follows: "\$129.80. Birmingham, Ala., June 1st, 1890. Four months after date I promise to pay to the order of Goldsmith & Davis one hundred twenty-nine and 80/100 dol-

lars, value received, at Birmingham, Ala. [Signed] H. J. McCafferty." They also introduced a statement of the bill of the defendant with the plaintiffs, in words and figures as follows: "H. Judson McCafferty, Birmingham, Ala., bought of Goldsmith & Davis, terms four months' note, 1 bale Havana tobacco, 118 lbs., at \$1.10,—\$129.80; one case leaf tobacco, \$105.00, 350 lbs., 30 cents,—\$105.00." Here the plaintiff rested. The bill of exceptions then recites: "The defendant, McCafferty, was then introduced, who testified that the tobacco was unsound, and that the same had been resweated, and that it was not worth exceeding 20 cents per pound; that plaintiffs had guaranteed the soundness of said tobacco at the time the sale was made. The defendant further testified that at the time he bought the tobacco it was represented to be natural-sweat leaf, but in fact defendant found for the first time, after keeping it about six weeks, that the tobacco was resweated, and he then wrote to the plaintiffs, and they sent the written guaranty that it was not resweated. The longer defendant kept the tobacco, the worse it got. Goldsmith (one of the plaintiffs) called to see defendant in July or August, 1891, and assured him that the tobacco was not resweated. On re-examination defendant testified that he did not know that the tobacco was resweated until after the notes were given. On cross-examination defendant testified that he received from plaintiffs letters dated May 12, May 13, June 7, August 4, and September 13, 1890, and he wrote the following letters: July 21st, July 29th, October 18th. And he further testified that he had used all of the tobacco purchased from plaintiffs in his business. He also introduced one Pfeister, who testified that he was in the cigar manufacturing business, well acquainted with the quality of tobacco, and that said tobacco he had examined at the request of defendant, and that the same was unsound, had been resweated, and that the same was not worth exceeding 20 cents per pound. The defendant introduced another witness, who testified to the same effect." The plaintiffs then introduced in rebuttal the letters which had passed between them and the defendant, and which were as follows:

"New York, May 12th, 1890. Mr. H. Judson McCafferty, Birmingham, Ala.—Dear Sir: Your order through our Mr. Goldsmith to hand. Tobacco will be shipped to-morrow. Yours, truly, Goldsmith & Davis."

"New York, May 13th, 1890. Mr. H. Judson McCafferty, Birmingham, Ala.—Dear Sir: We have this day shipped the leaf via Savannah Str. Inclosed you will please find bill. Trusting to receive your future orders, we are, yours, truly, Goldsmith & Davis."

"New York, June 7, 1890. Mr. H. J. McCafferty—Dear Sir: Your letter we have received, and in reply wish to say that we are

surprised that the case of wrappers our Mr. Goldsmith sold you is not satisfactory. Mr. Goldsmith sold quite a number of them, and we had no complaint. But we wish to state to you that, if the case is not satisfactory, you can return the same. We don't want you to keep any stock if not satisfactory, but if you would try the same a little more we have no doubt it would turn out satisfactory. Hoping to receive your future orders, we remain, yours, truly, Goldsmith & Davis."

"Birmingham, Ala., July 21st, 1890. Goldsmith & Davis, New York—Gentlemen: Sirs, I was unable to get to case leaf in question, to give it a fair trial on mold, until last week, as I was short on a cigar that I make by hand. The leaf works quite well on mold, but I make but few mold cigars, and the case would last me a long time for that kind of work. Although I will keep it, if you will give me longer time on it. Let me hear from you, and oblige, yours, truly, H. J. McCafferty."

"Birmingham, Ala., July 29th, 1890. Goldsmith & Davis, New York—Gentlemen: Sirs, inclosed you will find notes for the amount of bill bought of your Mr. Goldsmith. I have dated note for Havana from June first, as that was the arrangement I made with Mr. G. Hoping this will be satisfactory, respectfully, H. J. McCafferty."

"New York, Aug. 4th, 1890. H. J. McCafferty—Dear Sir: Your letter, with inclosed two notes for \$234.80, received, and have given you credit for the same, and inclosed please [find] receipt, and accept thanks. Yours, truly, Goldsmith & Davis."

"New York, Sept. 13th, 1890. Mr. H. J. McCafferty, Birmingham, Ala.—Dear Sir: In reference to the leaf we shipped to you on May 12, 1890, will say that our Mr. Goldsmith has arrived home, and will say he finds the tobacco sound, and is not resweated, and we can therefore not exchange the same, as you have the tobacco in your possession now over four months. Our notes must be paid when due. Yours, truly, Goldsmith & Davis."

"Birmingham, Ala., Oct. 2nd, 1890. Goldsmith & Davis, New York City—Gentlemen: Your Mr. Goldsmith gave me his word of honor that his firm would deal fair with me, and I am somewhat surprised that my note has been protested. I am willing to pay what the leaf is worth, and have been advised that you cannot collect any more than that after your written guaranty that it was not resweated, and would not spoil. I have handled tobacco for twenty-odd years, and know something about leaf; and I say this goods is resweated, and not worth the price asked. If you think best to sue, go ahead. I will stand you a trial. Respectfully, H. J. McCafferty."

"Birmingham, Ala., Oct. 13th, 1890. Goldsmith & Davis, New York—Gentlemen: Yours of the 6th at hand, and in reply will

say your sale of tobacco to me was resweated goods, and a swindle from the start, for I am told by another manufacturer that your Mr. Goldsmith offered the Havana to him for 5 c. less per lb. than he sold it to me. Another man, old in the cigar business, says the case of leaf is not worth more than 18 c. lb. at the most. It is only fit for binders; and will inclose a copy of your guaranty that the goods [would] not spoil. Also in your letter of June 7th are these words: 'If the case is not satisfactory, you can return the same, but, if you would try the same, we have no doubt it would turn out satisfactory.' With all of this kind of fair writing on your part I felt safe in sending you my notes. The Havana has lost its aroma, and is but very little better than any good domestic filler. However, I will repeat I am willing to pay all the tobacco is worth and no more; the price to be decided by reliable cigar men. This is final, and I await your further action. Respectfully, H. J. McCafferty."

The plaintiffs requested the court to give the following written charge to the jury, and duly excepted to the court's refusal to give the same as asked: "If the jury believe from the evidence that the plaintiff did, by letter on the 7th day of June, 1890, offer to rescind the contract, and take back the tobacco, and that subsequently to that time the defendant agreed to pay the said note upon an extension of time for the payment of the debt, and that said extension of time was granted by plaintiff, then defendant ratified the contract, and they should find for the plaintiff." There was judgment for the sum of \$20.75, from which judgment the plaintiffs appeal.

Bush & Brown, for appellants. Cabaniss & Weakley, for appellee.

MCLELLAN, J. On May 12, 1890, Goldsmith & Davis sold to McCafferty "1 bale Havana tobacco, 118 lbs., at \$1.10,—\$129.80; and one case leaf tobacco, 350 lbs., 30 cents, \$105.00," on four months' time. On August 4, 1890, the evidence tends to show, McCafferty delivered separate notes for the two items of the account,—that for \$129.80, being the price of the bale of Havana, bearing date as of June 1st; and that for \$105, being the price of the case of leaf tobacco, bearing date as of July 1st. Each note was payable four months after date. Before these notes were executed a controversy arose between the parties as to the condition and quality of the case of leaf tobacco. McCafferty claimed that this tobacco was unsound, and, finally,—he now says, after the notes had been delivered,—that it had been resweated, whereas it had been represented and sold to him as "natural-sweat leaf;" and that it was not worth more than 20 cents per pound. He brought forward and insisted upon these claims by letters to the

sellers, but on July 21st, before the notes were delivered, he wrote that he would keep it if Goldsmith & Davis would give him a longer time than four months in which to pay for it. There is evidence in the fact that the note for this item was made payable four months from July 1st, instead of from May 13th, the date of the bill, or June 1st, the date of the other note, tending to show that this proposition was accepted, and the extension granted. On the other hand, in respect of the bale of Havana tobacco, the other item in the account, the amount of which was \$129.80, for which a separate note was given, there is no evidence that any controversy ever arose between the parties. All that is said in the correspondence, or anywhere in the evidence, having reference to this item, is found in McCafferty's letter of October 13th. He there says: "The Havana has lost its aroma, and is but very little better than any good domestic filler." This letter was written five months after the sale and delivery, and it cannot be construed into a claim that the tobacco was not as represented at the time of the sale, but only that during the intervening time it had lost its aroma; and this fact appears to have been thrown out merely for the purpose of conducing to a more favorable consideration of the buyer's claims as to the leaf tobacco. No extension of time for payment of this item is asked, and that none was granted is apparent from the date of the note, which is as of the first day of the month succeeding that towards the end of which the goods were received; and even the failure to date the note on the precise day of the receipt of the goods is explained in McCafferty's letter of July 20th, where he says: "I have dated note for Havana from June 1st, as that was the arrangement made with Mr. G.;" and this arrangement with Mr. G. was clearly a matter of convenience of dates, and not of any real extension of time, since it is not reasonable to suppose that McCafferty, having, as he claimed, a serious grievance against the sellers, which he proposed to abandon for an extension of time of payment, would have been content with the very few days intervening between the arrival of the shipment and the 1st of June. On the foregoing and other considerations shown by the bill of exceptions (which the reporter will set out in full) is based our conclusion that in point of fact no question has ever been made as to McCafferty's liability for the full amount of the note for \$129.80, representing the price of the Havana tobacco, and no claim was ever made that that tobacco, the sale and purchase of which was segregated from that of the leaf tobacco, and constituted a separate transaction, in legal effect, by McCafferty himself, was unsound, or was resweated, or was worth only 20 cents per pound; and no extension of time for payment therefor was ever asked or granted. The present action is upon this note

for \$129.80, evidencing McCafferty's indebtedness for the bale of Havana tobacco, the price of which, as we have seen, was \$1.10 per pound. The note for \$105, for the case of leaf tobacco, at 30 cents per pound, is no more involved here than if the transaction out of which it arose had never transpired. The trial court, however, instructed the jury, at defendant's request, as follows: "Even though the jury may believe the defendant asked for and obtained an extension of time of the indebtedness sued on, this does not prevent him setting up a failure of consideration in the debt sued on if the defendant was not aware, at the time he gave the note, that the tobacco was resweated, and it was in fact resweated;" and the jury returned a verdict for the plaintiffs for the value of the Havana tobacco, which they found to be 20 cents, instead of \$1.10 per pound. It is clear that this charge was entirely abstract, in that there was no evidence that any extension of time was asked or granted in respect of the Havana tobacco, or that it was resweated; and, this tobacco alone constituting the consideration of the note sued on, there was, it follows, no evidence of a failure of consideration. It is clear also to us that the jury were misled by this instruction to the conclusion that the evidence as to resweating, extension of time, and failure of consideration had reference to the Havana tobacco and the note sued on, when in truth its relation was entirely to the case of leaf tobacco, and the note for \$105, which is not sued on, since their verdict is wholly inexplicable upon any other hypothesis. It is very rarely the case that the giving of an abstract charge requires the reversal of a judgment. But where the charge is abstract and misleading, and it is, as here, manifest that the jury has been misled by it to the prejudice of the appellant, the law is well settled that the consequent judgment should be reversed. *Bernstein v. Humes*, 71 Ala. 260; *Herring v. Skaggs*, 73 Ala. 446; *Beck v. State*, 80 Ala. 1; *State v. Vance*, Id. 356; *Goldsmith v. State*, 86 Ala. 55, 5 South. 480; *Schaungut's Adm'r v. Udell*, 93 Ala. 302, 9 South. 550. For this error, into which the lower court was probably led by a request for an instruction on the same subject, and likewise abstract, by the plaintiffs, the judgment must be reversed. The cause is remanded. Reversed and remanded.

(102 Ala. 424)

WILLIAMS et al. v. SPRAGINS et al.

(Supreme Court of Alabama. April 10, 1894.)

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—COMPLAINT—PARTIES.

1. A bill alleging that defendant conveyed all his property to his minor children to defraud future creditors; that he withheld the deeds from record for nearly a year; that he remained in possession of the property, holding himself out to complainants as its owner; that complainants had no knowledge of such deeds

till after the debt to them was created; that defendant also gave a mortgage on his property to one who knew of his falling condition; and that defendant remained in possession of the property, consuming and disposing of it, and thereby defrauding complainants,—sufficiently shows that the conveyances were fraudulent.

2. The joinder of the mortgagee as a party defendant does not render the bill multifarious, as a unity of fraudulent design permeates the whole transaction, and imparts to the action a singleness of purpose.

3. Defendant's wife having conveyed her interest to her children, who were made parties to the suit, she is not a necessary party.

4. A bona fide mortgagee of part of the property fraudulently conveyed, though not a necessary party, is a proper party; the purpose in joining her not being to compel her to foreclose, but to ascertain what interest, if any, she has, and to have it protected.

Appeal from chancery court, Lee county; S. K. McSpadden, Chancellor.

Action by Spragins, Buck & Co. and others against R. G. Williams and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The bill is filed by the complainants as creditors of R. G. Williams, to set aside as fraudulent, conveyances made by him to his children, and a mortgage made by him to one Montgomery, which is alleged to have also been fraudulently made. The bill alleges that said R. G. Williams became indebted to the complainants as follows: To Spragins, Buck & Co. for goods, wares and merchandise sold to him by them, in the summer and fall of 1892, amounting to the sum of \$3,818.40; to the Perry Manufacturing Company, for buggies, carts and other vehicles, sold by said company to him, to the value of \$1,063.43, for which he gave his note, dated January 4, 1893, and payable March 15, 1893; to the Nashville Saddlery Company, for merchandise sold to it, to the amount of \$284.30, for which he gave his note to said company, dated December 9, 1892, payable March 13, 1893; to the Kentucky Manufacturing Company, for merchandise sold, to the value of \$2,514.61, for which he executed his note to said company, dated October, 1892, payable March 1, 1893, and to J. K. Orr & Co., for \$440.18, by note dated December 5, 1892, payable March 1, 1893; that said R. G. Williams has been engaged in merchandising in Opelika for the past 20 years, during which time he held himself out to the business world as a man of large means and property, gaining thereby for himself a large and extensive credit, and made large investments in real estate, farming lands, and other property; that in 1891, he formed a mercantile copartnership with one J. G. Whitfield, and carried on a mercantile business in Opelika, under the style of R. G. Williams & Co., for about 12 months, and about June, 1892, they ceased to carry on business under said firm name, and it was afterwards carried on under the name of C. P. Williams, under a pretended sale to him; that said C. P. Williams was a son of said R. G. Williams, who was, at the date

of said pretended sale to him, a minor, with no means or business experience, and who was then and is now insolvent; that while said business was carried on in the name of his said son, the said R. G. Williams remained at the place of business actively managing and controlling the same; that during that time, the said C. P. Williams endeavored to buy goods upon his own credit, but complainants refused to sell to him, but sold exclusively upon the credit and responsibility of his father, the said R. G. Williams, for which he executed his obligations to them, as above set out; that when it was ascertained that the son could not buy goods upon his own credit, the business was discontinued under his name, and the said R. G. Williams, managing and controlling it, disposed of the assets, consisting of a large stock of merchandise, to sundry persons, whose names are unknown to complainants, which was done in furtherance of his purpose to defraud complainants, and to hinder, delay, and defraud his creditors. It is further averred, that on the 27th of June, 1892, said R. G. Williams executed deeds of gift to all of his property, both real and personal, and to his effects of every description, to his four children, Claude P., Earle G., Robert G. and Eleanora V. Williams; that said deeds were secretly and fraudulently withheld and never made known, until placed upon record in the counties where the property sought to be conveyed is situated,—in the county of Lee on the 1st day of March, 1893, and in the county of Chambers, on the 11th March, 1893; that the grantees in said deeds were all minors, and two of them under 14 years of age, at the time, and all of them resided with their father, the said R. G. Williams; that said deeds were secretly and fraudulently made, with the view of future dealings with complainants and with the purpose of defrauding them as well as other future creditors; that said Williams, besides the amounts in which he is indebted to complainants, is indebted, as complainants are informed and believe, to other creditors, to the amount of about \$20,000, the greater part of which has been contracted by him since the date of said deeds of gift; that after the date of said deeds of gift to his children, the said Williams remained in the possession and control of all of said property described in said conveyances, and continued to hold himself out to complainants, as well as to the business world, as the owner of said property; that complainants had no knowledge of said conveyances until after the creation of the indebtedness to them, as above set forth, and not until after said deeds were filed for record as above stated, and that said Williams has been and is now in possession of said property, and is carrying on large and extensive farming operations. It is further averred upon the information and belief of complainants, that said Williams and his

said son, C. P. Williams, on the 2d of February, 1893, made and executed to one Montgomery a mortgage, exhibited to the bill, which purports to have been given to secure an indebtedness of \$10,000, which complainants, believe, charge and aver was simulated and fictitious; that said mortgage was not put upon record, until the 13th of March, 1893; that on the 17th March, the grantors and grantees therein, made an entry on the margin of said record, reducing the amount to \$5,000, which is stated to be for advances made, to make a crop in the year 1893, and it is averred, that at the time of the execution of said mortgage, said Montgomery had full knowledge of the failing condition of said R. G. Williams and of his large indebtedness to creditors, and that said mortgage was made to hinder, delay and defraud complainants and his other creditors; that said mortgage was executed to cover up all the personal property, notes and accounts which the said R. G. and C. P. Williams claimed to own at the time of its execution, and what they might acquire during the year, and thereby hinder and delay complainants and the other creditors in the collection of their just demands; that the mortgagors are in the possession, use and enjoyment and control of nearly all the property described in said mortgage, and that they are using, consuming and disposing of a portion of said property, thereby hindering, delaying and defrauding complainants in the collection of their debts. It is further stated that, as complainants are informed, Mrs. T. C. Fitzgerald holds a mortgage on a portion of the real estate conveyed by said Williams to his children, but which, as they are informed, has been almost if not entirely paid off and discharged; and it is further averred, that all of said conveyances, except the mortgage to Mrs. Fitzgerald, were fraudulent in their inception, and made with the purpose of hindering and delaying complainants in the collection of their just demands, and are therefore void. The deed of gift of lands, which is exhibited to the bill, is executed by said R. G. Williams and his wife, E. V. Williams, and recites, that R. G. Williams and wife, E. V. Williams, in consideration of the love and affection which they have towards their beloved children, give, grant and convey unto them, etc., and conveys a large amount of land in Lee and Chambers counties, and in the city of Opelika. The other deed exhibited, is by said R. G. Williams to his said children, of same date as the conveyance by him and his wife of the lands to said children, viz. 27th June, 1892, and conveys horses and mules, on said lands conveyed to his said children, wagons, buggies, farm tools and implements owned by him, and all growing crops, household and kitchen furniture, and concludes, "In fact all moneys and all other property that I now own after my debts are paid that I now owe, then what money I have is to

belong to them." The mortgage to Montgomery, executed the 2d of February, 1893, conveys the crops of every kind raised by mortgagors and their interest in tenants' or cotenants' crops in Lee county, in the year 1893, and also a large number of carts, buggies, and wagons, harness, mules, horses, lumber, corn, fodder, cotton seed, etc., which are alleged to belong to mortgagors and to be free from incumbrance, and all other personal property, notes and accounts, that they may own during the year; and the mortgage was given, also, to secure any future advances which might be made by the mortgagee to them. It is also stated that a mortgage by the same parties to said Montgomery on crops and stock in Chambers county, Ala., secures the same debt. The said R. G. Williams, C. P. Williams and the other three children of said R. G. Williams, the said Montgomery and Mrs. T. O. Fitzgerald are made parties defendant to the bill.

The prayer is for an account to ascertain the amount due to each of complainants; that said deeds of gift, exhibited as B and C to the bill, and the mortgage to said Montgomery, be declared null and void, and subject to the payment of complainants' debts, and ordered to be sold for their payment; that Mrs. T. C. Fitzgerald be required to propound and show what balance, if any, is due upon her mortgage, and that her rights, if any, be protected by the decree of the court, and for general relief.

J. M. Chitton, A. & R. B. Barnes, and W. J. Samford, for appellants. Jas. R. Dowdell, Thos. L. Kennedy, and S. O. Houston, for appellees.

HARALSON, J. 1. The demurrer to the bill questions the sufficiency of its allegations, as charging fraud in the defendant, R. G. Williams, in the execution of the voluntary conveyances to his children, and the mortgage by him and his minor son, C. P. Williams, to Montgomery. If tainted with actual fraud, the rule is, that voluntary conveyances are void, even as to subsequent purchasers. *Dickson v. McLarney* (Ala.) 12 South. 364. As to averments charging fraud, it is well settled, that complainant is not bound to aver all his matters of evidence tending to establish fraud, but he must show with accuracy and clearness, matters essential to his right of recovery, and these must not be left to depend on inference or on general or ambiguous averments. *Seals v. Robinson*, 75 Ala. 369. The test of the sufficiency of such averments is, not whether they might not have been more direct and full in the statement of facts out of which the conclusion of fraud arises, for these are not required to be minutely alleged; but, whether they are sufficient to notify the defendants that the bona fides of the transactions are assailed, and to put in issue their validity. General averments of facts, from

which, unexplained, a conclusion of fraud arises, are sufficient. *Pickett v. Pipkin*, 64 Ala. 520; *Burford v. Steele*, 80 Ala. 148; *Pollak v. Searcy*, 84 Ala. 262, 4 South. 137. In this bill the averments of fraud, and of facts relied on to show it, both in the execution of the voluntary conveyances and the Montgomery mortgage, are direct and positive. The certain effect of such transactions was to deprive complainants and other creditors of their claims, and the bare statements of the case as made, are sufficient to show the effect of these transactions to be, to hinder, delay and defraud, as well as the bad motive with which they were done. This was all that was necessary. *Sims v. Gaines*, 64 Ala. 396; *Burford v. Steele*, supra.

2. The execution of the mortgage by R. G. Williams and his son, C. P. Williams, to Montgomery, on the facts stated, show it to be a part of a general scheme, on the part of the defendant, R. G. Williams, participated in by said Montgomery, to defraud the creditors of said Williams. The facts averred are sufficient, unexplained, to warrant the conclusion of fraud. To have joined said Montgomery, as one of defendants, does not render the bill multifarious. This is a common practice, sanctioned by the courts in the interest of convenience and of doing complete justice. In such cases, a unity of fraudulent design is held to permeate the whole transaction, so as to impart to the suit a singleness of object and purpose. *Burford v. Steele*, supra; *Russell v. Garrett*, 75 Ala. 348; *Lehman v. Meyer*, 67 Ala. 396; *Hinds v. Hinds*, 80 Ala. 225; *Handley v. Heflin*, 84 Ala. 604, 4 South. 725.

3. Mrs. E. V. Williams, wife of R. G. Williams, was not a necessary party. If she owned any interest in the lands, she conveyed it to her children, who are made parties to the suit. R. G. Williams is the alleged fraudulent grantor, and not she. *Story*, Eq. Pl. §§ 231, 262, 570.

4. Mrs. Fitzgerald was not a necessary party. The purpose in joining her was not to compel her to foreclose her mortgage, if she had one, but to ascertain if she had any and what interest, and have it protected. The complainants as creditors of an alleged fraudulent voluntary conveyancer do not assail her mortgage if she has one, but the purpose is to ascertain her interest in any part of the property fraudulently conveyed, so as to reach the residuum. If she has any interest she may disclose it, and have it protected, or if she has none she may disclaim. It is a common practice to make parties defendants to bills, who are supposed to have some interest, and they are proper parties, at least.

5. This covers all the grounds of demurrer insisted on in argument by defendants' counsel, and which appear necessary for us to notice. There are many grounds they leave untouched, with the italicized suggestion,—*"Each ground of demurrer is insisted on and*

is not waived." It would have been tedious for them to pursue the discussion of these grounds, and we deem it unnecessary to go further than they did, and decline to undertake what they seemed to think was useless. Affirmed.

(33 Fla. 620)

JACKSON v. STATE.

(Supreme Court of Florida. May 22, 1894.)

JUSTICES OF THE PEACE—CRIMINAL JURISDICTION.

In counties where there are criminal courts of record, justices of the peace have, in criminal causes, no trial jurisdiction, as distinguished from mere power, as committing magistrates, to inquire into criminal charges with reference to the detention for trial, or bail or discharge, of the accused.

(Syllabus by the Court.)

Error to circuit court, Duval county; R. M. Call, Judge.

Habeas corpus by William Jackson against the state of Florida. Judgment remanding petitioner, and he brings error. Reversed.

John E. Hartridge, for plaintiff in error.

RANEY, C. J. Plaintiff in error was arrested on a charge of larceny, and, being arraigned before a justice of the peace of Duval county, pleaded guilty, and was sentenced to pay a fine of \$10 and costs of court, and, in default of payment, to be confined in the county jail, at hard labor, for a term of 60 days. Being in custody of the sheriff under the process issued on such judgment, he obtained from the judge of the fourth judicial circuit a writ of habeas corpus.

There is in Duval county a criminal court of record, established under section 24 of article 5 of the constitution; and the question involved here is whether or not, in counties where there are criminal courts of record, justices of the peace have any trial jurisdiction of criminal causes, as contradistinguished from mere power to inquire into criminal charges with reference to the detention, bail, or discharge of the accused. The circuit judge decided in favor of the jurisdiction, and remanded the petitioner.

The provisions of the constitution bearing upon this question are as follows:

"The circuit courts shall have exclusive original jurisdiction * * * of all criminal cases not cognizable by inferior courts. * * * They shall have final appellate jurisdiction in * * * all criminal cases arising in the county court or before the county judge, of all misdemeanors tried in criminal courts, of judgments or sentences of any mayor's court, and of all cases arising before justices of the peace in counties in which there is no county court." Article 5, § 11.

The county judge "shall have the power of a committing magistrate." Article 5, § 17.

"County courts * * * shall have jurisdiction * * * of misdemeanors." Section 18, art. 5. County courts, it may be re-

marked, can exist only in those counties where the legislature may see fit to create them. Id. art. 5. But county judges are provided by the constitution, independent of legislative discretion.

"The county commissioners of each county shall divide it into as many justice districts, not less than two, as they may deem necessary. There shall be elected one justice of the peace for each of the said districts. He shall hold his office for four years." Article 5, § 21. "In each county where there is no county court as provided in section 18 of this article, the justices of the peace shall have jurisdiction * * * in such criminal cases, except felonies, as may be prescribed by law; and in counties where county courts are established, as provided for in section 18 of this article, every justice of the peace * * * shall have power to issue process for the arrest of persons charged with crime, and to make the same returnable before himself or the county judge for examination, discharge, commitment or bail of the accused. * * * Appeals from justices of the peace courts to circuit courts in criminal cases shall be tried de novo under such regulations as the legislature may prescribe." Article 5, § 22.

"There shall be established in the county of Escambia, and upon application of a majority of the registered voters, in such other counties as the legislature may deem expedient a criminal court of record, and there shall be one judge for each of said courts. * * *" Article 5, § 24. "The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively." Section 25. "All offenses triable in said court shall be prosecuted upon information under oath to be filed by the prosecuting attorney, but the grand jury of the circuit court for the county in which said court is held may indict for offenses triable in the criminal court. Upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information." Section 28. "The county courts in counties where such criminal courts are established shall have no criminal jurisdiction and no prosecuting attorney." Section 29. Other sections make provisions not necessary to be noticed. Article 5, §§ 26, 27, 30, 31, 32.

Our conclusion is that, in criminal causes, justices of the peace have no trial jurisdiction, as distinguished from mere examining jurisdiction, in counties where there is a criminal court of record, as there is in Duval county. It is true that section 22 of article 5, supra, provides that they shall have, in each county where there is no county court under section 18, jurisdiction in such criminal cases, except felonies, as may be prescribed by law, and, in any county where there is such county court, only an examining jurisdiction; but in our judgment this

is not conclusive of the question. It is clear that a criminal court of record was intended to have original jurisdiction of all criminal cases, not capital, arising in the county where it may be established; a jurisdiction coextensive as to territory with that of the county court, and much more liberal as to the character of offenses, yet including also all those cognizable by the county court. This original jurisdiction is subject to the appellate jurisdiction of the circuit court in cases of misdemeanor (section 11, art. 5), and to that of the supreme court in cases of felony (section 5, Id.). In the nature of things, it is not probable that the convention or the people would have given justices of the peace even a limited concurrent trial jurisdiction with a purely criminal court specially established for the purpose of trying all the offenses, not capital, committed in the county; and particularly so when, by section 29, concurrent jurisdiction has been denied even to county courts. Still, this could not be relied on to control an otherwise clear import of a constitution. However, we see that, wherever there is a criminal court of record, all offenses "triable" in said court—that is, all offenses of which such court has jurisdiction—"shall be prosecuted upon information under oath to be filed by the prosecuting attorney," and that, although the grand jury may indict for offenses triable in such court, the trial has to be upon information. The constitution clearly means that, wherever there is a county criminal court, no offense, not capital, committed in the county, shall be tried in any other manner. Its purpose in providing the court, and making this declaration, was that wherever the legislature, acting, as it is their duty to do, upon an application by a majority of the voters of a county, should establish a criminal court of record, such court should have the exclusive jurisdiction to try all offenses not capital, committed in the county. Wherever there is such a court the organic law gives to any person charged with such an offense the right to be tried in it under the forms and safeguards indicated. That this court seems to have been overlooked in framing section 22, *supra*, does not change the effect of the provisions as to it specially referred to.

We see that, whenever there may be both a county court and a criminal court of record in a county, the former court has no criminal jurisdiction. Still, it is apparent that, under these circumstances, justices of the peace would have no trial jurisdiction in criminal cases, but all such jurisdiction, in cases not capital, would be vested in the criminal court; it being the intent that this court shall have the entire original trial jurisdiction, exclusive of all other courts, in such cases. It is therefore plain that the intent of the convention and the people was that the criminal court of record should, where there was a county court, not only

supply its place in the exercise of original jurisdiction in criminal cases, but have an increased original jurisdiction; and it is not natural to suppose that it should supplant justices of the peace of any trial jurisdiction in criminal cases where there is a county court in the same county, and not do so where there is not one. Taking into view all the provisions of the constitution bearing upon the question, we are satisfied that its purpose and effect were that the original jurisdiction of the criminal court of record should be exclusive, and that, where there is such a court, justices of the peace have no trial jurisdiction in criminal causes. The justice of the peace was without jurisdiction in the premises, and his proceedings are void. The plea of guilty entered by the accused could not confer jurisdiction withheld by the people.

The cause will be remanded, with directions that the judgment of the circuit court be reversed, and a judgment entered discharging the petitioner, William Jackson, from further detention under such judgment and commitment of the justice of the peace.

(32 Fla. 618)

STEPHENS et al. v. HALE.

(Supreme Court of Florida. May 15, 1894.)

BILL OF EXCEPTIONS—SETTLEMENT AFTER TERM—ORDER ALLOWING TIME—MOTION TO STRIKE—PENDING MOTION FOR NEW TRIAL.

Where an order allowing time beyond the term of the court for settling a bill of exceptions has not been entered in the minutes of the court, as required by circuit court law rule 97, and it is apparent from the bill of exceptions that such an order was made, and the bill settled, within the time allowed, a motion to strike the bill from the transcript will be granted ordinarily, subject, however, to the right of the party appellant to move to reinstate the bill on having procured, within a reasonable time, an amendment; but, where it appears that a motion for a new trial has not been disposed of by the trial court, the motion to strike will be denied.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; J. J. Finley, Judge.

Action by S. B. W. Stephens and others against Mary E. Hale. From a judgment for defendant, plaintiffs appeal. On motion to strike bill of exceptions. Denied.

S. Y. Finley and Horatio Davis, for the motion. John G. Reardon, opposed.

RANEY, C. J. Appellee moves to strike the bill of exceptions from the transcript, the ground on the motion being that the bill of exceptions was not made and signed during the term of the circuit court at which the trial was had, and no order extending the time for making up and presenting the bill of exceptions was entered in the minutes of the court at such term. The bill was not made up and signed during the term, and there is no pretense that the order has ever been entered in the minutes, either at such

term or subsequently nunc pro tunc. Circuit Court Law Rule 97; *Temple v. Immigration Co.*, 23 Fla. 59, 1 South. 333. It is apparent from the bill of exceptions that an order extending the time for settling the bill was made, and that the bill was actually made up and signed within the time allowed, and, but for circumstances to be noticed, we should, as in the case cited, grant the motion, subject to the right of the appellants to move to reinstate the bill on having procured, within a reasonable time, an amendment nunc pro tunc of the minutes or record of the proceedings of the circuit court. The circumstances referred to are that the certified copy of the entries appearing in the minutes of the circuit court, which is presented by the movant in support of his motion, and was served on appellants' counsel with the notice of such motion, and is not denied to be correct, not only shows, by the absence of the order referred to, that no such order has been entered on the minutes, but it also shows that the motion for a new trial has never been disposed of. If it was not disposed of, the case is not properly here on appeal, but remains in the trial court for a disposition of the motion, and the proper motion would be to dismiss the appeal. It is apparent, however, from the bill of exceptions, which is indorsed by counsel for all parties as having been agreed upon, that such motion was in fact denied. It seems, then, that both the appellee and the appellants are much interested in having the minutes of the court amended so as to speak the truth. As the record stands, a motion to dismiss would be the only proper motion for the appellee to make, however delaying its effect would be on the final disposition of the cause in this court in case either of amendments nunc pro tunc, or a subsequent disposition of the motion for a new trial (if the same was not in fact disposed of), and the bringing of the cause here again by proper appellate procedure. The motion is denied.

(33 Fla. 617)

CLARKE et al. v. SOUTHERN EXP. CO.

(Supreme Court of Florida. May 8, 1894.)

ABANDONMENT OF APPEAL.

Where there has been an entire failure of counsel for plaintiff in error to file any brief or argue the errors assigned in the appellate court, they will be considered as totally abandoned, and the judgment affirmed.

(Syllabus by the Court.)

Error to circuit court, Marion county; Jesse J. Finley, Judge.

Action by Marion Clarke and James O. Clarke against the Southern Express Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

John E. Hartridge, for defendant in error.

MABRY, J. In April, 1885, plaintiffs in error sued defendant in error in the Marion

county circuit court, and a trial of the cause at the spring term, 1889, resulted in a verdict and judgment for the defendant. A writ of error was taken from the judgment to this court, the transcript being filed June 14, 1889, and the assignment of errors filed January 30, 1890. On June 10, 1890, the cause was submitted to the court on brief of counsel for defendant in error, without prejudice to the right of counsel for plaintiffs in error to be heard during a subsequent day of that term of the court.

There has been an entire failure of counsel for plaintiffs in error to file any brief or argue this cause before the court, and the errors assigned must be considered as totally abandoned. This court has repeatedly held that errors assigned, and not argued here, will be treated as abandoned, and not considered.

Therefore, the judgment of this court is that the judgment appealed from be affirmed, and an order will be entered accordingly.

(33 Fla. 506)

WOODWARD v. STATE.

(Supreme Court of Florida. April 10, 1894.)

JURY LIST—SELECTION OF GRAND JURY—NOTICE OF DRAWING—ELECTION OF FOREMAN—PLEA IN ABATEMENT.

1. Pleas in abatement setting up mere irregularities in the drawing and summoning of juries are not looked upon with favor by the courts, and the greatest legal accuracy and precision are required in their allegations, and they must be free from uncertainty and ambiguity.

2. The second section of chapter 4015, Acts 1891 (Rev. St. p. 960), contemplated annual selections of jury lists by the county commissioners; and, where it is shown that a list of persons to serve as jurors had been selected by said commissioners for the year, the presumption is, in the absence of sufficient showing to the contrary, that the list was selected at a meeting held the first week in January of that year. The proviso in said section in reference to selecting a jury list in counties where criminal courts of record exist contemplated the existence of such courts at the time of the annual selection of the jury lists by the commissioners, and the creation of a criminal court of record in a county after the selection of such a list for that county will not affect the list already made, nor will it affect the official action of the commissioners in reference to selecting a jury list until the time arrives for the annual selection for the succeeding year.

3. The provision in section 2804, Rev. St., that, "in counties wherein criminal courts of record are established, no grand jury shall be summoned to attend at any term of the circuit court, unless the circuit judge shall file with the clerk a written order directing a grand jury to be summoned," was not intended to limit or regulate the power of the court, in term time, to direct the summoning of a grand jury where none had been ordered and summoned for the term; and a plea in abatement alleging that the indictment against the accused was found by an illegal grand jury, because no written order was filed by the circuit judge with the clerk, directing that a grand jury be summoned to attend and serve at said term of court, is defective, as it does not exclude the presumption that the indictment was presented by a legally constituted grand jury, or that

the court did not, in term time, legally organize the jury that presented the indictment.

4. The notice provided in section 4, c. 4015, Acts 1891, for drawing jurors, is material, and the drawing of a jury without giving such notice would be irregular.

5. An issue made on a plea in abatement, setting up that the notice of the drawing of jurors required in section 4, c. 4015, had not been given, is one of fact to be tried by a jury, and a refusal to submit such an issue to a jury, and the disposition of it by the judge, will be error.

6. To an allegation, in a plea in abatement, that the grand jury did not select one of its members as a foreman, the state replied that the grand jury did select one of its members (naming him) as foreman, as shown by the records of the court. *Held*, that an issue tendered on the replication presented an issue to be tried by the court on the inspection of the record, and not one to be submitted to a jury.

7. Where the record shows that the requisite jurors to form a grand jury have been sworn touching their qualifications as such, and found qualified, and then, without taking the oath prescribed for grand jurors, retired under charge of an officer of the court, and selected one of their number (naming him) as foreman, after which they reported to the court the name of the juror so elected as foreman, and he was recognized by the grand jury and court as foreman during the term and acted as such, this will amount to a ratification of the election of such foreman, if it be that the foreman should be selected after the jury is sworn.

8. A witness cannot, on cross-examination, be interrogated as to facts and circumstances not connected with the matters stated on the direct examination, but the rule permits, on the cross-examination, an inquiry into all the facts and circumstances connected with the matters brought out in the examination in chief.

(Syllabus by the Court.)

Error to circuit court, Hillsborough county; Barron Phillips, Judge.

William Woodward was convicted of murder in the first degree, and brings error. Reversed.

J. B. Wall and Palmer W. Smith, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MABRY, J. The plaintiff in error was indicted on the 10th day of May, A. D. 1893, during a term of the circuit court for Hillsborough county, for the murder of Samuel Kelly, and was convicted, on the 15th day of the same month, of murder in the first degree, as charged in the indictment. Before arraignment and trial, defendant filed a plea in abatement, and it appears that after a demurrer on the part of the state had been sustained as to a part, and overruled as to the remainder, of this plea, defendant asked leave to withdraw the plea filed, and to interpose an amended plea in abatement then presented, which was granted on condition that the demurrer to the plea withdrawn, and the ruling of the court thereon, should apply to the amended plea. The condition of the record as to the plea in abatement is that the defendant filed such plea, alleging that the indictment returned against him was found by an illegally constituted

grand jury, as follows: That the board of county commissioners for Hillsborough county did not make out a list of not less than 475, nor more than 500, names of registered voters who had paid their last assessed capitation tax, to serve as jurors, and cause such list to be signed by the chairman of said board, and forthwith delivered to the clerk of said court prior to the finding and return of the indictment against defendant; that said clerk did not, at least 15 days before the sitting of the said term of court, draw from any box containing not less than 475, nor more than 500, names of registered voters, or supposed registered voters, the names of 12 persons to serve as grand jurors at said term of court; that the time and place of drawing the names of 12 persons to serve as grand jurors for said term of court were not advertised by written notices posted in three public places in said county ten days before the day on which the names of such persons were drawn from a box by the clerk of said court; that said grand jury did not select one of their number to be and to act as foreman of said jury; and that no written order was filed by the circuit judge with the clerk of the court, directing that a grand jury be summoned to attend and serve at said term of court. A demurrer filed by the state was sustained, as we understand the record, to all the grounds of the plea except as to the allegations in reference to the notice of drawing the grand jury, and that the grand jury did not elect a foreman, and as to these the demurrer was overruled. The state then filed a replication alleging that notice of the drawing of the grand jury that presented the indictment against the defendant was given by posting written notices in three public places in Hillsborough county ten days before the 17th day of April, 1893, when said jury was publicly drawn in the courthouse in said county, and that the grand jury did elect one of their number, to wit, Henry H. Scarlett, as foreman of the jury, "as shown by the records of this court." The defendant moved to strike out the words in quotation marks, and this motion was overruled. Defendant joined issue upon the replication, and demanded a trial of the same by jury, but the court declined to call a jury, and, upon hearing, overruled the plea in abatement. The rulings of the court sustaining the demurrer to the extent mentioned, refusing to strike out the quoted words in the replication, declining to submit the issues to a jury, and overruling the plea in abatement, are assigned as errors.

The case was tried before the act of 1893, c. 4122, became law. By the second section of the act of 1891, c. 4015, the boards of county commissioners of the several counties of the state were directed, at meetings to be held the first week in January of each year, or as soon thereafter as practicable, to select from the list of registered voters who had paid their last assessed capitation

tax in their respective counties a list of not less than 290, nor more than 310, persons properly qualified to serve as jurors, and possessing certain qualifications mentioned in the act, and which lists shall be signed by the chairman of such boards, and forthwith delivered to the clerk, and by him recorded in the minutes of the board. The following provisos are added: "Provided, however, that in counties where county criminal courts now exist or may hereafter be established, the county commissioners of said counties shall make out a list of not less than four hundred and seventy-five (475), nor more than five hundred (500), names of registered voters, who have paid their last assessed capitation tax, to serve as jurors; provided, that if in any of the counties of the state the county commissioners shall not be able to select the number required by this section, they shall be authorized to select a less number, to be the highest number possible." On the 10th day of April, 1893, the act creating the criminal court of record for Hillsborough county went into effect; and it is contended by counsel for plaintiff in error that, after this date, the box from which the jurors were drawn should have contained not less than 475, nor more than 500, names. It is not stated in the plea before us that the county commissioners for Hillsborough county did not, prior to the passage of the act creating the criminal court of record for that county, select the list of jurors, as required by the act of 1891, and the legal presumption is that they had done so. They were directed to perform this duty at the meeting to be held the first week in January, or as soon thereafter as practicable, and the presumption is that they performed their duty. The statute of 1891 contemplated annual selections of jury lists on the part of the county commissioners, and in making a list for any year they were, of course, governed by the law in force at the time of selection. The proviso in reference to selecting a jury list in counties where criminal courts of record exist contemplated that such courts existed, or had been established, at the time of the annual selection of such list by the commissioners. The creation of a criminal court of record in any county after the selection of a jury list for the year would not affect that list, nor would it affect the official action of the commissioners until the time arrived for the selection of a jury list for the succeeding year. This being the case, it becomes apparent that the first and second grounds of the plea are bad, and the action of the court in sustaining the demurrer as to them was proper. These grounds of the plea are faulty in other respects. While it is alleged that the county commissioners did not select a list of jurors of not less than 475, nor more than 500, names, and that the clerk of the circuit court did not, 15 days before the sitting of the court, draw from a box

containing such number of names 12 persons to serve as grand jurors, it is not shown how the action of the commissioners and the clerk in the particulars mentioned affected the indictment returned against defendant. It is not alleged that the indictment was found by a grand jury drawn from an illegal list or box, or that said grand jury was drawn from any box. In the event a grand jury has not been properly drawn or summoned to attend a term of court, the judge has the power, in term, to have a jury drawn, or to direct the summoning of one from the body of the county at large. The greatest accuracy and precision are required in pleas in abatement setting up irregularities in the selection or drawing of jurors, and such pleas must be free from uncertainty and ambiguity. *Reeves v. State*, 29 Fla. 527, 10 South. 901.

Section 2804, Rev. St., provides that, "in counties wherein criminal courts of record are established, no grand jury shall be summoned to attend at any term of the circuit court, unless the circuit judge shall file with the clerk a written order directing a grand jury to be summoned." The last ground of the plea to which the demurrer was sustained alleges that no such order was filed with the clerk, directing that a grand jury be summoned to attend and serve at the term of the court when defendant was indicted. When a criminal court of record is established in a county, the circuit court ceases to exercise original jurisdiction in criminal cases arising therein, except capital offenses; and, when no such offense has been committed in the county since the preceding term of the circuit court, the necessity for a grand jury may not exist. The purpose of this statute is to save the expense attending the summoning of a grand jury at a term of the circuit court in counties where criminal courts of record exist when none is needed. The criminal court of record for Hillsborough county was established on the 10th day of April, 1893, and the spring term of the circuit court for that county convened, on the 8th day of May following. The third section of the act of 1891, c. 4015, provides that, "at least fifteen days before the sitting of any regular term of the circuit court at which a jury shall be required, the clerk of the court, in the presence of the county judge, or in his absence a justice of the peace of the county, and the sheriff or a deputy sheriff of the county, shall proceed to draw from the box the names of twelve persons to serve as grand jurors at such court." The plea does not allege that the grand jury for the spring term, 1893, of the circuit court for Hillsborough county, was not drawn and summoned before the criminal court of record for the county was established; furthermore, it was not intended by section 2804 of the Revised Statutes, directing a written order to be filed with the clerk for the summoning of a grand jury, to limit or regulate

the power of the court in term time in reference to the organization of juries. When the court meets in session, if it should be ascertained that no grand jury had been properly drawn or summoned, one can then be ordered, in accordance with statutes on the subject, and the order recorded upon the minutes of the court. The plea alleges that no written order of the judge was filed with the clerk, directing that a grand jury be summoned to attend and serve at the term of court when defendant was indicted. The plea does not exclude the presumption that the indictment was presented by a legally constituted grand jury. *State v. Brooks*, 9 Ala. 9. It does not allege that the grand jury that presented the indictment was drawn and summoned after the creation of the criminal court of record for Hillsborough county, when it became the duty of the circuit judge to file the order for the summoning of the jury, or that the court did not properly, in term time, make all necessary orders in reference to the organization of said jury. Pleas in abatement setting up mere irregularities in the drawing and summoning of juries are not looked upon with much favor by the courts, and strict rules of pleading are enforced as to them. The court did not err in sustaining the demurrer to this ground.

The demurrer was overruled as to the other two grounds of the plea, and the issues joined on them were disposed of by the court. The first of these grounds alleges that the time and place of drawing the names of 12 persons to serve as grand jurors for the term of court when defendant was indicted were not advertised by written notices posted in three public places in said county for ten days before the day when the names of such persons were drawn from a box by the clerk of said court. From what has already been said, it becomes apparent that this ground of the plea is also faulty, and the demurrer should have been sustained as to it. It simply alleges that there was no advertisement of the time and place of the drawing of the names of 12 persons from a box by the clerk to serve as grand jurors for the term of the court, but how this affected the indictment returned against the defendant is not shown. The court, however, overruled the demurrer, and the state attorney replied that notice of the drawing of the grand jury that found the indictment against the accused was given by posting written notices in three public places in the county ten days before the 17th day of April, 1893, when said jury was publicly drawn in the courthouse of said county. Issue was joined on this, and, on trial by the court, was found in favor of the state. Accepting here, as was done by the court below, as an issue tendered on the pleas and replication thereto, that notice of the drawing of the grand jury was given in accordance with

the provisions of the act of 1891, we must determine whether the court was in error in not submitting such issue to a jury for trial. Our view of the statute of 1891, c. 4015, is that the notice therein provided for the drawing of the grand jury required is material, and that a jury drawn without such notice should not be accepted by the court as a properly drawn grand jury. The trial judge in the case before us regarded such notice as essential, and required an issue to be made up involving an inquiry into the giving of such notice. This issue was one of fact resting in pais, and, according to the long-established rule requiring such issues to be tried by a jury, it should have been submitted to such body for trial. The court tries questions of law, and the jury passes upon questions of fact, and this rule applies to issues on pleas in abatement as well as to other issues. This common-law rule has been recognized and declared by statutory enactment in this state. Rev. St. § 2904. The defendant in the case before us did not waive his right to have the jury try the issue accepted by the court, but insisted on it, and the refusal of the court to so submit the issue, it seems to us, was a violation of the rule stated. It may be contended that the giving of the notice of the drawing of the grand jury under the circumstances alleged in the replication cannot constitute the basis of a material issue in this case, for the reason that no authority existed for the drawing of the jury. As appears from what is stated in the replication, the notice of the drawing of the jury in question was posted before the date when the criminal court of record for Hillsborough county was established, but the drawing of the jury took place on the sixth day after the one on which the court had its existence. The replication alleges the drawing of the jury on the 17th of April, 1893; but it is not stated that any order of the circuit judge directing the summoning of a grand jury was filed with the clerk before the drawing occurred. Where the clerk is directed by the judge in vacation to summon a grand jury in a county where a criminal court of record exists, it is contemplated that the order shall be given before proceedings are begun by the officers for the regular drawing of jurors for a term. In the present case it must be assumed that no order was filed with the clerk for the summoning of a grand jury before the notice of the drawing was given, for the reason that there was no law then in force making it the duty of the court to file such order. The giving of the notice of the drawing of the jury, at the time it was given, was legal, and, in our judgment, it dispensed with the necessity of any written order from the judge directing the drawing to take place. At all events, we are impressed with the view that if the grand jury in question was drawn after proper notice under the circum-

stances mentioned, and the court proceeded in term time to organize the grand jury so drawn, it would amount to a judicial determination of the necessity of the presence of a grand jury at the term. The result is that the issue presented by the replication to the plea was material, tendering a question of fact involving the regularity of the drawing of the grand jury that found the indictment against defendant, and the court should have submitted it to the jury for decision under proper instructions.

The other ground of the plea upon which an issue was made and tried by the court is that the grand jury did not select one of its members as foreman of that body. The state attorney replied that the grand jury did select one of its members, to wit, Henry H. Scarlett, as foreman, as shown by the records of the court. The motion to strike out the last paragraph of the replication was properly overruled. Defendant had the right to test the legal sufficiency of the replication by demurrer, but he had no right to have the court strike out a clause in it, and leave the remainder as a pleading. The issue tendered on the replication is that Henry H. Scarlett, a member of the grand jury, was elected as its foreman, as shown by the records of the court; and this presented an issue to be tried by the court on an inspection of the record, and not one to be submitted to a jury. *Chase v. State*, 46 Miss. 683; *Atkins v. State*, 16 Ark. 568. Considering the issue on this part of the plea as we find it, the court committed no error in its ruling thereon.

The indictment returned against the defendant is indorsed, "A true bill," and signed by "Henry H. Scarlett, Foreman," and the record of the court in reference to the organization of the grand jury, copied into the transcript, recites that the jurors (naming them), having been sworn touching their qualifications as jurors, were found qualified, and that said grand jurors retired to their room in charge of a sworn bailiff to select their foreman, and returned into court, and reported that they had selected Henry H. Scarlett as their foreman. It is then recited that the oath prescribed for grand jurors was taken by Scarlett and one other member, and after them the proper oath was administered to the others. The defendant introduced Scarlett, and he testified, without objection, that after the members of the grand jury had been examined and found qualified to serve as grand jurors, but before taking the oath prescribed by law for them to take before entering upon the discharge of their duties as grand jurors, they elected him to act as foreman of the grand jury, and, after he had been elected, the grand jury returned to the court room, and took the oath prescribed by law; that thereupon the court charged them, and they retired to their room, elected a clerk, and proceeded to investigate the matters brought before them;

and that there was no election of a member of said grand jury to act as foreman after the final oath had been taken, as stated. The point that counsel for defendant insist on under the ground of the plea now being considered is that before a grand jury is sworn it cannot elect a foreman or do anything else in the capacity of a grand jury. The statute provides that "the grand jury shall select its own foreman" (section 2809, Rev. St.), and it is contended that the grand jury, in contemplation of this statute, means a duly organized and sworn body. Whatever force there may be in this view, it can be of no avail, we think, to the defendant in this case. The record shows that Scarlett acted as foreman of the grand jury after it was duly organized and sworn, and that he was so recognized by that body as well as the court. This, in our judgment, would be a ratification of the former election, if it was not competent for the grand jury to make the selection when it did.

There are many assignments of error made in this case, based upon the drawing, summoning, and impaneling of the petit jury that returned the verdict against the defendant; but in view of the fact that the judgment must be reversed on account of the error shown, and another that will be pointed out, we refrain from any discussion of these assignments of error. What is here said is deemed sufficient to guide the court in reference to the objections as to the validity of the indictment.

The error referred to relates to the exclusion of testimony desired to be brought out on behalf of the defendant. The deceased was shot in a small room by the defendant, as the latter was leaving the room, and as he was at or near a door opening into the room. There was evidence of a difficulty between these parties in the room before the shooting. The defendant, in his statement, said that he was struck in his left side by the deceased, without provocation, and tumbled over a chair, and, when he fell over, deceased rushed up and kicked him in his left side, and drew a knife on him. In rebuttal the state introduced a witness who stated that he was in the room at the time of the difficulty between the deceased and defendant. He was asked if the deceased kicked the defendant during any part of the difficulty, to which the witness replied, "I never saw him." He was requested to answer "Yes" or "No," and said "No." He also stated that, if the deceased had kicked defendant, he (witness) would have seen it. On cross-examination, counsel for defendant asked the witness if he saw the deceased strike the defendant, and on objection of the state, this question was excluded. Exception to the ruling of the court was properly made, and the ruling is assigned as error here. We do not see how this ruling can be sustained. The question excluded bore upon a material phase of the defense. Ac-

cording to the defendant's statement, the fatal shot was fired immediately after he had been knocked over a chair, kicked in the side, and pursued by the deceased to the door with a knife in his hand. It was competent and clearly material for the defendant to show, if he could, that the deceased struck him in the room just before the shooting, and such evidence would be proper on the question of premeditation, if for no other purpose. It is directly connected with the examination in chief, and relates to a part of the same transaction there brought out. It was error to exclude this question. *Williams v. State*, 32 Fla. 315, 13 South. 834. We have not fully considered the special charge given to the jury by the court at the instance of the state, but deem it proper to call the attention of the court to it for further consideration, should it be requested on another trial.

The judgment is reversed, and a new trial awarded, and it will be so ordered.

(33 Fla. 606)

JACKSONVILLE, T. & K. W. RY. CO. v. ADAMS et al.

(Supreme Court of Florida. May 1, 1894.)

EMINENT DOMAIN — ASCERTAINMENT OF COMPENSATION—JURY TRIAL—CONSTITUTIONAL LAW.

1. The purpose of the provision of section 29 of article 16 of the constitution, that compensation for property appropriated to the use of any corporation or individual shall be ascertained by a jury of 12 men in a court of competent jurisdiction, as shall be prescribed by law, is that there shall be the concurrent judgment of the 12 as to what is just compensation. The legislature cannot make the judgment of less than 12 competent to answer the requirement of the constitution. The words, "as shall be prescribed by law," relate to procedure, and do not authorize any change or impairment of the agency by which compensation is to be fixed.

2. The provision that a majority of the jury of 12 may determine all matters before them, to be found in the act of June 8, 1887, amending certain sections of the act of February 12, 1885, regulating the condemnation of lands for the use of railroads, is in conflict with section 29 of article 16 of the constitution, in so far as the latter section ordains that the compensation for property appropriated to the use of a corporation or individual shall be ascertained by a jury of 12 men in a court of competent jurisdiction, and is void; yet such void provision does not impair the validity or efficiency of the other provisions of the act of 1887.

3. The act of February 12, 1885, regulating the condemnation of lands for the use of railroads, provided that compensation should be ascertained by six disinterested freeholders, registered voters of the county, they being styled "commissioners." It was composed of nine sections, and was of itself a complete statute. The constitution of 1885 became operative January 1, 1887. *Held*, that the provision of this constitution that compensation for property appropriated to the use of a corporation or individual shall be ascertained by a jury of 12 men, in a court of competent jurisdiction (section 29, art. 16), did not have the effect to render the act of 1885 incapable of amendment by legislation subsequent to the taking effect of the constitution, so as to make it conform to the provisions of section 29 of article 16 of the constitution.

4. The act of February 12, 1885, regulating the condemnation of lands, as amended by the v.1580.no.9—17

statute of June 8, 1887, does not offend the clause of the constitution prohibiting special or local laws for summoning grand or petit jurors.

5. A report of a jury, under the act of February 12, 1885, regulating the condemnation of lands, as amended by the act of June 8, 1887, was signed by each of the 12 jurors, but contained this statement: "This report and verdict are concurred in by ten of the jurors." *Held*, that the report was evidence that ten jurors, and no more, concurred in the finding.

6. That an appeal lies from an order of the circuit court dismissing a proceeding under the act for the condemnation of land for railroad purposes, as amended in 1887, has been adjudicated already in this cause. 11 South. 169, 29 Fla. 260.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Proceeding by the Jacksonville, Tampa & Key West Railway Company against Charles S. Adams, administrator, and others. From an order, in effect, dismissing the proceeding, said railway company appeals. Reversed.

J. R. Parrott, Hamlin & Stewart, and T. M. Day, Jr. for appellant. A. W. Cockrell & Son, for appellees.

RANEY, O. J. The following provisions are to be found in our constitution: The right of trial by jury shall be secured to all, and remain inviolate forever. Section 3, Declaration of Rights. The number of jurors for the trial of causes in any court may be fixed by law, but shall not be less than six in any case. Section 38, art. 5. No private property, nor right of way, shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of 12 men in a court of competent jurisdiction, as shall be prescribed by law. Section 29, art. 16. This constitution became operative on January 1, 1887; and the statute regulating the condemnation of lands for the use of railroads which was of force at this time was that of February 12, 1885 (chapter 3595 of our Laws). Under it the appraisalment was to be made by "six disinterested freeholders, registered voters of the county in which the land is situated," the statute designating them as "commissioners." The first legislature that assembled under the constitution referred to enacted the statute of June 8, 1887, c. 3712, amending certain sections of the above act of February 12, 1885, and providing that on the presentation of the petition the judge of the circuit court should make an order for the summoning of 12 disinterested freeholders, registered voters of the county in which the land is situated, as a jury, to appraise and value the said land, on their oaths well and truly so to do, and to affix the amount of compensation to be made to the owner or owners of the land. It also provided that the jury should view the land

described in the petition, hear the allegations of the parties, and appraise, ascertain, and determine the value of each tract or parcel of land proposed to be taken, with the value of the improvements thereon, and each separate estate therein, and the damage that will be sustained by the owner or owners by reason of the taking thereof, and they shall fix the amount of the compensation to be made to each of the owners thereof; and, further, "a majority of the jury may determine all matters before them."

The act of 1885 was composed of nine sections, and was, of itself, a complete act. The act of 1887 is an act to amend the 2d, 3d, 4th, 5th, 6th, and 7th sections of the former statute. One of the contentions of Adams' counsel is that the statute of 1885 was entirely repealed by the new constitution, as that statute provided for a divestiture of the owner's interest in the land by the act of six commissioners, and the constitution substituted the different agency of a jury, as indicated above, and hence that the designated sections were incapable of amendment, and the act of 1887 was absolutely void. In support of this contention, such counsel cite the case of *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962, where, in 1889, a statute was passed which purported to amend a specified section of an act approved April 10, 1872, but the stated section had been amended by the enactment of a distinct and complete section in 1887; and it was held that, as the amendment of 1887 was a repeal of the original section, such section was not in existence, nor the subject of amendment, in 1889, and hence that the amendment of 1889 was of no effect. To avoid any erroneous inference from the statement of the doctrine of this case, we should not fail to remember that in Florida the adjudicated law is that, where a section of a statute is amended expressly,—as by an enactment that it "shall read as follows," the amendment desired following,—the amendatory section becomes, for future purposes, including those of subsequent amendment or repeal, the named section of the first act. *Basnett v. City of Jacksonville*, 19 Fla. 664; *Saunders v. Provisional Municipality*, 24 Fla. 226, 4 South. 801; section 15, art. 3, Const. However, we do not think that section 29 of article 16 of the constitution, *supra*, had the effect to strike down or abrogate entirely the act of 1885, or those sections of it amended by the act of 1887. On the contrary, our judgment is that the stated section of the constitution merely rendered invalid and inoperative those clauses of the act which provided for an ascertainment of the damages by commissioners, and the act, as thus affected, was amenable to make it conform to the provisions of section 29 of article 16 of the constitution. *State v. Monmouth Plank-Road Co.*, 26 N. J. Law, 99; *State v. Seymour*, 35 N. J. Law, 47; *Bonaparte v. Railroad Co.*, 1 Bald. 205, Fed. Cas. No. 1,617;

McCauley v. Weller, 12 Cal. 500; *Railroad Co. v. Turner*, 31 Ark. 494. We find neither authority nor good reason to the contrary of this conclusion.

The purpose of the last-mentioned provision of our constitution (section 29 of article 16), in so far as it provides that the compensation to the landowner shall be ascertained by a jury of 12 men in a court of competent jurisdiction, is that there shall be the concurrent judgment of the 12 as to what is a just compensation in any case. We appreciate the arguments to the contrary, founded upon both the existence of the former system of commissioners as the proper agency for fixing the damages, and the subordination of the same to the legislative will (*Cruger v. Railroad Co.*, 12 N. Y. 190; *Menges v. City of Albany*, 56 N. Y. 378), but our judgment is that the essential guaranty of the constitution, in substituting for it a jury of 12 men, was to secure to the landowner the protection of the judgment of this number; and to permit the judgment of a smaller number to control is not to be reconciled to either the meaning of the language used or to the intent shown by it and the change which has been made. If the legislature can authorize a majority of the jury to ascertain the compensation, or determine the matters before them, they can give the same power to less than a majority. A concession to the legislature of power to make the judgment of less than the entire 12 competent to answer the requirement of the constitution is a surrender of all protection from the prescription of the stated number, and renders this feature of our organic law a useless declaration. The words, "as shall be prescribed by law," at the end of the section, relate to the procedure in such cases, but do not authorize any change or impairment of the agency by which the compensation is to be fixed.

In *Railway Co. v. Hock*, 118 Ill. 587, 9 N. E. 205, where the provision of the constitution of 1870 was: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law,"—and where it was held that the right to a jury might be waived, it was said that this section of the constitution "was, no doubt, intended as a new protection to the citizen; one not theretofore enjoyed; an additional safeguard placed in the hands of the citizen, to which he might resort when a necessity seemed to exist to afford him full compensation for property" taken. To this we may add that to permit legislation doing away with the necessity for a concurrence of the 12 would, in our judgment, remove all "additional safeguard."

The provision of the act of 1887, "A majority of the jury may determine all matters before them," at least, as applied to fixing the amount of compensation to which the

landowner is entitled, is void; but it is so distinct and severable from the other provisions of the statute as not to impair their validity or efficiency, or the practical operation of the statute as a means for condemning lands for the purposes contemplated, and of ascertaining, through the agency of a jury of 12 men, in a court of competent jurisdiction, the amount of compensation to which the landowner is entitled. The decision and reasoning of this court in the cases of *Donald v. State*, 31 Fla. 255, 12 South. 695, and *English v. State*, 31 Fla. 340, 12 South. 689, are conclusive of this question. There a statute provided that every grand jury should consist of 12 persons, and the assent of 8 of them be necessary to the finding of an indictment; and it was held the act was valid, in so far as it provided that the jury should consist of 12 persons, although the clause requiring the assent of only 8 to the finding of an indictment was declared to be unconstitutional and void.

It appears from the record before us that the report of the jury of their proceedings concerning the land, in which is their verdict as to the amount or award of compensation due for the land, is signed by each of the 12 persons, but it contains this statement: "This report and verdict are concurred in by ten of the jurors." We are unable to conclude that the fact of the signing of it by the 12 can be taken, notwithstanding the above statement, as evidence that the entire 12 concurred in the finding, but our judgment is that the signing of all is their attestation of the truth of what is stated in the body of the report, and that 10, but not more, concurred in the finding. The only natural and safe conclusion is that only 10 concurred in it. There is no evidence that any more did. Because of the concurrence of only 10, we think the judge should have refused to confirm the report.

The contention that the legislation under discussion offends section 20 of article 3 of the constitution is unsound. That section ordains that the legislature shall not pass special or local laws providing for summoning grand and petit juries. This jury is neither a "grand" nor a "petit" jury, in the sense in which those terms are there used. Such juries as these constitute a distinct class, of themselves; and the statute is applicable to all cases of the class covered by the statute, and is neither special nor local in its operation or effect, within the meaning of the named section of the constitution.

The statute of 1887, § 4, provides that should the owner or owners show, on the hearing on the report, good cause why the report should not be confirmed, the judge shall refuse to confirm the same, and he shall order and cause to be taken such further proceedings in the matter, not inconsistent with the act, as, in his judgment, right and justice demand. The judge erred in so far as this order declared the law to be un-

constitutional, and refused to order further proceedings under the act. In view of the conclusion of this opinion as to the majority clause set out above, there should have been further proceedings.

The proceeding is one in the circuit court, as distinguished from one before the circuit judge. They are instituted and conducted in that court, and the acts of the judge are as the judge thereof, his orders and decrees being required to be recorded in the chancery order book thereof, and such orders and decrees or judgments are appealable, as any other chancery order. This has already been decided in this cause. *Railway Co. v. Adams*, 29 Fla. 260, 11 South. 169.

In view of what has been decided in *Railroad Co. v. Craver*, 32 Fla. 28, 13 South. 444, it is unnecessary for us to say more on the general subject of procedure in such cases.

Our conclusion is that the order appealed from, in so far as it, in effect, dismissed the proceeding, is erroneous, and should be reversed, and the cause remanded for further proceedings according to the law and practice in such cases. It will be ordered accordingly.

(33 Fla. 523)

GOULD et al. v. CARR et al.

(Supreme Court of Florida. May 1, 1894.)

ADVERSE POSSESSION—INTERRUPTION BY FORCE—REAL ACTIONS—DEATH OF PLAINTIFF—ABATEMENT AND REVIVAL.

1. The establishment of a uniform rule, by the commissioners acting under the act of congress for the collection of direct taxes, that they would receive such taxes from no one but the owner of the land in person, avoids a sale by said commissioners under such proceedings, and a tender of the taxes was made unnecessary by such a rule.

2. The possession necessary to confer title under an adverse holding must be actual, continuous, and adverse to the legal title for the statutory period to bar the suit, and the adverse possessor must not yield or surrender his possession under the pressure of any legal procedure instituted to oust him, which he can successfully resist; and if he does so, and an entry adverse to him is made, the continuity of his possession will be broken. Contra, as to adverse possession interrupted by force or violence, and promptly regained by legal methods. *Townsend v. Edwards*, 6 South. 212, 25 Fla. 582, examined and limited.

3. At common law, the death of a sole plaintiff in real actions before judgment abated the suit, and such actions can only be revived in the name of the heir at law in whose favor a new cause of action arises upon the death of the ancestor by legislative authority.

4. The act of November, 1828 (section 77, p. 830, McClell. Dig.), declaring what actions shall die with the person and what shall survive, provides that those that do survive may be maintained in the names of the representatives of the deceased. Real actions are among those that survive the death of a plaintiff; and under rules 94 and 95, specially made for the government of circuit courts in actions of ejectment, such an action may be revived in the names of the heirs at law.

(Syllabus by the Court.)

Appeal from circuit court, St. Johns county; James M. Baker, Judge.

Ejectment by James M. Gould, for the use of Jacob Vanderpool, against Henry and Wiley Jenkins, and Henry Emmerly and J. T. Carr, executors of Delphi Emmerly. Said Gould and Vanderpool having died, Rutledge Gould and others, heirs at law, and George Vanderpool, administrator, were made parties plaintiff. From a judgment for defendants, plaintiffs appeal. Reversed.

A suit of ejectment was instituted on the 3d day of January, 1876, in the circuit court for St. Johns county, by James M. Gould, for the use of Jacob Vanderpool, against Henry and Wiley Jenkins, to recover possession of a certain described lot of land situated in the city of St. Augustine, in said county.

The plea of not guilty, and also a further plea that neither the plaintiff, his ancestor, predecessor, or grantor, had been seized or possessed of the premises in question within seven years before the commencement of the suit, were filed by the named defendants on the rule day in March, 1876, and no further proceedings were had in the case till February, 1889. Notice was served on counsel for defendants on the 16th day of February, 1889, that application would be made to the circuit judge on the 25th day of that month for an order making George B. Vanderpool, administrator of the estate of Jacob Vanderpool, deceased, and Rutledge Gould, Edward Gould, James Gould, Hester Flynt, Sarah Gould, and Lydia Gould, heirs at law of James M. Gould, deceased, plaintiffs in said suit, upon the suggestion of the deaths of the original plaintiffs. An order was made on the 26th of the same month, reciting that the deaths of James M. Gould and Jacob Vanderpool had been suggested, and that a certified copy of the letters of administration granted to George B. Vanderpool on the estate of Jacob Vanderpool, deceased, had been filed, and directing that the said heirs at law of James M. Gould, deceased, be made parties plaintiff in the suit in place of the said decedent Gould, and that George B. Vanderpool, administrator, be made party plaintiff in place of Jacob Vanderpool, deceased.

Subsequently the cause was referred to John C. Cooper, Esq., an attorney at law, as referee, for trial, and the following agreement in writing, signed by counsel for plaintiffs and defendants, was filed in the case with the referee, viz:

"In Circuit Court, St. Johns County. Rutledge Gould et al., for Use of Geo. B. Vanderpool, Admr., &c., vs. Henry Jenkins, Wiley Jenkins, Henry Emmerly and John T. Carr, Executors, &c., of the Estate of Delphi Emmerly. Stipulation of Parties.

"It is hereby stipulated and agreed by the parties to the above action as follows, to wit:

"First. That the lands and premises in controversy in said action were sold in December, A. D. 1863, for taxes under the direct tax laws of the United States of America then in force; that at said sale James W. Allen became the purchaser, to whom a certificate of

purchase was issued by the tax commissioners under said laws; and that on or about January 4, 1864, the said James W. Allen, for value received, assigned and transferred such certificate to one Edmund Hill, who was at once admitted to the possession of the said lands and premises by the said Allen. This admission shall not prejudice the plaintiffs from making proof of any fact or facts that will impeach the validity of such sale.

"Second. That Edmund Hill, on or about the 16th of April, A. D. 1881, being then in full possession, executed and delivered to Delphi Emmerly, his daughter, a deed of conveyance of the said lands and premises, whereby all the right, title, interest, and estate of said Hill in said lands were conveyed to said Emmerly; that under such conveyance the said Emmerly was let into the possession of said lands and premises, and held the possession thereof until she died, to wit, 16th day of February, 1886.

"Third. That on the 22d day of December, A. D. 1885, Delphi Emmerly duly executed her last will and testament, whereby she devised the said lands and premises to her two children, Edward M. Thomas and E. M. Emmerly; that by said will the defendants Henry M. Emmerly and John T. Carr were duly appointed executors thereof, and that they duly qualified as such executors on the — day of —, A. D. 1886, and thereupon entered upon the discharge of their duties as such executors; that said will was duly admitted to probate in the proper office, and was properly executed.

"Fourth. That Edmund Hill died before the death of the said Delphi Emmerly.

"Sixth. That the plaintiffs, who sue for the use of Geo. B. Vanderpool, as administrator of Jacob Vanderpool, are the lawful heirs at law of James M. Gould, and that on and prior to December 21, 1863, the said James M. Gould was lawfully in possession of the said land and premises under a valid claim of title as sole heir of Elias B. Gould, deceased.

"Seventh. That James M. Gould and Jacob Vanderpool are dead, and that Geo. B. Vanderpool is the duly-constituted administrator of the estate of the said Jacob Vanderpool, deceased.

"Eighth. That on or about the 13th day of March, A. D. 1870, the said James M. Gould executed and delivered to Jacob Vanderpool a deed of conveyance of said lands and premises, and that, at the time of the execution and delivery of said deed, Edmund Hill was in the possession of the said lands and premises, claiming adversely and in hostility to the title of the said James M. Gould, who conveyed all his right, title, and interest in the lands to said Vanderpool.

"Ninth. That John T. Carr and Henry M. Emmerly, as executors, etc., shall duly appear and be made parties defendant to said action before the trial thereof."

In compliance with the stipulation, Henry

M. Emmerly and John T. Carr, as executors of the will of Delphi Emmerly, deceased, appeared, and filed a plea of not guilty.

The second plea of the defendants Henry and Wiley Jenkins, setting up the statute of limitations, was stricken out by the referee on motion of plaintiffs, on the ground that such defense could be proven under the general issue, and, upon final hearing, judgment was rendered in favor of defendants. Plaintiffs appealed to this court.

The other facts necessary to be stated will appear in the opinion of the court.

Rude & Dewhurst, for appellants. H. Blsbee, for appellees.

MABRY, J. (after stating the facts). It appears from the admitted facts and the testimony in this case that James M. Gould, as sole heir of Elias Gould, deceased, was rightful owner and in possession of the lot of land in question on the 21st day of December, 1863, and that the lot was sold in that month, under the direct tax laws of the United States, to James W. Allen, who received a certificate of purchase from the tax commissioners, and in January, 1864, conveyed the lot to Edmund Hill. Hill immediately took possession of the lot under his purchase from Allen, and remained in possession until the 30th day of October, 1871, when he was dispossessed by the sheriff of St. Johns county by virtue of a writ of possession based upon a judgment in ejectment for the possession of said lot, rendered on the 25th day of that month, in favor of Jacob Vanderpool, and against Hill. Vanderpool's action of ejectment was based upon a deed of conveyance of the lot to him from James M. Gould, bearing date March 13, 1870; but it is conceded that, at the time of Gould's conveyance to Vanderpool, Hill was in the actual, adverse, and hostile possession of the lot. After Vanderpool had been put into possession, which, it appears, was five days after the rendition of the judgment in ejectment, Hill prosecuted an appeal to this court, and succeeded in having the judgment reversed, and a new trial awarded. *Hill v. Vanderpool*, 15 Fla. 128. After the reversal of the judgment, Hill was restored to the possession of the lot on the 9th day of June, 1875, by virtue of a writ of restitution issued by the circuit judge to the sheriff and Hill; and those claiming under him and his title have been in possession ever since.

On September 22, 1875, Jacob Vanderpool entered a nonsuit in his ejectment action against Hill, and on the 3d day of January, 1876, suit of ejectment was commenced for the possession of the lot in the name of James M. Gould, for the use of Jacob Vanderpool, against Henry and Wiley Jenkins, and out of this suit have grown the proceedings now before us. Pleas were filed for Henry and Wiley Jenkins in March, 1876. James M. Gould died on the 4th day of Feb-

ruary, 1878. Jacob Vanderpool died some time between 1876 and April, 1883, and the proceedings to revive the suit in the names of the heirs at law of Gould and the administrator of Vanderpool, as shown by the statement herewith filed, were had in February, 1889.

Hill conveyed the lot, in 1881, to Delphi, his only child, who first married Thomas, and, after his death, H. M. Emmerly, and she died in February, 1886, leaving a will in which John T. Carr and H. M. Emmerly are named executors. Hill died between 1881 and 1885, and during the lifetime of his daughter, Delphi.

The tax sale to Allen in 1863, under the direct tax proceedings, was void. If it cannot be affirmed, on the testimony before us, that a tender of the taxes assessed on the lot of land, and for which it was sold, had been made before sale, it is clearly shown, we think, that the tax commissioners, or a majority of them, before the sale was made, established a uniform rule that they would receive the taxes assessed on property in the city of St. Augustine from no one but the owner in person, and that, where such owner was in the Confederate lines, he was required to appear in person, and pay his own taxes. Under the decision of *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, and authorities there cited, the tax sale in question was void. This point is not much insisted on by counsel for appellees, but the main reliance for an affirmance of the judgment is placed upon an adverse possession of the lot by Hill and those claiming under him for the statutory period to bar the suit.

The principal contentions for appellee are—First, that Hill's possession was not interrupted in consequence of his dispossession from October, 1871, to June, 1875, by virtue of the writ issued on the Jacob Vanderpool judgment subsequently reversed; and, second, should this not be correct, the proceedings in the names of the heirs of James M. Gould, deceased, cannot be regarded as a revivor of the suit commenced by said decedent, but must be considered as a new suit by the heirs from the time they were made parties plaintiff, and that the statute of limitations will run against them from the death of their ancestor up to the commencement of their suit. An examination of the testimony has satisfied us that the possession of Hill from January, 1864, up to the time he was dispossessed, in 1871, was adverse, and that his possession after his restoration, in 1875, as well as the possession of those claiming under him since, has been adverse and hostile to both Gould and Vanderpool, and all others, and will sustain a claim of title by adverse possession, if the limitations of the statute as to time have been fully met. If Hill's possession was not broken by his dispossession in 1871, and he and those claiming under him must be considered as still in possession from that time on, it is clear that the

action commenced by Gould in January, 1876, was barred. The statute of limitations of 1872 went into effect on the 27th day of February of that year, and the action against Hill, if we consider him as remaining in possession, would have been barred in six months from the approval of the act. *Spencer v. McBride*, 14 Fla. 403; *Wade v. Doyle*, 17 Fla. 522. If Hill's dispossession operated to break his adverse holding, then it commenced anew from the time he was restored to possession in 1875. Suit was not brought by Gould within six months from the approval of the act, and hence the necessity of deciding the effect of Hill's dislodgment under the ejectment suit instituted by Vanderpool. The deed from Gould to Vanderpool in 1870 was void as to Hill, for the reason that the latter was then in adverse possession of the lot. *Levy v. Cox*, 22 Fla. 546; *Edwards v. Parkhurst*, 21 Vt. 472; *Hamilton v. Wright*, 37 N. Y. 502; *Betsey v. Torrance*, 34 Miss. 132. The case was not reversed in this court on this account, but the facts stated are admitted, and Vanderpool, realizing his situation, entered a nonsuit. The character of adverse possession essential to give title to land has been several times considered by this court, but the facts of the cases considered did not necessitate a decision of the point now presented. *Wade v. Doyle*, supra; *Seymour v. Creswell*, 18 Fla. 29; *Townsend v. Edwards*, 25 Fla. 582, 6 South. 212; and *Watrous v. Morrison*, 33 Fla. —, 14 South. 805. It is said in *Townsend v. Edwards*, in speaking of adverse possession: "If interrupted, even by fraud or force, and the possession be recovered by a peaceable or forcible entry or by process of law, the continuity is broken, and the statute begins to run only from the time of the re-entry." This, however, was said in argument, as will be seen by an examination of the case, its facts not calling for a decision of the point. In Missouri it has been decided that a forcible entry by the owner upon an actual adverse possession of another does not interrupt such possession, if an action for the forcible entry is commenced within a reasonable time, and prosecuted to a successful termination. *Ferguson v. Bartholomew*, 67 Mo. 212; *Cary v. Edmonds*, 71 Mo. 523. In a case in Ohio it appeared that the adverse claimant improved a part of the tract, and continuously occupied it by tenants from the spring of the year 1845 to the winter of 1863-64, when the house on the place was torn down by neighbors on account of objectionable tenants placed on the land, and the material of the building was moved away by the tenants early in 1864. About the same time most of the fencing was stolen, and the greater part of the cleared land was common. It also appeared that, from the time the house was pulled down to the spring of 1865, no tenant actually resided on the land, but during that time the claimant, through his agent, continued to pay taxes, and to exercise all other acts of owner-

ship and control that were possible under the circumstances. No intention of abandoning the property was entertained, nor was any adverse entry or claim made. It was said by the court that no principle of law or equity would make such acts of lawlessness inure to the advantage of the plaintiffs. *Clark v. Potter*, 32 Ohio St. 49. Decisions in Alabama affirm that the forcible interruption by a naked trespasser redressed by legal remedies will not, as to him, avail to break the continuity of an adverse possession. *Ladd v. Dubroca*, 61 Ala. 25; *Beard v. Ryan*, 78 Ala. 37. In harmony with the views expressed in the decisions referred to is an able opinion of Judge Dillon in the case of *City of Pella v. Scholte*, 24 Iowa, 283. No one, it would seem, should be allowed to avail himself of the advantages of the law which he has gained by its violation. But Vanderpool did not oust Hill by force. He was turned out by virtue of a writ of possession based upon a judgment in ejectment, subsequently reversed, it is true, and afterwards the suit discontinued. It is insisted that, before such ouster can be considered as a break of Hill's possession, it must be shown that the suit was successfully prosecuted, and resulted finally in a change of possession. There is authority for the position that a judgment in ejectment establishes simply the right of plaintiff to the possession of the land sued for; and unless it is followed by entry into possession, either by writ of possession, or without it with the consent, surrender, or abandonment of defendant, such judgment can have no effect on defendant's continued and uninterrupted adverse possession for the prescriptive period. *Bright v. Stevens*, 1 Houst. 240; *Jackson v. Haviland*, 13 Johns. 229; *Carpenter v. Mining Co.*, 63 Cal. 616; *Smith v. Trabue*, 1 McLean, 87 Fed. Cas. No. 13,116; *Kennedy v. Reynolds*, 27 Ala. 364. There are decisions to the contrary. There was no ultimate recovery by Vanderpool in his suit, and the possession which he gained on the judgment in the trial court was restored to Hill, but there was an actual possession by Vanderpool from October, 1871, to June, 1875. Counsel have not cited, nor have we been able to find, a direct adjudication as to the effect of such a possession on the adverse claim of an occupant. The statute declares that, in actions of the character of this one, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for seven years before the commencement of such action. There is here a clear requirement of a continuity of possession on the part of the adverse claimant. It is said in *Groft v. Weakland*, 34 Pa. St. 304, that if there be one element more

distinctly material than another in conferring title, where all requisites are so, it is the existence of a continuous adverse possession for the statutory period. The adverse claimant must "keep his flag flying, and present a hostile front to adverse pretensions." *Stephens v. Leach*, 19 Pa. St. 262. The rule is stated in *Core v. Faupell*, 24 W. Va. 238, as follows, viz.: "Upon every discontinuance of the possession of the wrongdoer, the possession of the rightful owner is, by operation of law restored, and nothing short of an actual adverse and continuous possession for the statutory period can destroy his right or vest title in the wrongdoer. * * * He must show that such adverse possession has been continued, consecutive, and unbroken for the statutory period. It is something done by him, not merely that which is left undone by the owner, that is to be considered. There can be no constructive adverse possession against the owner when there is no actual possession which he could treat as a trespass and bring an action for. Unless the adverse claimant is so in possession of the land that he may at any time be sued as trespasser, the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there, so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations." To the same effect is the decision in *Malloy v. Bruden*, 86 N. C. 251. The supreme court of the United States, held, in *Armstrong v. Morrill*, 14 Wall. 120, that where lands owned by one individual, but in the adverse possession of another, were forfeited to the state, and subsequently redeemed by the owner by virtue of a private act of the legislature, the continuity of the adverse possession was broken in point of law, and that such possession, though it might have been in fact continuous, was neither restored upon the redemption so far as to be continuous in law, nor was it so affected as that the person holding adversely could tack the adverse possession prior to the forfeiture to the possession subsequent to the redemption, and so make out a term of adverse possession. The necessity of the continuity of the adverse possession is emphasized in this case. An adverse claimant who was driven from the premises by Indians, and resumed possession as soon as it was safe to do so, was not permitted to compute the period of his absence under the plea of the statute of limitations. *Fitch v. Boyer*, 51 Tex. 336. A possession vacated in obedience to a military order compelling all citizens who adhered to the Mexican cause to leave the country was thereby interrupted. *Holliday v. Cromwell*, 37 Tex. 437. The correct rule, we think, to be deduced from the law on the subject, is that the adverse possessor, the inception of whose title is founded in wrongdoing, must not yield or surrender his possession under the pressure of any legal methods used to oust him, if he can legally prevent it; and

if he does, and an entry adverse to him is made, the continuity of his possession will be broken. Vanderpool's judgment against Hill was rendered on the 25th day of October, 1871, and it appears that two notices of appeal were served,—one on the 1st day of November, 1871, and the other on the 21st day of March, 1873,—and the judgment was reversed in this court at the January term, 1875. The presumption is that the appeal under the first notice was abandoned, and prosecuted under the second. No supersedeas was obtained, and no effort made to avoid or resist the writ of possession issued to put Vanderpool in possession; yet there were legal remedies provided to prevent such a result. So far as we know, Hill took no steps to avoid the serious consequence to him of leaving possession, except of prosecuting the appeal, and we think he should have been prompt to use all legal means to retain the possession of the premises. Furthermore, it will be observed that the statute requires that the premises shall be held adversely to the legal title; and if we were to hold that, as between Vanderpool and Hill, the latter must be regarded as continuing in possession from October, 1871, in analogy to the doctrine already referred to, of not allowing a party to take advantage of a wrong done by himself, still the legal title to the lot, so far as concerned Hill, was in Gould. The view expressed in the West Virginia case referred to is that the adverse claimant must so continue in possession during the statutory period that the owner may sue him for the recovery of the land. The consequences to the owner would be serious if an occupant who had been ousted by a stranger, but afterwards restored to possession, could claim the bar of the statute, when, as a matter of fact, he was not in possession, and could not be sued. The statute cannot admit of such a construction. It may be said that, while Gould's deed to Vanderpool was void as to Hill, and as between Gould and Hill the title was in the former, still it was held beneficially for Vanderpool. If Hill had remained in possession, the opportunity of Gould to sue existed, notwithstanding Vanderpool's suit, and, by relinquishing possession, this opportunity was taken away. Vanderpool may have discovered his mistake in suing, and have urged a suit on the part of Gould if Hill had remained in possession.

The next objection is that the suit could not be revived in the names of the heirs of James M. Gould. Suit was commenced by Gould in January, 1876, against Henry and Wiley Jenkins, and about two years after pleas filed, the plaintiff died. In February, 1880, notice was given of an application to revive the suit in the names of the heirs of Gould, and an order was made by the circuit judge, reviving the suit in their names as plaintiffs. No objection was made to such proceedings, but by consent the executors of Delphi Emmerly appeared, and the case was tried upon

the issues presented by the pleas of not guilty filed by Henry and Wiley Jenkins and said executors. As no objection was made in the trial court to the proceedings to revive the suit in the names of Gould's heirs so long a time after his death, we cannot review such action of the court, provided such revivor could be made. On the record presented, the only question is whether the suit could legally be so revived. Our conclusion is that it could. At common law, the death of a sole plaintiff in real actions, before judgment, abated the suit. *Green v. Watkins*, 6 Wheat. 260; *Macker v. Thomas*, 7 Wheat. 530; *Cutts v. Haskins*, 11 Mass. 56; 2 Tidd, Pr. marg. p. 1117; 1 Com. Dig. 120, H 32. Upon the death of the ancestor, the legal title, under the common-law rule, descends to the heir at law, and thereupon a new cause of action arises in his favor to recover real estate withheld from him. If the suit of an ancestor can be revived upon his death in the name of the heir, it must be done under legislative authority. The provision in the act of February, 1861 (section 74, p. 829, McClel. Dig.), that, "in case of the death of a sole plaintiff, the legal representative of such plaintiff may, by leave of the court, or a judge, enter a suggestion of the death, and that he is such legal representative, the action shall thereupon proceed," may contemplate a revivor in the name of an executor or administrator alone, as contended for by counsel (*Price v. Strange*, Madd. & G. 159); and the thirty-fifth rule of practice for circuit courts, framed under the statute mentioned, seems to add force to such contention. If this be true, it does not follow that the revivor in the names of the heirs at law of Gould was not properly made. The act of November 23, 1828, while it declares what actions shall die with the person and what shall survive, provides that those that do survive may be maintained in the names of the representatives of the deceased. McClel. Dig. p. 830, § 77. The action here is one that does not die with the plaintiff. Rule 94 provides that "in all cases where the rules as to making parties in other actions can not be made applicable to actions in ejectment, and there is no rule in ejectment, or statute controlling the subject, then the persons may be made parties upon motion and notice, in such manner and upon such terms as the judge may direct." The ninety-fifth rule reads as follows: "If in any case there should be a person in interest or possession, other than the executor or administrator of the deceased plaintiff or defendant, who should be made a party plaintiff or defendant to the suit, he may be made a party, after such notice and such manner, and upon such terms as to pleading as the court or judge may direct. Such order may be made in vacation as well as in term." These rules were made by the court under the statute specially for actions of ejectment, which are real actions; and as such actions do not die with the plaintiff,

but may be maintained in the name of the representative, and as the heir is the real representative of the ancestor, it is contemplated by the rule that such heir, being a person in interest, may be made a party, and maintain the suit. The action to be maintained, as contemplated by the rule, is the one commenced by or against the deceased plaintiff or defendant. This being the case, it will be seen that the action before us was commenced about six months after Hill was restored to the possession of the land, in 1875,—the date when his adverse possession began after its former interruption. He cannot tack his last adverse possession to his former holding, and this left him without the requisite statutory bar. The fact that the heir may not be entitled to recover mesne profits for the time the land was held in the lifetime of the ancestor, if such be the case, is no reason why the land itself may not be recovered. The suit was commenced against Henry and Wiley Jenkins in January, A. D. 1876. Pending the suit against them, who were in possession under Hill, the latter conveyed the lot in 1881, to his daughter, whose executors voluntarily appeared and defended the suit in 1889. The commencement of the suit under such circumstances must, of course, date from the time of the institution of the action against Henry and Wiley Jenkins.

For the reasons given, the judgment must be reversed, and a new trial awarded; and it will be so ordered.

(102 Ala. 135)

SULLIVAN v. STATE.

(Supreme Court of Alabama. April 10, 1894.)
JURY IN CAPITAL CASE—HOMICIDE—MANSLAUGHTER.

1. The statute provided that for the trial of a capital felony the court should order the sheriff to summon not less than 50, nor more than 100, persons, including the regular jurors for the week, the court to inquire into and pass on the qualifications of all who appeared in response; the names of all whom it might hold competent to be listed, and the defense to strike 2, and the prosecution 1, till 12 remained, who were to be sworn as the jury. *Held*, that the court had no power, *ex mero motu*, to discharge a person because he had been summoned by a wrong Christian name, and such error would be presumed prejudicial.

2. A dying declaration: "S. cut me. He cut me for nothing. I never did anything to him,"—is not incompetent as an opinion, nor irrelevant to the homicidal act.

3. A part of a dying declaration, "I pray God to forgive him" (defendant), is irrelevant.

4. In a sudden quarrel, one is obliged to retreat if possible, to avoid the necessity of taking life; and any instruction on self-defense in such a case, which does not submit the question of such possibility, is properly refused.

5. It was error to refuse the charge that, before the jury could convict defendant of murder in the second degree, they must be satisfied from the evidence, beyond all reasonable doubt, that defendant unlawfully stabbed deceased, and that he did it willfully or maliciously.

6. Since malice and formed design may be

inferred from the use of a deadly weapon, the court properly refused to charge, on a prosecution for killing with such weapon, that if two persons fight willingly on a sudden quarrel, and one kills the other, the killing is manslaughter; and that if one intentionally does an act calculated to take life, and death is unintentionally produced, it is manslaughter.

Appeal from city court of Selma; J. W. Mabry, Judge.

James M. Sullivan was convicted of murder in the first degree, and appeals. Reversed.

The appellant was indicted and tried for the murder of William L. Emerson, and was convicted of murder in the first degree, and sentenced to the penitentiary for life. Reversed and remanded.

The facts of the case referring to the exceptions reserved by the defendant to the action of the court in excusing one of the jurors are sufficiently stated in the opinion. The testimony for the state tended to show that on November 12, 1892, in one of the streets of Selma, the deceased, William L. Emerson and two other persons, were standing talking; that the defendant came up, "holding his hands in front of his waist, his left hand being held over his right," and, as he came up facing the three, he said: "We have had a big day to-day." To this the deceased replied: "Yes; you have had several big days. You had one when you shot that man in the leg in front of the market house." The defendant responded: "Yes, G—d—you; I don't have to shoot you in the leg;" and at the same time, while standing about two feet from the deceased, the defendant drew a dirk, and plunged it into the breast of the deceased. During all of this time Emerson was standing still, with both hands down by his side in a natural position, had nothing in his hands, and did not curse or make any movement towards the defendant. Immediately after being stabbed, the deceased staggered back, and fell, bleeding copiously from the wound, and called for a doctor. The deceased was then moved from the street to a drug store, and died in about 40 minutes after the cutting. The deceased repeatedly said to one of the witnesses that was standing by him, while he was lying on the floor of the drug store, "that he could not live; that he was dying." After this statement, while lying on said floor, the deceased said: "Jim Sullivan cut me. He cut me for nothing. I never did anything to him. I pray God to forgive him for it." The defendant objected to the introduction in evidence of that part of the deceased's statements that defendant "cut him for nothing," and "I pray God to forgive him," and moved the court to exclude these expressions from the jury, on the ground—First, that they were merely conclusions of the deceased; second, they were the deceased's opinions; third, they did not relate to the circumstances or transactions of the killing. The court overruled this motion of the de-

fendant, and to this ruling the defendant duly excepted.

The testimony for the defendant tended to show that upon coming up to where the deceased was standing with two other people, and the defendant addressing the remark to them, as stated above, the deceased replied to him in an angry manner, and cursed him; that the defendant told the deceased he had no pistol, and to go off and let him alone; that the deceased then started towards the defendant with his left hand raised, and his right hand upon or near his pistol pocket, and, when the deceased got near the defendant, the defendant struck at the deceased with his knife, and that the deceased's hand struck the back of the defendant's hand, and drove the knife into the deceased's breast.

The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that if the defendant did not provoke or encourage the difficulty, but approached the defendant [deceased] in an orderly and peaceful manner, and the deceased replied angrily and insultingly, and advanced towards the defendant, and placed his hands behind him in such manner as to indicate to a reasonable man that his purpose was to draw a pistol, and fire, the defendant was authorized to anticipate him, and stab him; and the rule in such case would not [be] raised, if it should turn out that the deceased was in fact unarmed, as the law of self-defense does not require the defendant to wait until the weapon is presented, ready for deadly execution." (3) "The court charges the jury that if the defendant did not provoke or bring on the difficulty, but approached the deceased in an orderly and peaceful manner, and the deceased replied angrily and insultingly, and advanced towards the defendant with one hand raised, and the other hand placed upon or in the direction of a pistol pocket, in such manner as to indicate to a reasonable man that his purpose was to draw a weapon and use it, the defendant was authorized to anticipate him, and cut first." (6) "The court charges the jury that, before they can convict the defendant of murder in the second degree, they must be satisfied from the evidence, beyond all reasonable doubt, that the defendant unlawfully cut or stabbed W. L. Emerson, and that he did the cutting or stabbing willfully or maliciously." (13) "If two persons fight willingly on a sudden quarrel or provocation, and one kills the other, the statute makes the killing manslaughter in the first degree." (16) "The court charges the jury that if one intentionally does an act calculated to take life, and death is unintentionally produced, the homicide is manslaughter in the first degree." (18) "The court charges the jury that the danger that will excuse one for killing another need not be real or actual. It may now be known that

all the appearances of danger were false, and Emerson never intended to do defendant any harm, and that he did not have a pistol or other deadly weapon; yet, if the jury believe, from all the evidence in this case, that the appearances of danger surrounding the defendant at the time were such as to produce a reasonable belief in the mind of defendant that his life was in danger, or that he was about to suffer great bodily harm, and that there was no other reasonable means at the time, open to the defendant, to avoid the danger, but by taking Emerson's life, the defendant being without fault at the time, the law holds him harmless, and the jury must acquit him, although Emerson may have had no pistol or other deadly weapon."

P. H. Pitts, for appellant. Wm. L. Martin, Atty. Gen., for the State.

BRICKELL, C. J. The court made an order setting the day of trial, and that, with the persons drawn and summoned as petit jurors for the week, other names should be drawn, so as to increase the number to 75, a list of whom were to be served on the defendant. This course was pursued; and on the day of trial, in the process of the organization of the jury, the court was inquiring into and passing upon the qualifications of the persons appearing, in obedience to the summons, to serve as jurors. The name of Theodore Lacy was called, who was one of the regular jurors of the week. He responded, but said that, though summoned by the name of Theodore, his true name was Theophilus Lacy. Thereupon, *ex mero motu*, the court excused or discharged him from service as a juror, to which the defendant excepted.

1. The special statute in relation to the drawing and impaneling of grand and petit jurors, in the county of Dallas, requires that, whenever any person stands indicted for a capital felony, the court must, on the first day of the term, or as soon thereafter as practicable, make an order, conforming to section 4874 of the Code of 1876, commanding the sheriff to summon not less than 50, nor more than 100, persons, including those summoned on the regular juries for the week, from whom the panel for the trial is to be selected. Upon the court, on the day set for the trial, if the cause is ready for trial, is imposed the duty of inquiring into and passing "upon the qualifications of all persons who appear in court in response to the summons to serve as jurors," and to cause the names of all those whom the court may hold to be competent jurors to try the defendant to be placed on lists, and to require the defendant to strike off from the lists 2 names, and the solicitor to strike off 1; and this process is continued until only 12 names remain, who are to be sworn and impaneled as the jury. It is further provided that, "if the sheriff fails to summon any juror drawn, or any ju-

ror summoned fails or refuses to attend the trial, or there is any mistake in the name of any juror drawn or summoned, none or all of these grounds shall be sufficient to quash the venire, or continue the case." Pamph. Acts 1884-85, p. 498. It is obvious that the power the court is authorized to exercise in the process of the organization of the jury is the inquiry into, and determination of, the qualifications as a juror of the person appearing in obedience to the summons. It may doubtless reject any or all who may be subject to any disqualification, or who may not have the statutory qualifications. So, it may probably excuse or discharge any person because of reasons, personal to himself, which would render service as a juror oppressive. Beyond this it is not contemplated by the statute the power which the court may exercise, *ex mero motu*, shall extend. If there be not an absence of the statutory qualifications, or a temporary disqualification, or reasons personal, rendering service as a juror oppressive, the duty of the court is to cause the names of all appearing to be placed on the lists from which the jury is to be selected. A list of all who are to be summoned to appear, the law requires to be served on the defendant. The object is to enable him to prepare for his challenges; to afford him the opportunity of ascertaining whether causes for challenge exist; to exercise intelligently the right of peremptory challenge and the power of selection which the statute confers. *Parsons v. State*, 22 Ala. 50. There should not be interference with this right, further than the statute sanctions. The juror was not incompetent. There was no disqualification; no request to be excused because service would be oppressive. The only reason for his discharge was the misnomer of his Christian name,—a misnomer not affecting his identity, for by it he had been summoned, and to it he responded; an error which, by the express terms of the statute, is immaterial; not ground for quashing the venire, or a continuance of the cause. The court erred in the discharge of the juror. The error, it may be, was not of practical injury to the defendant. We deem it safer, however, to adhere to the long-settled rule that, when error is shown, the presumption of injury arises, which must be clearly repelled by the record, or the judgment will be reversed. 1 Brick. Dig. p. 780, § 100.

2. After the deceased had received the fatal stab, and after he had given up all hope of recovery, he made statements concerning the encounter, which were received in evidence against the objection of the defendant. Such statements—dying declarations—are exceptional testimony, and are received from the necessity of the case; the circumstances and the solemn surroundings being treated as supplying the sanction and restraining force over the declarant which a solemn oath imposes in ordinary cases. But the declarant does not become a general witness. He

can only speak of the transaction which causes the death, and such accompanying acts, statements, and conduct as shed light on it; the *res gestae*, in a strict sense. Anything previously done or said, unless called up and made part of the altercation, cannot be proven as a dying declaration; and, when so called up, it can be proved as such only to the extent it is repeated or uttered in the altercation. It does not legalize any statement by the declarant of the past transaction out of which the difficulty grew. It is only such acts or statements done or uttered at the time of the final, fatal encounter and catastrophe, and which tend to shed light on it as a part of the *res gestae*, which can be so proved. *Fonville v. State*, 91 Ala. 89, 8 South. 688; *Bibb v. State*, 94 Ala. 31, 10 South. 506; *Railroad Co. v. Pearson* (Ala.) 12 South. 176; *Johnston v. State* (Ala.) 10 South. 667. Just before Emerson, the deceased, expired, when he was conscious he was dying, and so expressed himself, he made two declarations, which were offered in evidence as dying declarations. Each was separately objected to, each objection was overruled, the testimony was admitted, and a separate exception was reserved to each ruling. One of the declarations was: "Jim Sullivan cut me. He cut me for nothing. I never did anything to him." The objections made to this testimony were "that it was the conclusion of the declarant,—the opinion of the deceased,—and that it did not relate to the circumstances or transaction of the killing." There is nothing in this objection. The statement certainly did relate to the act or transaction of the killing. The killing was effected by means of an incised wound. All the witnesses concur in that. He also said Sullivan cut him for nothing, and that he (the declarant) did nothing to Sullivan. True, this statement was very general, but it was admissible as a collective fact. 3 Brick. Dig. p. 437, §§ 458, 400, 463, 465. The other part of the declaration was simply a continuation of the former: "I pray God to forgive him." This should have been excluded. It did not in any way relate to, or shed any light on, the act of killing, or that which apparently led to it.

3. It may be that charges numbered 1 and 18, requested by the defendant, find support in charges which were pronounced correct in *De Arman's Case*, 71 Ala. 351. We are nevertheless constrained, in view of the more recent rulings of this court, to declare that the city court properly refused to give them in the form in which they were requested. When an assault is made on a sudden quarrel, and a mutual combat ensues, retreat, if possible, to avoid the threatened danger, is a duty; for, as was said in *Com. v. Drum*, 58 Pa. St. 91, "when it comes to a question whether one man shall flee, or another shall live, the law decides that the former shall flee rather than that the latter shall die." *England v. State*, 52 Ala. 322; *Pierson v. State*,

12 Ala. 149. There may be cases of murderous assault, or of assaults with intent to commit other atrocious felonies, from which it is not the duty of him who is assailed to retreat, or employ any other effort to avoid taking life; but in all cases of sudden combat, to establish excusable homicide in self-defense, it must appear that the party killing had retreated,—had made real effort to avoid the necessity of taking life. Any instruction to the jury in such case, though it may assert every other fact essential to constitute homicide in self-defense, which does not necessitate the inquiry whether retreat or other effort to avoid the taking of life was practicable, is properly refused. *Holmes v. State* (Ala.) 14 South. 864; *Webb v. State* (Ala.) 14 South. 865; *Gibson v. State*, 89 Ala. 121, 8 South. 98; *Cleveland v. State*, 86 Ala. 2, 5 South. 426. For the like reason, charge numbered 3 was properly refused. Charge 6 should have been given. Charges 13 and 16 were rightly refused. The hypothesis of neither of them is a universal truism. Cases falling within each of the postulates might be murder, for there may have been formed design, and the homicide may have resulted from that formed design.* If it did, although Sullivan may have been killing people, yet, according to their language, no matter how deadly the weapon, nor how directly aimed at Emerson, yet, unless the killing was intentional, the crime could not be of higher grade than manslaughter. In other words, no matter how deadly the blow, or how likely to produce death, yet, unless the jury find there was a specific intention to kill, the homicide is only manslaughter. Manslaughter is the unlawful killing of a human being without malice. Every one must be held to intend the known consequences of an intentional act. When life is taken by the direct use of a deadly weapon, if there be nothing else in the transaction,—no justifying or explanatory circumstances,—the presumption is that the killing was done pursuant to a formed design. Malice may be inferred from the use of an instrument known to be liable to produce death. 3 Brick. Dig. p. 216, § 524; *Hadley v. State*, 55 Ala. 31. Reversed and remanded.

HARALSON, J., not sitting.

(102 Ala. 563)

KUHLE v. LONG et al.

(Supreme Court of Alabama. Feb. 13, 1894.)

APPEAL FROM JUSTICE—PRACTICE—EVIDENCE—INSTRUCTIONS.

1. Where the summons in the justice court runs in the name of E. L. and J. L., doing business as L. & Co., they may file their complaint on appeal to the circuit court in their individual names.

2. A complaint filed in the circuit court on appeal before the trial was entered upon is in time.

3. In a suit to recover money paid for taxes, a tax collector's receipt in the firm name is

admissible, though the parties sue in their individual names.

4. After the jury have retired, it is error to give them further instructions, at their request, in the absence of counsel, the court having made no effort to have them called.

5. The objection that the court instructed the jury in the absence of counsel cannot be raised on appeal where it was not urged on motion for new trial.

Appeal from circuit court, Mobile county; James T. Jones, Judge.

Action by Elizabeth Long and another against Mariah M. Kuhl. From a judgment for plaintiffs, defendant appeals. Affirmed.

This was an action of assumpsit to recover the amount paid by the plaintiffs for taxes upon certain property which they had purchased from the defendant. The suit was originally commenced in a justice of the peace court. There was no complaint filed in that court, but in the summons the cause of action was stated as follows: "Amt. due bill taxes, city of Mobile, on property bot. by plaintiff from defendant after January 1, 1892, \$16.40; amount of taxes bill, state and county, Mobile, bot. by plaintiff from defendant after January 1, 1892, \$24.75." The justice of the peace rendered judgment for the plaintiff for \$41.15, the total amount claimed, and the defendant appealed to the circuit court. In the circuit court the plaintiff announced ready, without having filed a complaint in the cause; and thereupon the defendant moved to dismiss the cause for the want of prosecution, and because the plaintiffs had announced themselves ready for trial, and had not filed any complaint, the record showing that the amount claimed by plaintiffs was more than \$20. The court refused this motion, and the defendant duly excepted. The plaintiffs were then allowed by the court to file their complaint, in which they sued individually as Elizabeth Long and Catherine Long, and not as Long & Co., as the summons from the justice of the peace court declared. On the trial of the cause, as is shown by the bill of exceptions, Elizabeth Long, one of the plaintiffs, testified that she and her coplaintiff purchased a certain lot of land from the defendant on January 21, 1892, and that there was a deed executed to them on that date. This witness further testified that she had paid the taxes when the bill for the same was presented to her by the tax collector, and offered to introduce in evidence the receipt of the tax collector for the payment of the same. One of these receipts was made out in the name of "Mrs. Elizabeth Long & Co." To the introduction of this receipt of the tax collector in evidence the defendant objected, because it was immaterial and irrelevant, and because on its face it was not the tax bill of the plaintiffs in this case. The court overruled this objection, admitted the said receipt in evidence, and to this ruling the defendant duly excepted. The testimony for the defendant tended to show that the negotiation for the

purchase of her land by the plaintiffs was carried on by the agents of the respective parties. The agreement of her agent to pay the taxes is copied in the opinion. It was also testified for the defendant that the payment of taxes due upon real estate was, according to usage and custom, in the real-estate business, a matter of special agreement between the vendor and vendee, and that the taxes were usually pro-rated. Upon the introduction of all the evidence, the defendant requested the court to give the general affirmative charge in her behalf, and duly excepted to the court's refusal to give the same. The action of the court in giving additional instructions to the jury in the absence of the defendant's counsel is sufficiently stated in the opinion. After the return of the verdict of the jury for the plaintiffs, the court rendered judgment accordingly; and thereupon the defendant moved the court to set aside the verdict and judgment, and grant her a new trial, upon several grounds, which it is unnecessary to set out in detail. This motion for a new trial was overruled, and the defendant duly excepted. The appeal is prosecuted by the defendant, who assigns as error the rulings of the court upon the evidence, the refusal to give the general affirmative charge for the defendant, the court's refusal to grant a new trial, and the instruction by the court to the jury in the absence of her counsel.

Fredk. G. Bromberg, for appellant. Wm. S. Anderson, for appellees.

COLEMAN, J. On the 21st of January, 1892, Mariah M. Kuhl sold and conveyed by deed, for a present expressed consideration, with covenants of warranty, a certain parcel of land to Elizabeth Long and Catherine Long. Subsequently, the vendees paid the taxes which were assessed against the land for the year 1892. The plaintiffs Long began proceedings in the justice court to recover the amount thus paid for taxes. The lien for taxes attaches to land on the 1st day of January, and this lien holds good against any subsequent alienation. *Driggers v. Cassidy*, 71 Ala. 529; *Swann v. State*, 77 Ala. 545. The summons issued by the justice of the peace commanded the defendant to appear and answer the complaint "of Elizabeth Long and Catherine Long, doing business as Long & Co." The bond given on the appeal from the justice court to the circuit court was made payable "to Elizabeth Long and Catherine Long," and from a judgment "in favor of Elizabeth Long and Catherine Long." There was no error in allowing the plaintiffs to file their complaint in the circuit court in their individual names. The suit was originally brought in their names as shown by the summons. Nor was there any error in overruling the motion to dismiss the suit because no complaint had been filed in the circuit court before the parties announced them-

selves ready for trial. It was filed before the trial was entered upon. The defendant objected to the introduction of the tax collector's receipt, "because immaterial and irrelevant, and because, on its face, it was the bill of Elizabeth Long & Co." There is no merit in this objection. These receipts are evidence tending to show payment and the amount paid, and it was entirely competent to explain the receipts.

The next question presents one of more difficulty. The transaction for the sale of the land was carried on for several days by agents of the respective parties. The vendor, Mariah M. Kuhl, was present at no time. After the agreement for the sale and purchase of the land was agreed upon by their respective agents, the vendor signed the deed for the conveyance of the land, and delivered it to Espalla, her agent, to be delivered upon compliance with the terms of purchase. The vendee, Long, was present to pay the purchase money and to receive the deed. It is in evidence "that the plaintiffs requested that the defendant give her a writing that she would pay all taxes accruing up to January 1, 1892, and Espalla, as agent, executed a writing as follows: "Mobile, Ala., Jany. 25th, 1892. This is to certify that I, Joseph Espalla, Jr., agent Mrs. Maria M. Kuhl, will see that all taxes on the store and lot on the north side of Dauphin street, 3d west of Claiborne street, up to the 1st day of January, 1892, are paid by the said Mariah M. Kuhl. [Signed] Mariah M. Kuhl, Per Joseph Espalla, Jr., Agent." This writing was delivered to plaintiff, and by her accepted. A comparison of the receipt with the deed does not enable us to determine that both instruments refer to the same property. The proof is silent on this question. One bears date January 25, 1892; the deed, January 21, 1892. We are unable to determine from the evidence whether both were delivered at the same time, and when the purchase money was paid, or whether the one bearing the later date was subsequent also in its execution, and independent of the other. If the two were contemporaneous, and related the one to the other as different parts of the same transaction, construing them as one, we think the parties themselves have settled the question of liability. If the parties expressly stipulated that the vendor was to pay all the taxes, which were a lien upon the land, up to January 1, 1892, the principle that "expressio unius est exclusio alterius" would apply. Unless we give this effect to the writing, it could have no operation. On the other hand, if it was executed several days after the sale and purchase were completed, and did not enter into its consideration, without some sufficient consideration it would not be binding, and the parties would stand upon their legal rights and liabilities fixed by the written terms of the contract of sale and purchase. We do not think evidence of any custom among real-

estate brokers admissible to enlarge or diminish or affect the legal rights and liabilities of parties fixed by their written agreement, about which there is no ambiguity.

The burden rests upon appellant to show affirmatively that error was committed by the trial court. The bill of exceptions states that, "after the jury had retired, they returned to the court room, and requested the court to give them further instructions, whilst the defendant's attorney was absent from the court, and the court gave additional instructions to the jury in his absence." We are not willing to give our sanction to a practice of this character. Courts should not instruct juries in the absence of counsel. They are not only deprived of the opportunity to except to such charges, but have no opportunity to ask for explanatory charges, if deemed necessary. We would not be understood as holding that counsel may absent themselves intentionally, and thus interfere with the administration and dispatch of business. Such is not our ruling. Here the jury had been charged and retired. Counsel for the defendant had the right to presume the instructions to the jury were completed, and that none others would be given without notice to him. If the court had caused counsel to be called, or otherwise exercised proper diligence to have him notified to attend, we would not say the court should unreasonably delay the jury or the termination of the cause, on account of the absence of counsel. All the evidence is set out in the bill of exceptions, and it shows that, upon the return of the jury into court for further instructions, the court proceeded to charge them orally, in the absence of counsel, and there is no evidence to show that any attempt was made to notify counsel. The question, however, is not presented in such a shape as to authorize this court to review it. If the appellant had moved the court to grant a new trial, based upon the action of the court in this respect, and his motion had been denied or overruled, and an exception reserved, we would not hesitate to reverse the case, but no such ground is specified in the motion for a new trial. The facts appear in the bill of exceptions, and the bill of exceptions fails to show an exception to the giving of the charge or to the action of the court. Affirmed.

(97 Ala. 54)

NEWSOM v. STATE.

(Supreme Court of Alabama. Nov. Term, 1892-93.)

Appeal from Geneva county court; E. J. Borland, Judge.

Newsom was convicted of carrying a concealed pistol, and appeals. Reversed.

COLEMAN, J. On the authority of the case of Childs v. State, 97 Ala. 49, 12 South. 441, this case is reversed and remanded.

(102 Ala. 628)

LEE v. DE BARDELABEN COAL & IRON CO.

(Supreme Court of Alabama. April 10, 1894.)

REVIEW ON APPEAL—NEW TRIAL—HEARING.

1. Decisions granting new trials will not be reversed unless the evidence plainly supports the verdict.

2. Where the motion for a new trial is made within the 30 days required by statute, the court may continue the hearing beyond such time.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by Sam Lee against the De Bardelaben Coal & Iron Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

B. M. Allen, for appellant. Walker Percy, for appellee.

COLEMAN, J. The appellant, Lee, recovered a judgment against the appellee, which judgment, upon motion of the appellee, was set aside, and a new trial granted. The present appeal is prosecuted from the order of the court granting a new trial. The cause of action was to recover for personal injuries averred to have been sustained by reason of the negligence of the defendant, and was brought under the employers' liability act. The complaint contains three counts. The defendant pleaded the general issue, and also contributory negligence, to the whole complaint. To the defendant's plea of contributory negligence, the plaintiff replied "that defendant knew of plaintiff's dangerous position at the time of said collision, and was guilty of wanton recklessness or gross negligence in running said locomotive engine across, over, upon, or against plaintiff as aforesaid." The defendant joined issue upon this replication. After the evidence had closed the court charged the jury "that the burden of proof is on the defendant to show contributory negligence," which charge was excepted to by the defendant. The court refused to instruct the jury "that plaintiff could not recover unless the jury was reasonably satisfied from the evidence that some one of the train knew that plaintiff was in a dangerous position," etc. If plaintiff had joined issue upon the defendant's plea of contributory negligence, the burden then would have devolved upon the defendant, to make good this plea. *Bromly v. Railroad Co.* (Ala.) 11 South. 341. Instead of joining issue, the plaintiff replied specially. A replication must either traverse, or confess and avoid, the matter pleaded, or present matter of estoppel. *Winter v. Bank*, 54 Ala. 172. A general replication is a joinder in issue on the plea. "A special replication is a brief statement in plain language of the facts relied on as an answer to the plea." Code, § 2688. The defendant is not required to offer evidence in support

of facts averred in the plea, which are confessed in the replication to the plea. In the case of *Dockery v. Day*, 7 Port. (Ala.) 518, the plaintiff declared upon a promissory note, to which the defendant pleaded infancy. The plaintiff replied a subsequent promise. This court held that the introduction of the note by the plaintiff did not authorize a recovery; that, in addition, he must prove a subsequent promise, as averred in his replication; and that the defendant was not required to prove the facts admitted in the replication. The principle is recognized in the case of *Coster v. Brack*, 19 Ala. 210. The replication confessed the facts averred in the plea of contributory negligence, and, to avoid their effect, averred that defendant "knew of plaintiff's dangerous position, * * * and was guilty of wanton recklessness in running the said locomotive engine or cars upon the defendant," etc. In the case of *Railroad Co. v. Johnston*, 79 Ala. 436, the principle was declared that if the complaint averred willful negligence on the part of the conductor, and the proof showed that the conductor was guilty of simple negligence, there was a fatal variance between the complaint and the proof. See *Railroad Co. v. Schaufier*, 75 Ala. 136. The rule declared in *Johnston's Case*, supra, was followed in the cases of *Railroad Co. v. Jacobs*, 92 Ala. 187, 9 South. 320; *Railroad Co. v. Winn*, 93 Ala. 306, 9 South. 509; *Harold v. Jones* (Ala.) 11 South. 747; *Railroad Co. v. Hurt* (Ala.) 13 South. 130. We do not consider the question as to whether the replication was a departure from the original complaint, as there was no objection to its sufficiency and competency. 18 Am. & Eng. Enc. Law, pp. 580, 581. Under the pleadings the court erred in some of the instructions to the jury, and in its refusal to give some of the charges as requested. For these errors the court properly granted a new trial.

There is no merit in the point that the court had no jurisdiction to make the order at the time the verdict was set aside, and a new trial granted. The motion was made within the 30 days required by the statute, and was continued, by an order of the court made within that time, to the day when it was considered by the court.

We purposely refrain from considering the evidence in the case, lest what we say might unduly influence another trial. We simply repeat the rule declared in the case of *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, that "decisions granting new trials will not be reversed unless the evidence plainly and palpably supports the verdict." *Dillard v. Savage* (Ala.) 13 South. 514. On this appeal, we cannot consider the ruling of the court upon the demurrers to the complaint. See, on this point, *Dusenberry's Case*, 94 Ala. 413, 10 South. 274; *Motherhead's Case* (Ala.) 12 South. 714.

Affirmed.

(102 Ala. 635)

GARDNER et al. v. MOBILE & N. W. R. CO.
(Supreme Court of Alabama. May 1, 1894.)

ASSIGNMENT OF JUDGMENT—EXECUTION SALE—
PROPERTY SUBJECT.

1. The assignment of a judgment, though not made in the mode provided by Code, § 2927, passes an equity to the assignee.

2. Special authority of an attorney to assign a judgment, or a ratification of the assignment, may be inferred from the acquiescence of the client therein for several years.

3. Equity will not set aside a sale under execution issued on a judgment barred by limitations, where a seasonable application to quash the writ was not made to the court issuing it.

4. Where a railroad company for 14 years neglected to operate its road or exercise its franchise, and tore up its track, it cannot claim that its right of way, in which it has the fee, is exempt from sale on execution because the corporation was created for the furtherance of public purposes, with which such sale would interfere.

Appeal from chancery court, Mobile county; W. H. Taylor, Chancellor.

Action by the Mobile & Northwestern Railroad Company against Lucy R. Gardner and others. From a decree for complainant, defendants appeal. Reversed.

The prayer of the bill was to cancel and remove certain deeds of conveyance as a cloud on the title to property alleged to belong to the complainant, and for an injunction to prevent the commission of trespasses by some of the defendants. The bill averred that the complainant was incorporated under the general laws of the state of Alabama on July 6, 1870; that, as such corporation, it was authorized to build its road from Mobile in a northwesterly direction, and that for that purpose it had secured for its uses, and for its right of way, certain property described in the bill; that on this said property it had constructed its roadbed, had built bridges, etc., and that for a time it had operated its road thereon. The bill further averred that, for a while, work on the Mobile end of its line had been discontinued, and that work had commenced on the Mississippi division of its road, where something over 20 miles of road was built, which was operated up to a recent period, when the complainant was deprived of the use of that part of its road by the foreclosure of a trust deed given to secure its bonded indebtedness; but that the Alabama corporation has remained in possession of its line of road, and that it has never abandoned its franchises, rights, or property. It was also averred in the bill that adverse claim to some of the property and franchises of the complainant in Mobile county was set up by the respondents; that such adverse claim was founded upon certain deeds from William H. McIntosh, as trustee, who claimed under deeds from the sheriff of Mobile county, to Lucy Gardner, administratrix as aforesaid, and Mary Henry, executrix as aforesaid. It was further averred that the deed from the sheriff to McIntosh, as trustee,

was made pursuant to the sale made by the sheriff on the 8th of October, 1888, under two executions issued out of the circuit court of Mobile county, August 29, 1888. One of these executions was in favor of William H. McIntosh, assignee of Mary Henry and Lucy Gardner, as said representatives, on a judgment recovered against complainant March 23, 1874, by William G. England & Sons, and was for \$2,500. The other execution was issued August 29, 1888, in favor of said William McIntosh, as assignee of Mary Henry, as executrix of Thomas Henry, deceased, on a judgment recovered in said court 24th June, 1875, by Walter Burgess, against complainant, for \$7,563.33. Sales by the sheriff under said executions were made October 8, 1888. The bill charges that no valid sale was made by the sheriff of the property and franchises described. First, because the property and franchises of complainant levied on and sold by the sheriff were not subject to levy and sale under executions from the circuit court. Second, because said judgments were paid and satisfied before said executions were issued. Third, because said executions were not good and lawfully issued. The bill avers that said pretended sales and said deeds cast a cloud, however, upon complainant's said property and franchises. The bill charges that the said Ruffin is trespassing upon complainant's said property by dragging a chain along its roadbed, by driving stakes in its ground, asserting the said property was his, and not the property of complainant, and that he is threatening to drive off the employes of complainant from its said property.

The respondents demurred to the bill, upon the ground that the complainant had a plain and adequate remedy at law; and by way of plea set up that no such corporation as the complainant existed, and that the bill was filed without authority. Answering said bill, the respondents admitted that such a corporation as the complainant was incorporated, but alleged that it had lost its charter by failure to comply with certain statutory requirements, and that the corporation had ceased to exist by nonuser of its franchise for five consecutive years. The respondents in their answer also denied that the complainants had been holding possession of the property in controversy, and, further answering, alleged that they were the owners of the land in controversy, and admitted that their claim to such ownership rests upon the sales made by the sheriff, and the deed executed by him as described in the bill. It was shown by the evidence that England & Sons recovered a judgment against the complainant corporation on March 23, 1874, for \$2,500; that execution was issued on this judgment April 28, 1874, and returned "No property found," and that this judgment was kept alive by the repeated issuance of executions, 10 years not elapsing between any of the dates of issu-

ance; that this judgment was assigned to the Aetna Life Insurance Company, and that on March 31, 1881, the Aetna Life Insurance Company assigned the same judgment to Thomas Henry and William H. Gardner, and that on August 16 and 22, 1888, respectively, Lucy R. Gardner, as administratrix, and Mary Henry, as executrix, of their deceased husbands' estates, assigned their respective interests in said judgment to W. H. McIntosh. It was further shown that on August 29, 1888, a pluries execution was issued by the clerk of the circuit court, in the name of W. H. McIntosh, assignee, and that under this last execution the sheriff levied upon the property of the complainant, and sold the same, at which sale said McIntosh became the purchaser.

On March 1, 1875, Walter Burgess recovered a judgment in the circuit court of Mobile county against the complainant for \$7,563.33. On May 9, 1876, Walter Burgess assigned this said judgment to W. H. Gardner, and on August 16, 1888, Lucy R. Gardner, as administratrix of the estate of W. H. Gardner, deceased, assigned said judgment to W. H. McIntosh. Execution was issued on this judgment July 13, 1875, but no other execution was issued until August 29, 1888, when the execution was issued in the name of W. H. McIntosh, assignee. Under this last execution, the sheriff levied upon the property of the complainant; at the same time he levied under the execution issued upon the England judgment, at which sale McIntosh became the purchaser. These judgments were assigned to W. H. McIntosh by Mary Henry and Lucy R. Gardner under a contract, to be held by said McIntosh, as trustee, pending an option which had been given by them to certain other parties. The time for the exercise of this option having elapsed, the said Mary Henry and Lucy Gardner requested McIntosh, as trustee, to reconvey the property to them, which he did in due form by deeds. It is these deeds, and the deed from the sheriff to McIntosh, which the complainant seeks to have canceled.

Fred. K. G. Bromberg, McCarron & Lewis, and Overall, Bestor & Gray, for appellants. Pillars, Torrey & Hanow and H. Austill, for appellee.

STONE, C. J. The bill was filed to vacate a sale of lands made by the sheriff of Mobile county under executions which were issued from the circuit court of that county, founded on judgments rendered against the appellee. It seeks a cancellation of the conveyance made by the sheriff to the purchaser, and of subsequent conveyances dependent on it, and prays an injunction to prevent alleged trespasses on the lands. The validity of the sale by the sheriff is impeached on the ground of alleged irregularities in the issue of the executions, the payment

of one of the judgments, and because the lands were the right of way of the appellee, and, as is asserted, not the subject of levy and sale under executions at law. Prior to the issue of the executions under which the sales were made, the judgments had been assigned. The assignments were not made in the mode prescribed by the statute (Code, § 2927), and the mandate of the executions was that the moneys made should be accounted for to the assignee of the judgments. In all other respects the executions corresponded to the judgments. Judgments have the assignable qualities of choses in action, and may be transferred by parol or in writing. If a statutory mode of assignment is provided, it is cumulative, in the absence of express words inhibiting other modes of assignment. 2 Freem. Judgm. § 422. The assignment, however made, passes an equity which courts will recognize and protect. It entitles the assignee to sue on the judgment or to issue execution thereon in the name of the assignor, and is beyond his control or interference. 2 Brick. Dig. p. 153, §§ 308-317. The statute to which we have referred does not lessen the assignable quality of judgments, nor limit the mode of assignment. It is cumulative, entitling the assignee, if the assignment is made in the mode provided, to sue on the judgment, or to the issue of execution thereon for his use, in the name of the plaintiff, whether living or dead. It in this way dispenses with the necessity of revivor in the event of the death of the plaintiff, and, under the operation of section 2595 of the Code, he may make himself the sole party on the record. The error in the mandate of the executions is, at most, a mere irregularity, incapable of injury to the appellee, and because of such irregularity a court of equity will not interfere to vacate a sale made by the sheriff. 2 Freem. Ex'ns, § 810; Ray v. Womble, 56 Ala. 82; Lockett v. Hurt, 57 Ala. 198. One of the judgments,—the one it is asserted was paid prior to the issue of execution thereon,—seems to have been assigned by the attorney of the plaintiff therein. Without special authority, an attorney at law can not assign a judgment he may have obtained for his client. The authority, or a ratification by the client, may be inferred from circumstances. The assignment was made many years before the issue of the last execution, and, so far as is now shown, its validity has never been questioned by the client. The silent acquiescence for years by the client is evidence that the attorney had authority to make it, or of a subsequent ratification. The contention of payment of this judgment was not ascertained by the chancellor to be true, and we find no reason to doubt the correctness of his conclusion. The other judgment, rendered in favor of Burgess prior to the issue of the execution under which the levy and sale were made, had become dormant, more than 10 years having elapsed after the test

of the last preceding execution. The execution was irregularly issued, and was voidable, but it was not void. 1 Freem. Ex'ns, § 2830; Sandlin v. Anderson, 76 Ala. 405; Steele v. Tutwiler, 68 Ala. 107. On a proper application, seasonably made, the court of law would have quashed it. McCall v. Rickarby, 85 Ala. 152, 4 South. 414. Such an application must have been made with reasonable diligence; unexplained laches would have been fatal to it. Bank v. Spencer, 18 N. Y. 150; Cowan v. Sapp, 74 Ala. 44; Ponder v. Cheeves, 90 Ala. 117, 7 South. 512. More than two years elapsed after the issue of the execution and the levy and sale before the filing of the present bill. Whether the court of law would, at that day, have entertained an application to vacate the sale because of the irregularity in the issue of the execution, it is not necessary to consider. Conceding that court would have intervened, the jurisdiction was exclusive. The rule is very general that a court of equity will not interfere to vacate a sale under legal process on account of irregularity in the issue of process or in its execution, but, as is properly said, "the application ought to be made to the court issuing the writ, and, if made elsewhere, ought not to be entertained." There must be accident, surprise, mistake, or fraud, or some fact or circumstance affecting the sale itself, and not resting on the irregularity of the process or irregularity in its execution, before a court of equity will take jurisdiction to vacate it. There is not, in this case, averment or evidence of either of these conditions. 2 Freem. Ex'ns, § 310; Ray v. Womble, 56 Ala. 32; Lockett v. Hurt, 57 Ala. 198; Cowan v. Sapp, 74 Ala. 44.

The more important question is whether the lands were the subject of levy and sale under the executions, and this depends materially upon the quality of the estate residing in the appellee. The allegation of the original bill is that they were acquired for a right of way, under the charter of the appellee, "by purchase, condemnation, and otherwise." The general law providing for the creation and regulation of railroad corporations, approved December 29, 1868, under which the appellee was incorporated and organized, contains the grant from the state of the franchises and powers it claims to have acquired. It did not confer the power of acquiring lands by proceedings in condemnation, or otherwise than by gift or purchase; and did not limit the estate or interest which could be acquired. The act of March 1, 1871, passed after the creation and organization of the appellee, conferred the power to resort to compulsory proceedings in condemnation for the taking of lands. Pamph. Laws 1870-71, pp. 55-60. There is no written evidence of the title of the appellee introduced; no other than vague and indefinite parol evidence, which seems to have been received without objection, indicating that parts of the lands were acquired

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by condemnation, and other parts by gift or purchase, not distinguishing between them. The grant of power to acquire, hold, and convey lands for a right of way or other uses by the law of 1868 is general and extensive. The third section confers power to "acquire and convey at pleasure, all such real and personal estate, as may be necessary and convenient to carry into effect the objects for which it was created;" and the fifteenth section provides for the acquisition by purchase or gift of any lands in the vicinity of the road, or through which it may pass, so far as may be deemed convenient or necessary to secure the right of way, or such as may be granted to aid in the construction of the road, and to hold and convey the same in such manner as the board of directors may prescribe. Pamph. Laws, 1868, pp. 462-466. It is an incidental power of every corporation, unless restrained by statute, to purchase and alien lands necessary for the exercise of its corporate powers, and this, "independent of positive law" conferring such power. Says Chancellor Kent: "All corporations have an absolute *jus disponendi* of lands and chattels, neither limited as to objects nor circumscribed as to quantity." 2 Kent, Comm. 281. And railroad corporations may take a fee in lands, although corporate existence is limited to a term of years. 1 Mor. Priv. Corp. § 330; Davis v. Railroad Co., 87 Ala. 633, 6 South. 140; Nicoll v. Railroad Co., 12 N. Y. 121. What was the quantity and quality of the estate the appellee had in the lands? The power to acquire an estate in fee, by purchase or gift, for a right of way, or for other uses, was very broad and general, and, according to the allegations of the bill and the scant evidence introduced, the lands were acquired, certainly in part, by the exercise of this power. If an easement only—the right to construct, maintain, and operate a railroad in and upon them—was acquired, it is not possible to ascertain the parts subject to the easement distinguished from the parts in which a fee was acquired. As the case is presented, the more probable inference is that the appellee had an estate in fee in the lands, and not a mere easement. If the latter is the nature or character of its estate or interest, entitling it to hold in exemption from levy and sale, the fact should have been shown by certainty of pleading and satisfactory evidence.

As a general rule, the property of all private corporations is as subject to legal process for the satisfaction of debts as is the property of natural persons. An exception obtains, however, when the corporation is created to serve public purposes, charged with public duties, and is in the exercise of its franchise and in the performance of its duties. Then, on considerations of public policy, without regard to the nature or quality of the estate or interest of the corporation, according to the weight of authority, such property as is necessary to enable it to dis-

charge its duties to the public and effectuate the objects of its incorporation is not subject to execution at law. The only remedy of a judgment creditor is to obtain the appointment of a receiver, and the sequestration of its income or earnings. 1 Freem. Ex'ns, § 179, and authorities collected in notes; 2 Mor. Priv. Corp. § 1125; *Gue v. Canal Co.*, 24 How. 257; *Bridge Co. v. Means*, 33 Neb. 857, 51 N. W. 240, and authorities cited. The exemption from levy is maintainable, however, only upon the theory that the corporation is created for the furtherance of public purposes of such importance to the public that there must not be private interference with such of the corporate property as is essential to effectuate these purposes; and presupposes that to these purposes the property is being applied. Property not necessary to effectuate these purposes, if acquired by gift or purchase, may be taken by legal process for the satisfaction of debts. 2 Mor. Priv. Corp. § 1125. And so may personal property be employed, and necessarily employed, in the exercise of corporate franchises. 1 Freem. Ex'ns, § 179. When the lands were levied on and sold, the appellee, as a corporation, had become inert, and had life in a name only. By nonuser it had subjected itself to the penalty of forfeiture by a direct proceeding at the instance of the state, while, only in the absence of such forfeiture, it could retain the capacity to exist as a corporation. It was an existence in name only. It was not, and had not been for a period of 13 or 14 years, in the exercise of its corporate franchises. The line of railroad had been graded, embankments, bridges, and trestles had been erected and constructed on the lands in controversy. The work was incomplete, and for more than 16 years prior to the levy and sale had been abandoned. From the only part of the road which was completed, more than 14 years before the levy and sale the rails and cross ties were removed, and sold to a street-railway company; and the locomotive and flat cars, the only rolling stock it seems to have ever possessed, and which had been utilized solely to aid in construction, were sold and carried away. Now, conceding that the property of the appellee essential to the exercise of its franchises and to effect the public purposes contemplated in its creation may be exempt from levy and sale under legal process, can the exemption continue after the franchises have been abandoned? Can it exist when the necessity for its existence has terminated? We think it is coextensive with the performance of the public purposes the corporation was intended to promote, and, when these purposes are abandoned, the exemption ceases, and the property stands in the condition of property not necessary to enable the corporation to perform its duties to the public. 1 Freem. Ex'ns, § 179. In *Benedict v. Heineberg*, 43 Vt. 231, a railroad company had ceased to use a portion of its road, and

was removing the rails necessary to its operation. The company owning in fee the part of the road so abandoned, it was held such part was subject to levy and sale under execution at law. The decision rests upon the proposition that the land so abandoned was not being held for public uses, or for use as a railroad. In that case, there was an abandonment in fact and intent of the public uses. Here, there was an abandonment in fact. There may have been a lingering hope that, at some indefinite time in the future, the corporation might resume activity, and apply the lands to the uses for which they were acquired, or that they could be sold to some other company, having the means or credit to complete the construction of a line of railroad. However this may be, the fact remains that there was not an exercise of corporate franchises for years, and the lands were not applied to public uses. Practically there was no pretense that they were held to enable the company to discharge its public duties. We are of opinion they were subject to levy and sale under the executions; that the sale was valid, passing to the purchaser the fee vested in the appellee. If the lands were not subject to execution, what remedy could the judgment creditors have? There was no income or earnings to be sequestered. The result of the contention would be that the lands were placed beyond the reach of creditors, and yet the appellee held the fee, having power and capacity to sell and convey it, but applying it to no public uses, and earning no income.

The question we have considered—the right to levy an execution at law on lands owned and held in fee, as the right of way of a railroad corporation, the corporation having become inert, and having ceased all user of its franchises and all performance of its public duties—was not considered in *Railway Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869. All that was considered and decided in that case was whether the mere right of way of a railroad company, “a mere easement in the land, to enable it to discharge its functions of making and maintaining a public highway, the fee of the soil remaining in the grantor,” was the subject of levy and sale under execution at law. The court expressly declared that it was “not necessary to discuss the general question as to the right to levy an execution at law on property owned by a railroad company in fee.” Nor is it now necessary to express an opinion whether, under any circumstances, the easement of a railroad company may or may not be the subject of levy and sale under execution at law.

The assignments of error are numerous, presenting many questions which have been discussed by the respective counsel. The conclusion we have reached renders it unnecessary to consider them in detail. The result is, the decree of the chancellor must be reversed, the injunction dissolved, and the bill

dismissed, at the cost of the appellee in this court and in the court of chancery. Reversed and rendered.

(102 Ala. 636)

SCHLOSS et al. v. McGUIRE et ux.

(Supreme Court of Alabama. April 10, 1894.)

FRAUDULENT CONVEYANCES—PREFERRING CREDITORS.

1. Transactions between husband and wife should be closely scrutinized, and the evidence considered and weighed in the light of this relationship, in actions by creditors to set aside deeds by one to the other to defraud creditors.

2. A debtor may, by an absolute sale of his property for an adequate consideration, reserving no interest to himself, prefer one creditor to another in the payment of his debts.

Appeal from chancery court, Russell county; Jere N. Williams, Chancellor.

Action by Schloss & Kahn et al. against M. McGuire and wife to set aside as fraudulent a deed made by M. McGuire to his wife, H. J. McGuire. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

Norman & Son, for appellants. L. W. Martin, for appellees.

COLEMAN, J. This is a creditors' bill, filed by appellants as creditors of M. McGuire, the object of which was to set aside and annul a deed of conveyance of certain lands made to his wife, and to condemn the same to the satisfaction of their claims. The bill charges that the consideration was purely voluntary, and made to defraud creditors. The proof shows that the debts due plaintiff were contracted during the years 1890 and 1891, and were admitted to be just. The conveyance was executed on the 1st day of December, 1891, subsequent to the contraction of the debts. The recited consideration of the deed is \$2,000, and it is not controverted that \$2,000 is a full and adequate consideration. The real contest is as to whether M. McGuire owed his wife, H. J. McGuire, the debt in payment of which it is contended that this conveyance was executed. The transaction being between husband and wife, it should be closely scrutinized, and the evidence considered and weighed in the light of this relationship. *Smith v. Collins*, 94 Ala. 394, 10 South. 334; *Owens v. Hobbie*, 82 Ala. 467, 3 South. 145. A good deal of testimony introduced by the respondents is not clear nor satisfactory, but there are a few prominent facts upon which our conclusion is based. We think it clearly proven—in fact, not questioned—that H. J. McGuire, the grantee, had a bank account with the Eagle & Phoenix Manufacturing Company, at Columbus, Ga., beginning as early as 1882, and that she had on deposit to her credit, as shown by the pass book, in April, 1884, \$2,171.71, and on January 3, 1888, \$2,167.48. Whether the sources from which this money was derived have been truly stated or not cannot vary the

result. At that time her husband's financial condition was good, and, so far as this record shows, there were no debts outstanding against him. The debts of complainants, as we have stated, were contracted in the years 1890 and 1891. That the husband used this money deposited to the credit of his wife in the payment of his debts is clearly proven. What is the evidence to show that he has ever repaid it to her? None except that found in the bank book itself and the evidence of the respondents. The bank book shows deposits to the credit of H. J. McGuire at different intervals until January 20, 1891, and it shows that these deposits were checked out by him, in payment of his debts to other persons than H. J. McGuire. There is no evidence of payment to her otherwise. They both swear that H. J. McGuire authorized M. McGuire to use this money as a loan to him to pay his creditors, and which he was to repay. Both swear that the loan has never been paid, except by the conveyance of the land. There is other evidence in the case, which is not controverted, that H. J. McGuire had at one time, in the year 1872, as much as \$2,500 in cash, which she testified was loaned to her husband. That a debtor may prefer one creditor to another in the payment of his debts, by an absolute sale of property for an adequate consideration, reserving no interest to himself, has been often decided. *Pollock v. Meyer*, (Ala.) 11 South. 385; *Wing v. Roswald*, 74 Ala. 346. There is no merit in any other question assigned as error. Affirmed.

(102 Ala. 566)

TOWN OF NEW DECATUR v. NELSON.

(Supreme Court of Alabama. April 10, 1894.)

TAXATION—ENJOINING COLLECTION—MUNICIPAL CORPORATIONS—CHANGING BOUNDARIES.

1. Where the corporate limits of a town are changed after the ending of the tax year, but before the taxes have been collected, the collection of the same will not be enjoined.

2. A bill to enjoin the collection of taxes on the ground of the illegality of the assessment should aver wherein the assessment and proceeding fell short of legal requirements, and it is not sufficient to state that the same were illegal.

3. An act changing the corporate limits of a town is not void for indefiniteness, when the description, though it gives no government numbers, can readily be followed by a surveyor, if upon the ground.

Appeal from chancery court, Morgan county; Thomas Cobbs, Chancellor.

Suit by J. M. Nelson against the town of New Decatur. From an order overruling defendant's motion to dissolve a temporary injunction, defendant appeals. Reversed.

The bill in this cause was filed by the appellee, J. M. Nelson, against the town of New Decatur, and prayed to have the said defendant perpetually enjoined from selling the lands of the complainant for the payment of certain taxes, which were assessed, as al-

leged in the bill, without authority of law. The respondent demurred to the bill, and moved to dismiss the same for the want of equity, and also moved to dissolve the temporary injunction which had been previously issued. Upon the hearing of the cause upon the demurrer and these motions, the chancellor overruled each of them; and the respondent now brings this appeal, and assigns the decree of the chancellor as error.

W. W. Callahan and E. W. Godbey, for appellant. G. A. Nelson and W. A. Johnson, for appellee.

PER CURIAM. It is certainly the general rule that the collection of taxes will not be arrested by injunction. It has its reason in public policy, which cannot lend its sanction to any remedial proceeding which might clog the machinery of civil administration. In addition to illegality or irregularity in the imposition of the taxes, or in the process of the collection, to borrow the language of Mr. High, "there must be some special circumstance attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise, the person aggrieved will be left to his remedy at law." High, *Inf.* § 485; *Insurance Co. v. Lott*, 54 Ala. 499; *City Council v. Sayre*, 65 Ala. 504; *Land Co. v. Ayres*, 62 Ala. 413; *Bank v. Mayor*, Id. 284; *Mayor v. Baldwin*, 57 Ala. 61; *Cooley, Tax'n*, p. 760.

The averments of the bill and its amendments, in which the complainant sets forth his causes of complaint, may be summarized as follows: That in July, 1893, the town of New Decatur assessed and caused to be levied on complainant's lands a certain pretended tax, "and your orator says said defendant corporation had no authority so to levy said alleged taxes against him. * * * That said defendant town, without any authority therefor, or any right so to do, and without first having made legal demand for said taxes, caused said property to be advertised for sale as delinquent in the payment of said taxes, * * * and is threatening and is about to sell said lands for said alleged taxes, * * * which taxes your orator alleges and charges were not assessed as the law required, nor as the charter of said town required, in this, to wit: That a large part of said alleged taxes is claimed in certain special improvements made in and upon said streets of said city, but not upon any street to which your orator's said land was adjacent or bounding. That said alleged taxes are illegal and void, as against your orator, for this, to wit: Your orator's said real property herein described is not now, and has not for a long time been, within the control, jurisdiction, and boundary of said town. Reference is had to the act of 1892 and 1893 (pages 319 and 320), and orator avers that his said property is west of

said Danville road—the corporation line which is asked to be considered. And complainant avers that the taxes the corporation is about to collect is not for the bonded indebtedness of the city, for which the property may be liable under the amended statute. That your orator's said property is not subject to the payment of said tax, for the reason that no legal assessment and levy of taxes thereon has been or could be made by said town against your orator's said property, and that there is no authority in law for the sale of the said real property for the collection and payment of said alleged taxes, so alleged to be due said defendant town from your orator. Your orator charges that said pretended advertisement is insufficient in law to authorize the sale of said described lands, in this, to wit: Said lands are not properly or sufficiently described, but notwithstanding their attempt to sell the same under said advertisement, the same as if it was sufficient; and a cloud has thereby been placed on your orator's title thereto, and said sale will be made by said defendant unless restrained by your honor's order." We have now copied, substantially, all the averments of the bill, as amended, which tend to give it equity.

The corporation taxes alleged by the town of New Decatur to be due to it for the year 1892 is the subject of this suit, and the severely-contested question is whether the lots mentioned in the bill are and remain subject to corporation taxation for that year. The lots lie in the western part of the town, as originally incorporated. Under the original act of incorporation, approved February 13, 1889 (Sess. Acts, 361), the western boundary of the town is established as follows: "Beginning at the southeast corner of the yards of the South & North Alabama Railroad, about one hundred and fifty feet northwardly from the cotton-compress lot; thence southwestwardly about five blocks with the present south line of the lands of the Decatur and Mineral Land company to the center line of Sixth avenue west; thence northwestwardly along the center line of said Sixth avenue west, about one block to the center line of the Old Danville road; thence northwestwardly with the center line of said Danville road to the present south corporate line of the town of Decatur." The amendatory act was approved February 8, 1893 (Sess. Acts, 319). It changed the western boundary of the town of New Decatur, and enacted "that the property and territory west and north of the following boundary line of said town, or between said line and the north line of the right of way of the Memphis & Charleston Railroad shall not be within the corporate limits of said town, to wit: Beginning at the southwest corner of the yards of the South & North Alabama Railroad, about 150 feet northwestwardly from the cotton-compress lot; thence southwestwardly about 5 blocks with the present south

line of the lands of the Decatur Mineral and Land Company to the east side of Sixth avenue west; thence along the east side of said Sixth avenue west to the south side of Second street north; thence westwardly along the side of Second street north to the east or southeast side of the old Danville road; thence along the east, or southeast side of the said old Danville road to the point where it intersects the south boundary line of the corporate limits of said town of New Decatur." There are other provisos, but they do not affect the question we are considering. It is obvious that this legislative change works a change in the western boundary of the town of New Decatur, and it is reasonably manifest that the effect of this change is to draw in the western boundary of the incorporated town. The quantity and form of the part of the real estate thus excluded from the corporate limits neither the statutes nor the pleadings enable us to determine. It is reasonably shown, however, that an attempt to levy and collect taxes for the year 1892 on lots within the old corporate limits, and outside of the new, gave rise to the present litigation. Let not the true question be lost sight of. The taxes sought to be enforced were for the year 1892. It is not gainsaid that throughout that entire year the appellee, Nelson, was the owner of the lots upon which the taxes were assessed, and that said lots, throughout that entire year, were within the then corporate limits of the town of New Decatur. Taxes, with us, are not attempted to be assessed or collected during the year in which they accrue. The assessment is made during the early months of the year succeeding their accrual, and the collection later.

It is contended for appellant that the act quoted above, approved February 8, 1893, is unintelligible as to the land intended to be excluded from the old corporate limits; that it is, to that extent, void for uncertainty; and that, consequently, the corporate limits, as established by the older enactment, remain unchanged. As a result of this contention, it is claimed that the lots, the attempt to tax which gave rise to this suit, are still within the corporate limits of New Decatur. This contention is rested on the language of the statute, "that the property and territory west and north of the following boundary line of said town, or between said line and the north line of the right of way of the Memphis & Charleston Railroad, shall not be within the corporate limits of said town." The statute then describes the new western boundary of the town of New Decatur which it proposed to establish. It gives no government survey numbers, but in stating the beginning of the line, and the various lines and points it must trace and touch, it gives the physical starting point and bearings, which, it would seem, must be intelligible to any one examining the grounds. This description of the new western bound-

ary of the incorporated territory, after describing the starting point, has this language: "Thence southwestwardly about five blocks with the present south line of the lands of the Decatur Mineral and Land Company to the east side of Sixth avenue west," etc. In the absence of a plat, or fuller description, we are not able to understand the newly-established western boundary of New Decatur, or to what extent it leaves out territory embraced in the older act of incorporation. It refers only to physical objects, which, to be understood, must be seen, or better described. From all that is visible to us, a surveyor could trace the line from the description given; and, deriving our information only from the language of the statute, it would seem that the part of the original corporate territory intended to be excluded by the later enactment is easily ascertainable. Extending a line due north from the starting point, as described in the later statute, and another line due west from the southernmost dip of the new line, would define and declare that all of the corporation's territory falling between those lines was intended to be excluded. But this conclusion is more or less conjectural, for there is not enough shown in the statutes or pleadings to assure us we understood the working of the statutes. There is nothing in this point, as presented.

As we understand this record, the taxes claimed are not based on alleged ownership of the lots in the corporate limits of the town throughout 1893. Such claim could not be asserted until the end of that year. The claim is predicated of Mr. Nelson's ownership in 1892, and up to February 8, 1893. Taxes, with us, are assessed early in the year, and should at least embrace all property and subjects of taxation owned and enjoyed during the preceding year, and on January 1st of the year of the assessment. They cannot be assessed as of the current year, for that cannot, as a rule, be known. It is just being entered upon. It is not denied that Mr. Nelson owned the property in 1892, and that during that entire year, and until February 8, 1893, the lots were within the corporate limits of New Decatur. For this, and this only, were they sought to be taxed. They enjoyed municipal protection during the entire year 1892, and until the change of boundary. Having enjoyed municipal protection, shall not the property be assessed for the support of that municipality? The property in this case was subject to assessment when the tax year commenced; and we need not declare what would have been the rule if the change of boundary had taken place before January 1, 1893. That case is not before us. The averments of the bill in this case are too general and indefinite, even if it otherwise contained equity. It should have averred wherein the assessment and proceedings under it fell short of legal requirements. The statements are not specific enough. One

avermment in the bill is "that a large part of said alleged taxes is claimed in certain special improvements made in and upon said streets of said city, but not upon any street upon which your orator's said land was adjacent or bounding." We suppose this complaint is rested on subdivision 81 of section 7 of the act approved February 13, 1889, which empowers the corporation to levy and assess taxes on property adjacent to streets, for the purpose of improving such streets. Sess. Acts, 378. This averment, like the others, is general and indefinite, but there is a graver objection to it. The town authorities, in levying and assessing the taxes, were not restricted to the limited power found in subdivision 81, to which we have referred. In the general grant of powers to the mayor and aldermen, we find these clauses in section 7: Subd. 3. "To levy and collect taxes for general and special purposes on real and personal property." Subd. 16. "To assess, levy and collect annually a tax for general and special purposes on real and personal property, not exceeding one half of one per cent on the value thereof, as assessed for state taxation during the preceding year." There is nothing in this objection. It will be noted, in what we have said, that the bill is without equity, and we are at a loss to perceive how it can be amended so as to give it equity. Still, we will not announce the decree here. Reversed and remanded.

The foregoing opinion, with the exception of the first paragraph, was prepared by the late chief justice, and is adopted as the opinion of the court.

(102 Ala. 144)

HORN v. STATE.

(Supreme Court of Alabama. April 10, 1894.)

CRIMINAL LAW—ASSAULT—EVIDENCE—INSTRUCTIONS—REMARKS BY COURT.

1. The prosecuting witness testified that defendant assaulted him and drew a pistol, whereupon the witness ran, and, while running, heard a pistol discharged, and was struck by a pistol ball, but did not see who discharged the pistol. *Held*, that he might further testify that on looking around, immediately after being shot, he saw defendant shoot at his wife, and try to shoot his clerk, as this tended to prove that defendant shot witness.

2. Such testimony was also admissible as part of the *res gestae*, there being testimony that defendant's quarrel was a general one against witness' family, and his intention was to compel them to give him five dollars.

3. Testimony that, soon after the assault, defendant refused to be arrested, and said he would kill any one who tried to arrest him, was admissible.

4. A statement, by the judge in his charge, that there was great conflict in the testimony,—in fact, downright contradiction,—and in his opinion a great deal had been sworn to that was untrue, was not error, where such statement was unquestionably correct, and there was no intimation as to what evidence the judge thought untrue.

5. While charging the jury, the judge said: "Third parties often come in and take the law in their own hands, but I have been sick with

fever two days, and some of you have been sick; but we have been here two days trying this case, in order to try the case according to law, as we ought to do." *Held*, that though such matters were wholly irrelevant, and should not have been mentioned, yet, as the jury was not misled, or the defendant prejudiced, no error was committed.

6. A direction to the jury that, if they agreed on a verdict by 11:30 p. m., they might send for the court, and he would come down and receive it, otherwise they would have to remain till morning, is no ground for reversal, where it does not appear that the verdict was rendered before the time named.

7. A charge that defendant is authorized, under the statute, to testify in his own behalf, and the jury have a right to give full credit to his statements, is properly refused as argumentative and misleading.

8. An instruction authorizing the jury to find that defendant had a right to shoot and kill if he believed such action necessary to his own safety, though the circumstances would not justify such belief in the mind of a reasonable man, is properly refused.

9. An instruction that the evidence should exclude every hypothesis but that of guilt is properly refused, since it is only necessary that every other reasonable hypothesis be excluded.

Appeal from circuit court, Marengo county; James T. Jones, Judge.

Paul Horn was convicted of assault and battery, and appeals. Affirmed.

Upon the trial of the cause, Isaac Rosenberg, being introduced as a witness for the state, testified that he kept a store in Faunsdale, Ala., and that, before the finding of the indictment, the defendant came to his store, a little before dark, and asked the witness for five dollars, and without explaining to the witness what five dollars, or anything about the same, immediately began whipping him with a buggy whip; that thereupon the witness ran towards the back part of the store; that witness saw defendant draw his pistol as he started to run; that, while he was running, he heard a pistol shot, and felt that he was struck; that he did not see the pistol shot by the defendant; that he saw no one shoot at him, and did not know who shot him; that, after he was shot, he fell down, and while in the kitchen, in the back of the store, he saw the defendant shoot once at his wife, who was standing on the front porch of his store. The defendant objected to this testimony as to the witness, seeing the defendant shoot at his wife, because it was illegal, irrelevant, and immaterial, and duly excepted to the court's refusal to exclude the same. The same objection was raised to this witness' testifying that, after having shot at his wife, the defendant tried to shoot his clerk, who had hidden behind the counter; and, to the refusal of the court to exclude this testimony, the defendant also duly excepted. Upon the examination of one Mack Walker for the state, he testified that, on the night of the difficulty between Rosenberg and the defendant, he had a conversation with the latter a short time before the difficulty, and thereupon the state asked the witness to state what was this conversation. The de-

fendant objected on the ground that the corpus delicti of the case had not been proved, and that the confessions and declarations of the defendant were not admissible at that time. The court overruled the objection, and to this ruling of the court the defendant duly excepted. The same objection was raised, and the same ruling made, in reference to the testimony of Tom Collins. The testimony of these witnesses is sufficiently stated in the opinion. Upon the introduction of J. C. Brown as a witness for the state, he testified that he saw Mrs. Rosenberg the next day, and she had one eye bruised, and it was bloodshot. The defendant moved to have this testimony excluded, because it was illegal, irrelevant, and immaterial, and duly excepted to the court's overruling his motion. The testimony in behalf of the defendant tended to show that, on going to the store of Rosenberg, he asked to be refunded the five dollars which Rosenberg had wrongfully taken from one of his laborers the evening before; that Rosenberg denied having taken the said money, and ordered the defendant out of his store; that, upon repeating his demand for the money, Rosenberg struck the defendant, and that Rosenberg's son, wife, and his clerk were holding him and beating him when a pistol was fired; that the first shot went up in the roof of the house; that, as the defendant was being held by Rosenberg's son, wife, and clerk, Rosenberg came from the back part of the store, and was advancing upon him with a knife, and, when he refused to stand back, he (the defendant) fired on him. This testimony was contradicted by the testimony of the state.

The portions of the court's general charge to which exceptions were reserved are copied in the opinion. The defendant requested the court, among other things, to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (26) "If Isaac Rosenberg kept a public storehouse in which goods and merchandise were sold to any and every one, and if the defendant went to the storehouse of said Rosenberg on business, and if the defendant was free from all fault in bringing on any difficulty with said Rosenberg, and if said Rosenberg made an assault, together with his wife and clerks, upon the defendant, and if the defendant had had no reasonable means of retreat, or fired the shot at said Rosenberg under the belief that he had no reasonable means of retreat, or that, in retreating, he was in imminent peril of his life or limb, or if, at the time, said Rosenberg was advancing upon him with a dangerous weapon, and defendant was held by one of the clerks of Rosenberg so that he could not retreat, he had the right, under the law, to use enough force to repel the said assault; and if the jury believe that it was necessary, under the evidence, for the defendant to kill said Rosen-

berg in order to protect himself, then the jury ought to acquit the defendant of an assault with intent to murder, and may find the defendant not guilty as charged in the indictment." (25) "If the defendant went to the store of Isaac Rosenberg, and entered the same peacefully, and did nothing to produce a difficulty, and Rosenberg thereupon assaulted the defendant, and the defendant shot at Rosenberg while said Rosenberg was assaulting the defendant, and the defendant was held, and was not able to retreat, and, while so held, shot at said Rosenberg under the honest belief that he was in danger of great bodily harm or of imminent peril to life or limb, the defendant had a right to shoot, and the jury must acquit the defendant." (14) "If the jury believe from the evidence that the defendant went to the store of Isaac Rosenberg on business, and that Isaac Rosenberg assaulted the defendant without provocation, the defendant being without fault in bringing on the difficulty, and that the defendant was in great danger of great and serious bodily harm, or that the defendant believed honestly that his life was in imminent danger, and that to retreat would greatly imperil his life or limb, then the defendant had the right to protect himself so far as necessary to repel the assault; and if it was necessary, in order for him to repel the assault, for him to shoot said Rosenberg, the defendant is not guilty, and the jury ought to acquit him." (15) "If, from the evidence, the jury believe that the defendant went to the store of Isaac Rosenberg on lawful business, and there got in a fight with said Rosenberg and his family, without doing anything to provoke, and being without fault in bringing on, the difficulty, and if, while in said fight, it became so that he could not retreat without great peril and imminent danger to his life, or if he honestly believed that his life was in imminent danger, or that he was liable to be subjected to grievous bodily harm by retreating, the law does not make it his duty to retreat, and he would not be guilty if he had killed the said Rosenberg under such circumstances, and ought to be acquitted." (N) "Charge the jury that they should not find the defendant guilty unless the evidence against him was such as to exclude to a moral certainty every supposition (or hypothesis) but that of his guilt." (B) "Charge the jury that the testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction without corroborating evidence; and such corroborating evidence, to avail anything, must be a fact tending to show the guilt of the defendant." (I) "Charge the jury that, when the evidence is chiefly circumstantial, that innocence should be presumed until the case is proved against the defendant, in all its material circumstances, beyond any reasonable doubt, and that the evidence ought to be

strong and cogent to find the defendant guilty as charged."

C. K. Abrahams, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The appellant, Horn, was indicted and tried for assaulting, with intent to murder, one Isaac Rosenberg, and convicted of an assault and battery upon said Rosenberg. The said Isaac was the first witness examined in the cause. His testimony tended to show that the defendant assaulted and beat him, and drew a pistol, whereupon the witness ran, and that, while running, he heard the report of a pistol, and was stricken by a pistol ball, but he did not see a pistol discharged by the defendant or any one else. It was, we think, clearly competent for the prosecution to strengthen the inference afforded by this evidence, to wit, that the defendant discharged the pistol, by the further testimony of this witness to the effect that, on looking around immediately after being shot, he saw the defendant shoot at his (the witness') wife, and that soon afterwards defendant "tried to shoot Tennerson, witness' clerk, who had hidden behind the counter." Disconnected from all other evidence in the case, this testimony went to show, not only that the defendant shot at Mrs. Rosenberg, and attempted to shoot the clerk,—which facts, of themselves, would ordinarily have been irrelevant,—but that he it was who shot Isaac Rosenberg, as charged in the indictment.

2. But there is another aspect of the case in which this testimony, as well as certain other facts adduced against defendant's objection, was relevant and competent. It was in evidence that Horn conceived that the Rosenbergs, whom he referred to as "those Jews," had wrongfully taken five dollars which belonged to him from one of his "hands" (laborers) a day or two before the occurrence laid in the indictment; that he went to their place of business and residence on the occasion of the assault, declaring that "he was going down there and get his money back from those Jews, or wear his buggy whip out on them;" that upon arriving there he demanded five dollars, and commenced whipping Isaac, who thereupon ran; that he then shot Isaac as he ran, and immediately shot at Mrs. Rosenberg, and attempted to shoot the clerk, Tennerson. It is apparent, on this aspect of the evidence, that Horn's cause of quarrel was a general one against the Rosenbergs; that his purpose in going there was to get five dollars from them, or, failing this, to wear his whip out on them; and that whatever he did there was actuated by this purpose, and intended to accomplish this end; and each of his acts, while thus engaged, was but a part of one and the same transaction, each act throwing light upon, and giving character to, the whole occurrence, and to every other act which then

and there transpired. Very clearly, we think the fact that he attempted to shoot the clerk, and shot at and severely beat the wife, are so connected with the assault upon Isaac as to bring all these things within the *res gestae* of any one of them, so that each would not only legitimately tend to establish the naked existence of the others, but would also have a very material and pertinent bearing upon the inquiry as to the intent which actuated the defendant throughout, in the way of showing that, when he assaulted and shot Isaac Rosenberg, his purpose was to kill him. There was, upon these considerations, no error in allowing the testimony referred to to go to the jury.

3. Moreover, had defendant's acts in respect of Mrs. Rosenberg and the clerk been disconnected in point of time and place from the assault upon Isaac Rosenberg, so that they would not constitute *res gestae* of the latter occurrence, they would yet be competent, in our opinion, on the principle declared in *Hawes v. State*, 88 Ala. 57, 67, 7 South. 402, where it is said: "The theory of the prosecution in this case, as developed on the trial, was that the defendant conceived that the lives of Emma Hawes, his wife, and of their children, May and Irene, stood between him and the consummation of a second marriage, and hence that the motive which prompted the murder of each of them was the same. There was evidence tending strongly to support this theory, and to show that the death of each one of the victims was but a part of a system in which the lives of all were involved, and in the working out of which, to the accomplishment of defendant's ulterior purpose, the life of each was, in substantially the same manner, ruthlessly sacrificed. Under these circumstances, all evidence going in any way to connect the defendant with the murder of his wife or of his daughter Irene was relevant to the issues involved on his trial for the murder of May, and was properly admitted. *Lawson v. State*, 20 Ala. 65; *Alsabrooks v. State*, 52 Ala. 25; *Gassenheimer v. State*, Id. 313; *Cross v. State*, 78 Ala. 430; *Ingram v. State*, 39 Ala. 247; *McDonald v. State*, 83 Ala. 46, 3 South. 305; 2 Bish. Cr. Pr. §§ 189, 235, 261, 327; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452, and cases cited."

The physical condition of Mrs. Rosenberg on the following day—that is, the fact that one of her eyes was bruised and bloodshot—was properly allowed to be deposed to before the jury as going to corroborate the state's theory of what occurred, as developed by other evidence, and also as tending to discredit the evidence on the part of the defense.

Some testimony offered by the state, namely, that of the witnesses, Mack Walker and Tom Collins, as to what the defendant said, a short time before the difficulty, about getting his money or whipping the Rosenbergs, was objected to on the ground that the corpus

delicti had not been proven. It is a sufficient answer to this objection to say that the ground of it is not supported by the fact. There was abundant evidence then before the jury to authorize them to find that the offense charged had been committed. Equally untenable is the objection to the evidence that, soon after the difficulty, defendant refused to be arrested, saying that he would kill any one who tried to arrest him, and that he would die before he would give up his pistol. *Bowles v. State*, 58 Ala. 335; *Ross v. State*, 74 Ala. 532; *Sylvester v. State*, 72 Ala. 206.

The foregoing covers all the exceptions reserved to the trial court's rulings on evidence. They are all without merit.

While delivering the general charge, *ex nro motu*, to the jury, the presiding judge made certain statements of fact to them, to which the defendant reserved exceptions. Among other things, he said this: "Gentlemen of the jury, there is great conflict in the testimony in this case, and, in fact, downright contradiction; and in my own opinion there has been a great deal sworn on the stand in this case that is untrue." This statement is borne out by the transcript. There was much of conflict and "downright contradiction" in the evidence, and there can be no doubt that "a great deal sworn to on the stand" in the case was untrue. The conflict and contradiction were such as to admit of no reconciliation. There was no room for the jury to reconcile all the evidence, and to believe it all. The only thing open to the jury was to determine what was true, and what was false, in the mass of evidence, a great part of which was in the nature of things untrue. On this state of case, the statement of fact by the judge being unquestionably correct, and his conclusion therefrom being inevitable, it is not conceivable how the expression of his opinion as to the untruth of a great deal of the testimony could have prejudiced the defendant, since there is nothing whatever in this part of the charge which indicates in the remotest degree what part of the evidence the judge thought to be untrue, or whether he had, indeed, any opinion that any particular part was untrue, or which tends to at all infringe upon the jury's undoubted right to find the truth upon either side of the conflict in respect of any point. While, therefore, this part of the court's remarks to the jury is out of the common, and is not to be commended, since the general charge, as well as special instructions, should be strictly confined to statements of propositions of law arising upon, or applicable to, the evidence adduced in the case, no error of law or fact is involved in what was said, we do not think the jury could have been misled thereby to the defendant's prejudice, and we will not disturb the judgment on account of it.

Again, the presiding judge, while instructing the jury, made the following statement

to them: "Third parties often come in and take the law in their own hands, but I have been sick with fever for two days, and some of you have been sick; but we have been here two days trying this case, in order to try the case according to law, as we ought to do." The facts here stated do not appear by the bill of exceptions, or otherwise, in the case before us. That "third parties often come in and take the law in their own hands" may, perhaps, be within the judicial knowledge of courts as current history. Perhaps, also, it may be taken for granted (it is not controverted) that the judge and some of the jurors had been sick, and that the trial had been in progress two days. But, whether these statements were borne out by the record or not, they had nothing whatever to do with this case,—no more bearing upon it than then existing weather conditions or any other casual disconnected circumstance would have had. They were outside the case, and should not have been brought to the attention of the jury at all, simply because they were wholly irrelevant. But here, again, it by no means follows that the judgment should be disturbed merely on account of them, any more than it would follow that a judgment should be reversed because the presiding judge had called the jury's attention to the fact that the sun was shining, or that rain was falling, or the like. In all such cases it must further appear that the foreign and wholly extraneous and irrelevant matter brought to the attention of the jury in this way misled them, or at least had a natural tendency to mislead them, to the prejudice of the party excepting. We find nothing of that sort here. Certainly, the fact that third parties often take the law into their own hands furnishes no reason for an unwarranted conviction by a jury, nor did the statement of that fact by the judge tend, that we can see, to prejudice the defendant. To the contrary, when taken in connection with what was further said as to its being the duty of the court and jury to try the case according to law, and the efforts both court and jury were making, under difficulties, to perform that duty, it seems to us that the natural tendency of the whole was towards a fair trial and an unprejudiced result. The exception reserved in this connection cannot avail the appellant.

Before the jury retired, the court told them that, "if they agreed upon their verdict by half past 11 o'clock, they might send for him, and he would receive their verdict, but, if they did not agree by 11:30 o'clock, he would not come down to receive their verdict, but they would have to wait till morning." It does not appear at what time the case was given to the jury, nor how long before 11:30 o'clock this was said to them, nor whether a verdict was reached by them before that time, and received by the judge, or not until the next or some subsequent day of the term. We will concede, without deciding, that this

was an improper communication to be made to a jury by the presiding judge, directly or indirectly, because of its tendency to hasten their deliberations. *Railroad Co. v. Phillips* (Ala.) 13 South. 65. But to authorize a reversal on this ground it must affirmatively appear, not, indeed, that the communication did, but that it might have, influenced the jury to the prejudice of the party complaining; or, in other words, the verdict must have been in fact rendered at a time, and under circumstances, to which the statement of the judge was applicable, and when, in consequence, that statement might have operated upon the minds of the jury to the defendant's detriment. Where this appears, it need not be shown—indeed, cannot be—that the statement, in point of fact, exerted any influence. The possibility of its having done so is sufficient. But this possibility itself must be shown. It is not shown in this case, for non constat but the verdict was reached long after the time to which the communication referred, and hence at a time to which it did not apply, and when the possibility of its exerting any influence had passed away. Without meaning to indicate, therefore, what would be our ruling had it been shown here that the verdict was reached by or before 11:30 o'clock of the day on which the case was given to the jury, we are clear to the conclusion that there should be no reversal in the absence of a showing that the verdict might possibly have been influenced by the communication, in that it was rendered within the time covered thereby. It would seem, moreover, that questions of this sort, which involve no ruling upon the law of the case as presented in the court below, should be raised by a motion for a new trial in that court.

Charge 24, requested by the defendant, and refused, is as follows: "The defendant is authorized, under the statute, to testify in his own behalf, and the jury have a right to give full credit to his statements." The court committed no error in refusing this request. That the defendant was authorized to testify for himself was not at all controverted. He went upon the stand, and did testify fully, without the slightest objection. That the jury had the legal right to believe him, nobody denied. This is, of course, implied in his right to become a witness, and is true in all cases where the defendant avails himself of this right. The purpose and only possible effect of the instruction were, not to establish these unquestioned rights of the defendant to testify, and of the jury to give credit to his evidence, but to draw an inference that he was entitled to credence from the fact that the statute gave him the right to become a witness, and thus to give him a fictitious standing in that capacity before the jury, and to meet the deduction against his credibility which counsel had drawn, or the jury might draw, from a consideration of his interest in the result of the trial. The

charge was, therefore, a mere argument, which might possibly have been given without error, but the refusal of which was equally without error. Moreover, its last clause involved a tendency to mislead the jury, under the particular facts of this case, to an assumption of the right to capriciously believe the defendant without due consideration of the other testimony before them.

Charges 14, 15, and 25, refused to the defendant, are faulty, in that in one of the alternatives of each they postulate the defendant's right to shoot Rosenberg on the former's honest belief that his life was in imminent danger, though the jury may have found that the circumstances were not such as to generate or justify the existence of such belief in the mind of a reasonable man. Similarly, charge 26 requested by the defendant was bad, in that it predicates defendant's right to shoot and kill Rosenberg, under the other circumstances it postulates, upon his mere belief that he was in imminent peril of life, and his further belief that he had no reasonable means of retreat, however unreasonable and unjustified by the situation and surroundings may have been his conclusion in each of these respects. It is sufficient to say of charge I, refused to the defendant, that it is patently abstract; the evidence in the case is not "chiefly circumstantial,"—and of charge B that it assumes that a witness for the prosecution had been "shown to be unworthy of credit." Both these charges are faulty in other respects. Charge N, refused to the defendant, is bad, as has been often held by this court, in that it requires too high a degree of proof for conviction. It is not necessary thereto that the evidence should exclude every supposition or hypothesis but that of guilt, but only that every reasonable supposition or hypothesis but that of guilt should be excluded. There is no error in the record, and the judgment of the circuit court is affirmed.

(46 La. Ann. 576)

**DINKELSPIEL et al. v. NEW ALBANY
WOOLEN MILLS. (No. 11,406).¹**

(Supreme Court of Louisiana. April 23, 1894.)

ATTACHMENT—AFFIDAVIT BY PLAINTIFF'S ATTORNEY—"BELIEF OF AFFIANT."

An affidavit by the attorney for plaintiff that, from information received from the parties, affiant believes the allegations in the petition to be true and correct,—the petition stating the debt and all other requisites,—is equivalent to swearing to the knowledge and belief of the affiant. The law does not exact that the word "knowledge" shall be used, but is satisfied if an equivalent is employed, and information received and believed to be true is knowledge. Code Pr. arts. 216-244.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.
Action by Dinkelspiel's Sons against the

¹ Rehearing refused May 7, 1894.

New Albany Woolen Mills. From a judgment dissolving an attachment issued at suit of plaintiffs, they appeal. Reversed.

Dinkelspiel & Hart, for appellants. Frank L. Richardson, for appellee.

MILLER, J. This appeal is from the judgment of the lower court dissolving, for a supposed defect in the affidavit, the attachment of defendant's property. The debt for which the attachment issued, and the nonresidence of defendant, are set forth in the petition, and the affidavit for the writ, made by the attorney for the plaintiffs, is in substance that from information received from the parties interested in the suit he believes the allegations in the petition to be true and correct. The defect suggested in this affidavit is that the attorney has sworn to his belief, but not to his knowledge, and it is claimed the law requires the affidavit both to knowledge and belief. The affidavit is that, from information received from the parties in interest, affiant believes the allegations in the petition to be true and correct. Information received and believed to be true is knowledge. It is precisely the knowledge, and all the knowledge, the agent or attorney as a general rule possesses. In a more general sense, it may be said that knowledge is mainly derived from information. The affidavit, then, must be deemed to embody the knowledge of the affiant. The word itself is not used, but that which constitutes knowledge is distinctly stated and embraced in the affidavit. The Code does not exact that the identical words used in it shall be inserted in the affidavit. If the affiant uses language equivalent to that of the Code, the law is satisfied. We think, therefore, it would be hypercritical to hold an affidavit insufficient because "information received and believed" is substituted for the word "knowledge." If the word "knowledge" had been incorporated in the affidavit, it would have expressed no more than the affidavit expresses. Code Pr. arts. 216-244. The earlier decision quoted in plaintiffs' brief held that an affidavit to the best of the affiant's knowledge satisfied the Code,—"for knowledge," said the court, "comprised belief." The court discarded, as not essential, the precise language of the Code, and accepted knowledge as the equivalent of belief. The other decision held the affidavit insufficient because the affiant deposed only he believed defendant indebted. "Belief," said the court, "did not embrace knowledge." The distinction made by the learned chief justice who pronounced these earlier decisions,—that knowledge includes belief, but belief does not imply knowledge,—may not be deemed entirely clear, but it is not perceived how either or both these decisions tend to show any defect in the affidavit in this case, combining as it does both knowledge and belief. *Bridges v. Williams*, 1 Mart. (N. S.) 98; *Bergh v. Jayne*, 7 Mart. (N. S.) 610.

It is clear, under our law, the defendant may bond and then move to dissolve the attachment. But our decision of the sufficiency of the affidavit is enough to dispose of the case. It is therefore adjudged and decreed that the judgment of the lower court be avoided, annulled, and reversed, and that plaintiffs' attachment and plaintiffs' suit be, and are hereby, reinstated, the costs of the appeal and of the lower court to be paid by appellee.

(46 La. Ann. 163)

STATE ex rel. LEHMAN et al. v. KING,
Judge, et al. (No. 11,422.)

(Supreme Court of Louisiana. Feb. 12, 1894.)

SUPREME COURT—ORIGINAL JURISDICTION—EXTRAORDINARY WRITS—INJUNCTION—RESCISSION.

1. The contention is not well founded that a judge of the civil district court, who grants, prior to allotment, an order of injunction, in so doing, exhausts his power over the order, and is without authority subsequently, and prior to allotment, to modify or rescind the same. Until allotment, he, for legal purposes, retains control of his own order.

2. Where such a second order has been granted, and it is sought to have the same reviewed under writ of certiorari, the judge of the particular division of the court who has, at the time of the application for the writ, control of the case by allotment, is the proper judge with whom to test contradictorily the order complained of.

3. It is a general, but not an inflexible, rule, that, prior to the modification or rescission of an order of injunction, notice should be given to the party who obtained the writ. Where the rule is departed from, it is proper that such notice should be subsequently given, to the end that parties may guard their interests and rights.

4. The powers of the supreme court, under article 90 of the constitution, are not confined to writs of certiorari, prohibition, mandamus, and quo warranto, but extend to other remedial writs.

5. Parties complaining of an order "suspending until after hearing" a prior order of injunction must, before invoking the supervisory powers of the supreme court, have unsuccessfully sought to have the "suspending" order rescinded. Where a restraining order is sought pending an examination of issues submitted for examination, the whole case should, as far as practicable, be placed before the court.

6. Where the United States marshal (under writs of fi. fa. from the circuit court of the United States, directed against a lessee), having seized the "right of occupancy" of certain premises, has (with the consent of the lessor and the receiver of the lessee appointed by the civil district court) granted to a third person the right of occupying the premises, on paying rent, until a sale under the writs, a creditor of the lessee, subsequently attaching the "right of occupancy" of the same premises, in the civil district court, cannot oust such person from his occupancy by ex parte injunction proceedings directed against him alone, nor is he entitled to a suspensive appeal from an order suspending until hearing an ex parte prior order of injunction, which would have accomplished that result.

(Syllabus by the Court.)

Application for certiorari, mandamus, and prohibition, on the relation of A. Lehman & Co., against the Honorable Fred. D. King, judge of the civil district court for the parish of Orleans, and others. Writs denied.

Dinkelspiel & Hart, for relators. Lazarus, Moore & Luce, for respondents.

NICHOLLS, C. J. Relators represent: That on January 1, 1894, they applied to the Honorable N. H. Rightor, one of the judges of the civil district court for the parish of Orleans, in the case entitled *A. Lehman & Co. et al. v. Walter P. Walsh*, for an injunction against said Walter P. Walsh, their petition being verified by proper affidavits. That the said judge granted the injunction, as prayed for, conditioned upon relators furnishing bond in the sum of \$1,000, which they did furnish, with good and solvent security; and the injunction was thereupon issued by the clerk of the court, enjoining and restraining the said Walsh from carrying on business in the stores Nos. 145 Canal street and 7 and 9 Bourbon street, in New Orleans, and from making any use of said premises, except for the purpose of preparing for the removal of the goods therein belonging to said Walsh. That on the same day a duly-certified copy of said injunction, under the seal of the court, was served upon the said Walsh, in person. That the said petition and application for injunction were presented to the said judge prior to the allotment of said cause, as authorized by the constitution of the state and the rules of said court. That said cause was not allotted according to the rules of said court until the following day, Tuesday, January 2, 1894, when same was allotted to division B of said court, presided over by Hon. Fred. D. King. That at about the hour of 11 o'clock a. m. on said Tuesday, January 2, 1894, and before the allotment of said cause, the following order was indorsed on said injunction served upon the said Walsh, to wit: "Upon representations of H. L. Lazarus, and a full statement of the facts, the writ issued herein is suspended until the further order of the court, and after hearing. New Orleans, January 2, 1894. [Signed] N. H. Rightor, Judge." That said copy of injunction, with the said order indorsed thereon, was thereupon filed in the clerk's office of said civil district court. That said order of January 2, 1894, was rendered without notice to relators, without any hearing of any kind, and they did not know of same until after it had been filed in the clerk's office as aforesaid. That, as soon after the allotment of said cause as possible, relators appeared before the said Hon. Fred. D. King, and asked for a suspensive appeal from said order, tendering a bond, with good and solvent security, in any amount to be fixed by the court; but on January 3, 1894, the said Hon. Fred. D. King refused said appeal as prayed for. That said order of January 2, 1894, is absolutely null and void, and without effect, for the following reasons: (1) That, in advance of the allotment of said cause, the said Hon. N. H. Rightor had no right or authority to act in said

cause, the granting of the preliminary writ of injunction having exhausted his authority in the premises; (2) that said order was rendered without notice, and without hearing of any kind; (3) that said order purported to be rendered because of the presentation to the court of certain facts, and an order regularly granted cannot be set aside by the court, upon matters of fact, until final hearing of the cause. That under the constitution of the state, and the rules of said civil district court, the granting of a preliminary writ by any judge of said court prior to an allotment does not in any wise affect the control of the cause by the judge to whom same may be allotted after the allotment; and therefore the said Hon. Fred. D. King, presiding judge of division B of the civil district court, is alone competent to deal with said cause, and is the only one of said judges against whom the process of this court may be directed, as to said cause. That relators are entitled to writs of certiorari, prohibition, and mandamus, to the end that said proceedings be inquired into, the execution of said order of January 2, 1894, restrained, and an appeal given the relator therefrom; the said writs to be operative in their order, so that if the writ of certiorari be granted, and made peremptory, the other writs will be unnecessary, or if the writ of certiorari be finally refused, and a writ of prohibition granted, the writ of mandamus will be unnecessary, and if both the writs of certiorari and prohibition be refused or set aside, after final hearing, that then the writ of mandamus be made peremptory. In view of the premises, relators' prayer was that a writ of certiorari issue, directed to the Honorable Fred. D. King, judge, commanding him to transmit the original record in the suit of *A. Lehman & Co. v. Walter P. Walsh* (No. 41,200); that the validity of said order of January 2, 1894, may be inquired into, and that said writ also be directed to the said Walsh, prohibiting him from acting under said order of January 2, 1894; and that, in due course of law, the said writ be made perpetual, and said order annulled and set aside. Under the restriction before stated, they prayed for a writ of prohibition directed to the said judge, enjoining him from enforcing or acting under said order of January 2, 1894, and that, in due course, said prohibition be made perpetual. Under the restriction before stated, they prayed for the issuance of a writ of mandamus commanding the said judge to grant a suspensive appeal from said order of January 2, 1894. They prayed that Walsh be served with a copy of the proceedings. This court ordered that a writ of certiorari issue, and that the respondents show cause why the writs of mandamus and prohibition should not be granted, as prayed for, but refrained from issuing any restraining order in the premises, for the reason that the petition utterly failed to disclose, as it should

have done, the character of the proceedings in the court below, or the facts and circumstances of the case in which an intervention was asked. We were inclined, for this reason, to refuse relators' application, in its entirety.

In the answer filed by the judge of division B, he states that he transmits, not only the record in the case of *A. Lehman & Co. v. Walter P. Walsh*, but other original records and copies incident to, and connected with, the litigation growing out of the seizures and attachments against the Runkel-Hoerner Company, Limited, in suits pending in the various divisions of the district court for the parish of Orleans, and liquidation proceedings, in which liquidators and receivers have been appointed, and various orders granted therein; that he transmits, and makes part of his answer, the said records, for the reason that they are part of, and concern, the same litigation, of which the injunction sued out by *A. Lehman & Co. et al.* is but a part, and that said records show that all the attachment proceedings and cases, including those by relators, were transferred to, and cumulated with, the liquidation proceedings. He avers: That all the orders granted by him and the Honorable N. H. Rightor in the case aforesaid are legal and valid, and that relators are not entitled to a writ of certiorari. That his own refusal to grant a suspensive appeal from the order suspending the injunction in the case of *A. Lehman & Co. et al. v. Walsh* does not entitle relators to writs of mandamus and prohibition. That the records transmitted show that an order of injunction was granted in the said case of *Lehman & Co. et al. v. Walsh* by the Honorable N. H. Rightor, judge of division D, and that subsequently the said judge, before the allotment of the case, suspended the operation of said injunction, by a written order to that effect, on the same day that the injunction was granted. That the injunction granted was not a matter of right, and was within the discretion of the judge to whom the application was presented to refuse or grant the same, and that, before the allotment of the case, the judge who originally granted the writ had the right to either revoke or modify the same; such order being entirely within his control, and power of modification or revocation. That said judge, having the authority, previous to the allotment of the case, to modify or revoke such order, could modify, revoke, or suspend the same, either upon a representation of facts made to him, or without such representation, and could do so either with or without notice to the parties in interest, and a contradictory trial upon the question whether the injunction should be suspended. That the judge had the absolute power to revoke or modify this class of injunctions, and to hold that he could only do so after notice and hearing of the parties upon the question of fact pre-

sented for the issuance of the injunction would be to deny his discretion and power to revoke or modify the order of injunction, and would deny him the power to set aside an injunction improvidently granted until after the delays which are always usual in rule, contradictorily granted, and the trial thereof, and would result in the party enjoined suffering all the injury resulting therefrom pending the trial and decision on any rules which might be taken. That, the said judge having the absolute power to revoke or modify the said order of injunction, the exercise of such power is not affected by the fact that he states in the order that he does so upon the statement of certain facts made to him; but the question is whether, upon the face of the petition, as presented, the case was of such a character as authorized the judge either to grant or refuse the injunction. That to hold that the judge who originally granted the injunction had no right or authority to set it aside would be to hold that an injunction, no matter how improvidently granted, would have to stand until allotment was made. That in the order suspending the injunction the judge made such suspension, as shown in the order, until further orders of court, and after further hearing. That, under the said order of suspension, relators had the right, and were reserved the right, to apply and move for reinstatement of the original order of injunction, and that he (the respondent judge) had been ready at any and all times to receive and consider such application, but that no such application had been filed by relators. That the Honorable N. H. Rightor having granted the original order of injunction, and having suspended the same, and the case having been subsequently allotted to respondent, and an application for a suspensive appeal having been made, respondent, in his discretion, refused such suspensive appeal; and relators are not entitled to a mandamus to compel the granting of the same, as the granting of the injunction, and the modifying of the same, were within the discretion of the civil district court, and to grant a suspensive appeal would be to control that discretion, and to reinstate an injunction which the lower court had, in its discretion, decided should be revoked and suspended. That the injunction sought by relators was in its nature mandatory, as, while the injunction is directed against the defendant Walsh, to restrain him from using and enjoying the possession of the premises, still, if reinstated, it would have the effect of ousting him from a possession which relators admit he now has. That the injunction, being thus mandatory in its nature, should not be issued until after legal trial upon its merits. The respondent judge relies upon the case of *Koehl v. Judge* (recently decided by this court) 45 La. Ann. —, 14 South. 352, as supporting these views.

An examination of the petition of relators,

upon which they obtained the order of injunction, shows that they averred that they were creditors of the Runkel-Hoerner Company, Limited; that, under writs of attachment, they had seized certain property of that company, including especially the leases and rights of occupancy of the premises Nos. 145 Canal street and 7 and 9 Bourbon street, in the city of New Orleans, which leases and rights of occupancy were worth about \$25,000; that unless they are able, in due course of law, to sell and realize upon said leases and rights of occupancy, all their claims against said company will not be paid in full; that W. P. Walsh, a resident of New York, temporarily in New Orleans, had taken possession of said premises without right or authority, and had announced his intention of carrying on business in the same, commencing on Tuesday, January 2, 1894; that they would be irreparably injured, should he be allowed to continue the possession and use of said property, and that they have no relief, save in the equitable writ of injunction; that, when Walsh purchased the contents of said stores, he was notified that he would have a reasonable time, not exceeding two weeks, within which to remove said goods from said premises, but that he had announced his intention of carrying on business, and selling said goods, regardless of said notice, and regardless of their rights, and those of other creditors of the said company. Their petition closed with the prayer that an injunction issue enjoining and restraining Walsh, his agents, clerks, and employees, from carrying on business in the said premises, and from making any use of the same, except for the purpose of preparing for the removal therefrom of the goods therein belonging to him; that after due proceedings the said injunction be by judgment perpetuated, with reservation of their right to sue Walsh for whatever loss or damage they may have sustained by reason of his retention or occupancy of the premises. The allegations of this last petition, like those of the petition in the present proceeding, are exceedingly indefinite. They do not set out all the facts of the case, and we are forced to gather these facts, as best we may, from the various records, or fragments of records, which the respondent judge has sent up. The answer of the respondent Walsh, verified by the oath of one of his attorneys, makes the following allegations: "Respondent would, for further answer, state the facts in connection with this litigation,—a litigation of which the injunction sued out by A. Lehman & Co. et al. was but a branch or incident. Respondent shows that in the cases styled Sweetser, Pembroke & Co. v. The Runkel-Hoerner Company, Limited, and The H. B. Claflin Co. v. The Runkel-Hoerner Company, Limited, attachments were issued from the United States circuit court for the fifth circuit and eastern district of Louisiana, and

levied upon the stock of merchandise and fixtures contained in the premises now occupied by your respondent; that subsequently suits were instituted, and provisional seizures issued, in the cases styled Joseph R. Mitchel v. Amos Runkel and Mrs. Sarah E. Atkins v. Amos Runkel, in the said United States court, on demands for rent, in the former case, of the Bourbon street premises, and, in the latter case, of the Canal street store, now occupied by your respondent; that judgments were obtained in the United States court, recognizing the lessor's privilege and pledge upon the stock of merchandise, and all movable effects in said leased premises; that the same were sold at marshal's sale under said judgments, and writs of fieri facias issued thereon, on the 26th day of December, 1893; that, previous to the sale, A. Lehman & Co. filed interventions in the cases of Sweetser, Pembroke & Co. and The H. B. Claflin Co. v. The Runkel-Hoerner Company, setting up that the attachments issued therein should be dissolved, on account of liquidators having been appointed in the state court, and all the property and effects of the Runkel-Hoerner Company having been ordered to be placed in the possession of said liquidators and receivers, collusion, etc.; that the said interventions and attachment cases of Sweetser, Pembroke & Co. and the H. B. Claflin Company were regularly put at issue and tried, and judgments were rendered, maintaining said attachments, and dismissing the interventions, the seizures under the attachments having been made prior to the appointment and qualification of liquidators and receivers; that, at the said sale by the United States marshal, respondent purchased the stock of merchandise and fixtures for a sum exceeding \$50,000, and paid cash therefor; that at and during the sale of said stock, and after the marshal had announced the terms thereof, G. Lehman, of the firm of A. Lehman & Co., asked the marshal whether the purchaser would be allowed to occupy the premises after the sale, and that the marshal responded that the purchaser would be allowed to have possession of the premises for two weeks, or possibly longer, and that if he continued any longer he would have to obtain the consent of the landlord, or parties interested; that in the said suits of Sweetser, Pembroke & Co. and the H. B. Claflin Company, and under the attachments issued therein, the right of occupancy now in controversy was seized by the United States marshal; that in the said suits in the United States court the liquidators appeared, and filed exceptions, setting up that, on account of the Runkel-Hoerner Company having gone into liquidation, the attachments should be dissolved, which exceptions were overruled by the court, and final judgment rendered in said cases in favor of Sweetser, Pembroke & Co. and the H. B. Claflin Company, and against the defend-

ants and the interveners, A. Lehman & Co. et al., the appointment and qualification of the liquidators being subsequent to the attachment and seizures thereunder in the United States court; that, subsequent to the purchase by respondent of the said stock of merchandise and fixtures, A. Lehman & Co. et al. appeared in the United States court, and took a rule upon the United States marshal and respondent to show cause why they should not vacate the premises now occupied by respondent; that subsequently, under the attachment proceedings in the civil district court for the parish of Orleans, division A, wherein the said A. Lehman & Co. et al. have secured attachments, the said parties took a rule upon the defendant the Runkel-Hoerner Company to show cause why the right of occupancy should not be sold in their case, as perishable, and that said rule was discharged, the judge of division A transferring all the attachments in his said division to division B, in which division the liquidators and receivers had been appointed and qualified for the Runkel-Hoerner Company. Respondent avers that he is occupying the said premises under permission from the United States marshal, and under agreement with the liquidators and receivers of the Runkel-Hoerner Company to pay the same rent that was agreed to be paid prior to the institution of said attachment proceedings against said company, and also with the consent of the landlord and original tenant, Amos Runkel, and with the understanding that, when the right of occupancy of the leased premises was sold, respondent would vacate the premises. That relators were absolutely without right to enjoin respondent from occupying or enjoying the premises, and they could suffer no irreparable injury by reason of the refusal to grant the injunction, or suspend the same after its granting, leaving out the question as to the granting or suspension of the same being within the discretion of the judge of the lower court."

In their petitions of intervention and third opposition filed in the United States circuit court on the 21st December, 1893, in the Sweetser, Pembroke & Co. and the H. B. Claflin Company cases, relators averred that on the 13th November, 1893, writs of attachment issued in these cases, under which the United States marshal took actual possession of the movable property of the Runkel-Hoerner Company, contained in No. 145 Canal and Nos. 7 and 9 Bourbon streets, and that the same was at the time of the filing of said opposition, and had been since the 13th November, in his possession; that on the next day, and at subsequent dates, they had obtained writs of attachment, some in the civil district court, others in the first city court, under which writs the said property was seized by the civil sheriff and the constable, by notices of seizure served upon the defendant and the United States marshal,—the last

named notices being accompanied by service of a petition, with interrogatories and citations, it being impossible for the sheriff and constable to make a physical seizure of said property, owing to the fact that the same was under the control of the marshal.

The injunction proceeding below having been assigned to, and being lodged in, division B of the civil district court, when relators' petition was filed here, the judge of that division is the proper one with whom, contradictorily, to test, by certiorari, the order of Judge Rightor, complained of. The fact that that judge has not made the answer or return in this case has left us without knowledge of the reasons which induced him to suspend the original order he had granted. We think it quite likely that, when he did so, he was under the impression it had not yet been executed. It may be that the judge, having had his attention directed to the fact that the first order had been granted on the 1st of January, was doubtful as to the legality of that order, and of any action to be predicated on it, or that under the facts of the particular case, the injunction being an incident of prior existing litigation in other divisions, he may have conceived that the parties should have addressed themselves to some other judge. Whatever his reasons, we do not think that, from the standpoint of "power," the second order can be successfully attacked. Relators selected the particular judge for the granting of the injunction. They maintain here that his original action was valid and legal. If so, the judge did not exhaust his powers in the premises, but retained control of the proceeding up to the allotment of the case. In *State ex rel. Buisson v. Judge*, 33 La. Ann. 419, as in *Mengelle v. Abadie*, 45 La. Ann. 678, 12 South. 921, this court said that "the power to issue the writ, when vested in a judge, implies that of dissolving it;" and in the former case we maintained the right of the judge who had granted an injunction in the absence of the particular judge, to whom it had been allotted, to rescind the order. It certainly was never contemplated, and we could not hold, that an ex parte order of a judge, which might have been improvidently granted,—which might, in fact, be an absolute nullity, working the greatest injury,—should be forcedly given full effect to until it could be set aside by regular proceedings, with the usual notices and delays, by the judge to whom the case would be ultimately allotted. 1 Black, Judgm. c. 14, §§ 297, 308. The power to rescind or modify is something other and different from the rightful exercise of the power, either as to the manner in which the rescission or modification was made, or as to its correctness. In *State ex rel. Moore v. Judge*, 37 La. Ann. 119, we said that "it was well established, as a rule, that notice to dissolve an injunction should be given to the party who obtained the writ;" but we immediately added: "Although, in extreme

cases, the judge, in his discretion, may dissolve at chambers, and *ex parte*." In *Baldwin v. Bellocq*, 35 La. Ann. 983, we said: "There is no doubt that a judge has the right and power, on an *ex parte* application, in a case of urgency, to dissolve an injunction on bond; but in such instances the dissolution, being at the risk of the mover, will be rescinded on a proper showing of error either in the lower or appellate court, and the matter reinstated, to be proceeded with contradictorily. It is decidedly preferable that such course be pursued, where circumstances will allow." These authorities show that a legal power exists in a district judge to dissolve even *ex parte* orders of injunction which he has granted, though the power, it is stated, must be very carefully and cautiously exercised. The duty of the court to give notice at once to parties in interest, of the action so taken, is referred to in *State ex rel. Moore v. Judge*, 37 La. Ann. 118, and is manifest. The action itself is, of course, subject to review and supervision in proper cases, through remedies varying under different circumstances. It is claimed that *ex parte* orders for the rescission of even *ex parte* injunctions are unauthorized; that great and irreparable injury would necessarily follow from such a practice. Cases can be easily imagined, however, where an inflexible rule that such orders should continue in force until contradictorily vacated or modified might be productive of still greater wrong and injury. We think the rights of all parties are fairly guarded and protected, in this state, under the discretionary powers of the district judges over such questions, supplemented, as they are, by the supervisory control over inferior tribunals which has been given to this court. Our powers, under article 90 of the constitution, are not limited, in proper cases, to writs of certiorari, prohibition, mandamus, and quo warranto, but are expressly declared by that article to extend to other remedial writs. In *State ex rel. Murray v. Judge*, 36 La. Ann. 578, we said that this court could issue a restraining order which would have the effect of an injunction asked for, but refused, below, and issue a mandamus directly to the district judge, to allow the injunction in limine, whenever a proper state of facts is presented, and all the requirements of the law have been complied with; that it was manifest that cases might be presented in which justice and reason required that some mode should exist of redressing at once the wrong or abuse of power of the district judge, even if there be other means of relief, if the slowness of ordinary legal forms would produce such a delay that the administration of justice might suffer from it. We do not propose to enter here into any extended examination or discussion of "judges' orders," "court orders," of orders rendered "*ex parte*" and those "contradictorily" obtained. It suffices to say that the order first granted herein by Judge

Rightor was not technically a judgment (*State ex rel. Behan v. Judges*, 85 La. Ann. 1077, 1078); and, even though it should not have been properly suspended, the error was not covered or reached by a claim that there is an absolute want of power in a district judge to vacate or modify, *ex parte*, under any circumstances, any order of injunction which he had previously rendered. It is not, legally, essentially necessary that such orders should in all cases be modified or vacated contradictorily with those in whose favor they have been issued. It is not true that the mere failure to give prior notice to such parties would carry with it, as the inevitable consequence of that fact, the absolute nullity of the modifying order, as for want of legal power in the judge over the whole subject-matter. 1 Black, *Judgm. c. 1, § 1, p. 5*; *Id. c. 14, §§ 297, 308*; *Craddock v. Croghan*, 1 Sneed, 100; *Claggett v. Simes*, 25 N. H. 402.

We are next to inquire whether, in the exercise of his power of *ex parte* revocation or modification, the judge has applied the power to a particular case in which he was not legally authorized to do so, so as to authorize a review of his action through the instrumentality of a writ of certiorari. We understand relators to claim that there is a class of cases such as leave no discretion in the district judge to determine whether he would or would not grant an injunction asked, when the facts are properly alleged and sworn to, and that the present case falls under that class; that the same reasons which withdraw from him, in that class of cases, all discretion as to granting the injunction, also withdraw absolutely from him the authority to modify or revoke, *ex parte*, the injunction which he has directed to issue. The fact that a particular case, when properly presented to a judge, may be of such a character as to make it his duty to issue an order of injunction, does not exact that the injunction should necessarily be continued until final hearing. While the injury complained of may justify an injunction, it may not be such as to work irreparable injury. The judge, therefore, even in such cases, has some power of action in the matter. It may be that he would not have the authority, for any reason dependent upon the merits of the case, to definitively dissolve the injunction, but he would have the right to entertain and act upon an application to dissolve on bond; and it would not be essentially necessary, as we have said, though generally right and proper, to have the same disposed of contradictorily. The falling of a particular case under the class referred to would not necessarily be determinative of the question of the legality of notice prior to action. Whether, in such case, the judge would have acted legally in proceeding *ex parte*, would depend upon its particular facts, and the grounds upon which the action was based. In dealing with that question the fact must not be overlooked that the modification or

revocation of the order may be grounded on causes extrinsic to the merits of the injunction. The judge, for reasons entirely independent of the merits, may reach the conclusion that the order of injunction was improvidently and illegally issued by him; and we should, if possible, be advised of those reasons by parties who, appealing to our supervisory powers, seek at our hands a restraining order pending the examination of the issues submitted to us. They should, as far as practicable, place the whole case before us. We consider such a requirement conservative; tending to secure the rights of all parties, and to further the proper administration of justice, by enabling us, speedily, through the reasons assigned below by the district judge, to come to a correct knowledge of the situation, and to act advisedly. In the present case, relators did not exhaust their remedy in the court below, or seek the obvious relief which was directly before them, and which they could doubtless have speedily obtained there, if entitled to the same. *State ex rel. Shakespeare v. Judge*, 40 La. Ann. 607, 4 South. 485; *State v. Levy*, 36 La. Ann. 944. The order of injunction granted was not absolute. Defendant was enjoined "until further orders of the court." The second order was not absolute. It suspended the injunction "until further orders of court after hearing." Relators took no steps whatever to have the suspending order revoked, or to obtain the hearing reserved and obviously tendered, but applied at once for a suspensive appeal, following the refusal thereof by this application to us. The second order was not a denial of the injunction. It merely postponed matters for a short period, to enable the replacing judge to advise parties—whose right to be heard was surely as great as that of the relators' to be heard—of the pending application, so as to guard their interests. We think that, under the circumstances of this case, relators, before making an appeal to us, should have applied, at least, for the revocation of the order complained of. In some states such a prior application for the revocation of an order complained of is made a condition precedent to the granting of even an ordinary appeal. See *Bostwick v. Knight (Dak.)* 40 N. W. 345; *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co. (S. D.)* 51 N. W. 342, 343, 345. We have ourselves established as a rule of practice that applications to us for relief against the actions of a court, charged as being in excess of power, and usurpations of jurisdiction, would not be generally entertained, unless exception had been made below to the want of power or jurisdiction, and the same had been overruled. We do not know upon what grounds Judge Rightor acted in this matter, and as he might have been authorized and justified, for a number of reasons, which we can readily imagine, in giving the second order, we cannot set it aside in this proceeding.

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Relators complain that even if the second order were not reviewable by this court, under its supervisory powers, they were entitled to appeal suspensively from the same, and this appeal was unjustifiably refused. It would appear that the Runkel-Hoerner Company were the lessees of the premises Nos. 7 and 9 Bourbon street and No. 145 Canal street, and had therein a stock of merchandise; that on the 13th November, 1893, under writs of attachment issuing from the United States circuit court at the instance of several creditors of that company, the stock of goods mentioned, and the right of occupancy of the said premises, were seized, and the premises and stock of goods were taken possession of by the marshal; that upon the next day, November 14th, the company went into liquidation in division E of the court, and receivers or liquidators were appointed by, and confirmed in, that division; that on the 14th November, 1893, and at various dates since, under writs of attachment issuing from the civil district court for the parish of Orleans, the same property, with the right of occupancy, was seized by the civil sheriff of the parish, through notices of seizure served upon the marshal (the notices being accompanied by service of petitions, with interrogatories attached, actual possession of the property not having been taken, by reason of the prior holding of the same by the marshal); that subsequently, under proceedings taken out in the United States circuit court by the lessors of the premises occupied, the stock of goods was sold at public auction, and was purchased and taken possession of, in the premises, by one W. P. Walsh; that Walsh still occupies the stores with the goods purchased by him, and is duly selling the same therein; that the seizures made by the marshal are still in full force; that the occupancy of Walsh is under the consent and with the permission of the marshal, the receivers, and the landlord, and that Walsh recognizes that it will terminate upon the sale of the right of occupancy, and admits that it will be his duty to vacate the premises upon the happening of that event; furthermore, that all the various suits and attachments connected with the company have been transferred to, and are now before, division E of the civil district court, where the proceedings in liquidation of the Runkel-Hoerner Company are still pending. Relators have not explained to us, in their brief, how their interests would be prejudiced by the temporary occupancy of the premises by Walsh, under the circumstances, nor how they would be advanced by having the injunction maintained. The premises are still in the possession of the marshal, under seizure; and, if he chooses (particularly, if the landlord and receiver consent) to permit Walsh to act as a quasi keeper or tenant, we do not see either the interest or the right of the relators to have him ousted by *ex parte* proceedings directed

against him. *Railroad Co. v. Railroad Co.*, 36 La. Ann. 561. For the reasons herein assigned, it is ordered, adjudged, and decreed that the provisional orders and writs be set aside, and relators' applications be rejected, at their costs.

(46 La. Ann. 923)

STATE v. WILLIAMS. (No. 11,438.)

(Supreme Court of Louisiana. May 7, 1894.)

INSURANCE—OPEN POLICY—PLACE OF CONTRACT—FOREIGN COMPANIES—LICENSE—AGENTS—RIGHT TO DO BUSINESS.

1. In an open policy of insurance, in which an aggregate amount is expressed, there are as many contracts of insurance as there are indorsements on the policy of separate shipments of goods.

2. If the open policy contains all the conditions which govern the shipments of goods specially insured under the policy, and the company reserves the right to reject or accept each special insurance in each shipment, the contract must be considered as made at the domicile of the company issuing the open policy.

3. Under such a policy, the insurance company having no agent in Louisiana, it cannot be considered as doing an insurance business in the state.

4. There is a clear distinction between the business of insurance agency and the conducting of an insurance business.

5. A person who takes out policies in a foreign company having no agent here, and which does no business here, cannot be made to pay a license which the company would pay if doing business.

6. It is within the power of the legislature to define what acts of a person in insuring and procuring the issuance of insurance policies may constitute him an insurance agent; but, after defining his occupation, it is not within its power to make him pay a license for a foreign corporation whose business he undertakes.

7. The legislature cannot appoint, by statute, an agent for a foreign insurance company, for any purpose, as its legally constituted agent, as it is in violation of article 236 of the constitution.

8. The right to prohibit foreign corporations from doing business in the state without complying with article 236 of the constitution carries with it the right to enforce the prohibition by appropriate legislation.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Rule by the state of Louisiana against J. H. Williams to compel him to pay license for a foreign insurance company. Judgment for defendant, and the state appeals. Affirmed.

E. H. McCaleb, Jr., for the State. Branch K. Miller (Thomas J. Semmes, of counsel), for appellee.

McENERY, J. The defendant is a cotton buyer, engaged in purchasing cotton and shipping it from the port of New Orleans. The cotton so purchased is insured in an open policy in the Atlantic Mutual Insurance Company, a foreign corporation, having no agent in the state of Louisiana, appointed as the law requires. The state tax collector proceeded by rule against the defendant to compel him to pay personally the license which it is alleged is due by said insurance

company under the provisions of section 7 of Act 150 of 1890. This section graduates licenses on "each and every insurance company, association, corporation or other organization or firm, or individual doing and conducting an insurance business of any kind, * * * whether such company * * * or other organization or firm, or individual is located or domiciled here or operating here, through a branch department, resident board, local office, firm, company, corporation, or agency of any kind whatsoever shall pay a separate and distinct license on said business for each company represented, * * * and on all risks located within the state, and upon risks located in other states or foreign countries, upon which no license has been paid." In the proviso to the section there is a prohibition to any foreign corporation doing business in this state except through an agent duly authorized and accredited for the purposes of said business, and for all purposes connected with licenses and taxation and service of process. The agent is to be appointed by authentic act, a copy of which is to be deposited with the secretary of state. The proviso further states that any person or firm who shall fill up or sign a policy or certificate of insurance on open marine or fire insurance policy, for a corporation, association, or persons not located or represented in this state, shall be considered the agent of such corporation, firm, or association or persons, and shall be liable for all taxes, licenses, and penalties enforced by the provisions of this act upon such persons, corporation, or association, as if represented by a legally appointed agent. The open policy issued by the Atlantic Mutual Insurance Company is one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time in the policy. There is no dispute as to the fact that this open policy was consented to in New York, and the policy issued directly from the domicile of the company. It was issued to the defendant, "J. Herbert Williams, on account of himself, and to cover cotton in bales purchased and shipped by him, on which drafts are drawn for the purchase upon whom it may concern. The amount of the open policy is \$200,000, covering shipments of cotton from September 23, 1893, to September 23, 1894, to ports in Great Britain direct, or via New York for transshipment, and to ports on the continent between Hamburg and Trieste, inclusive, direct, or via New York for transshipment; including the risk of fire at New Orleans while in preparation for or in process of shipment or awaiting shipment, but no fire risk prior to shipment to be covered unless the vessel is in port, loading, or ready to load, or until the cotton is discharged from the railroad cars, and at the risk of J. Herbert Williams; premium to be paid by the assured at the rates of this company. No risk is to be

insured by this policy until a letter signed by J. Herbert Williams and addressed to the president of this company, detailing name of vessel, particulars of shipment, with description of the property and amounts to be insured, is deposited in the post office at New Orleans, which must be done while the property is in good safety, in all cases prior to the departure of the risk from New Orleans; a duplicate letter to be sent by the following mail. A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to J. Herbert Williams. Risks indorsed hereon, and subsequently taken off, and new and separate policies issued, not to exhaust this policy. The said goods and merchandise hereby insured are valued, including premium, at the sums expressed in the letter of advice, as provided for herein, but not to exceed the invoice cost and ten per cent." The policy requires the notice, or "application," as it is called in the testimony, to be mailed prior to the shipment; and on its receipt the company has a right to accept or reject the application for insurance on the particular shipment. We presume the notice is required to inform the company whether or not the conditions prescribed by the policy previously issued in New York have been complied with. The policy required the premium on the insurance of any particular shipment of cotton to be paid on the presentation of the invoice or bill of lading and notice of shipment. The defendant, in pursuance of the terms of the policy, makes an application through his broker in New York to insure prior to the shipment of the cotton. His broker pays the insurance.

In the case of *Douville v. Insurance Co.*, 12 La. Ann. 259, this court interpreted an open policy similar in all essentials to the one under consideration. In that case the plaintiff had failed to furnish the defendant company with an invoice of goods purchased in Paris, which were lost under an open policy. This court said: "On a policy of insurance in this form there must necessarily exist as many contracts of insurance as there are indorsements upon the policy of separate shipments of goods. The delivery of the policy four years previously did not constitute a contract of insurance upon goods which might be shipped by the Arctic. Something more was required, viz. consent on the part of the plaintiff, a production of her invoices, and the payment of the premium on her behalf, and a communication of the unusual manner in which these goods were intended to be brought over, viz. in the trunks of a partner and an employee of the house, as baggage; and, on behalf of the company, an agreement to take the risk in this form." The principle announced here will govern this case. The company, by the terms of the policy, had the right to have notice of the mode of shipment, and it could accept the

policy or reject it if the shipment was by unusual methods, and incurred extra and hazardous risks. The open policy in this case is even stronger in favor of the separate contract of insurance being completed in the state of New York by the acceptance of the company. Or it would be more accurate to say that each shipment of cotton, and the insurance thereon, is part and parcel of the original contract of insurance, as it must be referred to the open policy for construction and interpretation. In that policy are found all the conditions for each separate shipment and insurance of cotton covered by the open policy. In the separate contracts or shipments there is no agreement or condition that is not found in the open policy. While the open policy is a separate insurance on each shipment of cotton, and the risk is to commence, as stated in the policy, from its loading on shipboard, or awaiting shipment, this is only an incident of the contract, material and important, but does not control the fact as to the place of making the contract. This is to be determined by the final assent to it, when it becomes complete and perfect. To illustrate: Suppose a resident of New York City takes out a policy of insurance on property owned by him in New Orleans, and the agreement is that the risk is to commence instantly on the issuing of the policy. The entire contract having been made in New York, the assent having been given there, and the contract completed, the risk is only an agreement or stipulation in the contract; so that the stipulation in the open policy that the risk is to commence from a certain time in New Orleans does not make the contract a Louisiana contract. The original policy and the special insurance effected under it are New York contracts, as the policies were issued from the domicile of the foreign corporation and assented to there. *Clafin v. Mayer*, 41 La. Ann. 1048, 7 South. 139. We have decided that a foreign insurance company which issues policies directly from its domicile, who has no agent here, and who only agrees to accept risks placed for it by a person residing here, cannot be compelled to pay a license. *City of New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 781. The Atlantic Mutual Insurance Company not having done any business in the state, the defendant cannot, even under the provisions of Act 150 of 1890, § 7, be considered as its agent. That part of section 7 of Act 150 of 1890 quoted above constitutes the person making these special contracts of insurance under an open policy the agent of the company, as though he had been duly appointed by law. If such is the effect of the act, and the agent thus appointed becomes the agent of the company, upon what principle can he be made personally liable for the debt of the principal? "A clear distinction exists in law as well as in fact, and must be observed by courts, between the business of an insurance agent and that of a

person or firm or corporation conducting or doing an insurance business." State v. Woods, 40 La. Ann. 175, 3 South. 543; City of New Orleans v. Rhenish Westphalian Lloyds, 31 La. Ann. 781; City of New Orleans v. Virginia Fire & Marine Ins. Co., 33 La. Ann. 11. If the defendant is liable at all, it is because of his agency for an insurance company domiciled out of the state. We think it is within the power of the general assembly to declare what acts of a party in issuing or procuring the issuing of insurance policies may constitute him an insurance agent, and subject him to the license required of such agents. But, after defining his occupation, it is not within its power to make him personally liable for the license of a foreign corporation whose business he undertakes. The business of an insurance agent is a separate and individual industry or occupation, and only taxable as such. City of New Orleans v. Rhenish Westphalian Lloyds, 31 La. Ann. 781. In the case of State v. Woods, 40 La. Ann. 177, 3 South. 543, this court said: "The attempt of the state, by means of this proceeding, is to make them personally liable for the license which is contemplated for the companies or corporations which they represent, and to subject their own property to the privilege created in favor of the state against the property of the parties who may owe the license provided by the statute. Such a proposition finds no sanction in reason or justice, and much less in the very law under which the proceeding has been instituted." In that case the proceedings were instituted against certain insurance agents to make them liable for licenses for conducting an insurance business. The licenses exacted were for the amount of business done by the corporation in this state which they represented. The suit was instituted under the provisions of Act 101 of 1886, § 7, which are identical with those of Act 150 of 1890, § 7, except the proviso in the latter act. The present proceedings, in effect, are the same as in that suit,—to make the agent responsible as one who conducts an insurance business. No law can make a person answerable for a debt which he does not owe. The defendant does not do an insurance business, and he cannot be made to pay a license for that occupation. Const. art. 236, requires the foreign corporation which desires to do a business in this state to appoint its own agent; therefore the legislature cannot appoint one for it. It is safe to say that the legislature cannot appoint an agent for an insurance company, to represent said company for any particular purpose as its legally-appointed agent, in violation of article 236 of the constitution. We do not mean to be understood that the legislature cannot designate persons who transact the business of a corporation domiciled out of the state, and having no agent here, as proper persons upon whom process may be served. Nor do we wish to

be understood to announce that the state is powerless to prevent the evil attempted to be suppressed by section 7 of Act 150 of 1890. The right to prohibit foreign corporations from doing business in the state unless they comply with its regulations cannot be denied, and this right carries with it the power to enforce the prohibition by appropriate legislation. Moses v. State (Miss.) 3 South. 140. The state can therefore prohibit its own citizens from conducting the business of taking out an open policy, covering special contracts of insurance, in a foreign insurance company which has not complied with constitutional and statutory regulations, as it has the exclusive right by virtue of its sovereignty to regulate the conditions and capacity of all persons within it, the validity of contracts and other acts done within its limits, the resulting rights and duties growing out of these contracts and acts, and the remedies and modes of enforcing justice and subjection to its will. Story, Conf. Laws, par. 18. Judgment affirmed.

(46 La. Ann. 706)

DURWARD et al. v. JEWETT et al. (No. 11,506.)

(Supreme Court of Louisiana. April 23, 1894.)

SUSPENSIVE APPEAL—WHEN ALLOWED.

1. Where the issues involved are as to the ownership of a certain fund, and the district court renders a decree in favor of plaintiffs, from which a devolutive appeal is taken by defendants, and the court afterwards orders the fund distributed among those to whom it was adjudged on their application, the fund being on deposit in the court and under its control, no suspensive appeal can be taken by defendants from the interlocutory order of distribution. Such an appeal would arrest the execution of the judgment originally rendered, which can only be done by defendants by a suspensive appeal from it.

2. In such a case no question of distribution of the fund among those to whom it was adjudged by the decree is presented. The judgment, not having been suspensively appealed from, must be executed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by S. Durward and others against Jennie Jewett and others. Judgment for plaintiffs, and defendants appeal. Dismissed.

Branch K. Miller, for appellants. Morris Marks, Leovin De Poorter, and Albert Voorhies, for appellees.

McENERY, J. The plaintiffs are members of the branch No. 1,148 of the Order of the Iron Hall. This branch is located in New Orleans. Fearing that defendants would dispose of the property which they held in trust for said branch for the benefit of plaintiffs and other members of said branch, and that there was no one to whom they could turn over the property, and fearing the same would be removed beyond the limits of Lou-

Isiana, the plaintiffs sued out an injunction commanding defendants to retain possession of all of said property, money, mortgage notes, etc., and restraining them from disposing of the same, and they be ordered to deposit said money, etc., in court for benefit of plaintiffs and all members of said branch. The defendants answered that the money subject to the suit constituted the reserve fund of 20 per cent. assessments levied on all local branches by the parent body of the order; that said money is the property of the order, whose headquarters are at Indianapolis, Ind.; and that the New Orleans branch held said money in trust for the order, and that a demand had been made upon said branch for the same. There was judgment ordering the defendants to deposit in court the property, money, etc., in controversy, reserving the rights of any and all parties claiming any title or interest in said fund or to said property. The injunction was perpetuated, from which judgment defendants took a devolutive appeal. The amount deposited in court was \$2,477.30. After this judgment was rendered, on motion of plaintiffs, suggesting that a distribution of the fund should be made between the parties, members or former members of said branch 1,148, and that the funds could not be distributed without the appointment of an auditor, B. Dreyfous was appointed to make a full and final settlement of the amount due to each and every member of said branch; to make a tableau of distribution, deducting costs and attorney's fees. A report was made by the auditor, and the plaintiffs filed a rule against defendants to show cause why the tableau and report filed by the auditor should not be homologated and approved. In answer to the rule defendants set up want of authority for the appointment of an auditor ex parte; that the funds sought to be distributed did not belong to the members of said branch 1,148, but to the supreme sitting of the order, by which we understand the central authority of the order, and therefore could not be distributed as proposed. The district court rendered a judgment on the rule homologating the auditor's report and ordered the fund distributed. From this judgment the defendants took a suspensive appeal. The appellees move to dismiss the appeal on the grounds that the opponents' interest in the fund is less than \$2,000, and their entire interest amounts only to \$142.90, and that the order is an interlocutory one, carrying into execution an original judgment.

Article 81 of the constitution, conferring jurisdiction on the supreme court when an amount is to be distributed, uses the language: "The fund to be distributed whatever may be the amount therein claimed." We are not required by the pleadings to make any distribution of the fund among those to whom, by the decree of the lower court, it was adjudged. The defense to the rule is

identical with that in the original suit from which the interlocutory order sprang. There was no suspensive appeal taken from that judgment, and its execution cannot be arrested by defendants. Code Pr. art. 578. The interlocutory order is in execution of this judgment. A suspensive appeal from this order in effect arrests its execution. We have held repeatedly that no appeal will lie from an interlocutory order which carries into effect a judgment which has become final, or from which no suspensive appeal has been taken. *Whan v. Irwin*, 27 La. Ann. 708; *State ex rel. Elder v. Judge*, 30 La. Ann. 229; *Boutte v. Executors*, Id. 177; *State ex rel. Remington Paper Co. v. Judge*, 46 La. Ann. —, 14 South. 806; *Murphy v. Murphy*, 45 La. Ann. —, 14 South. 212. If, in carrying into execution the decree of the lower court, the judge exceeds the bounds of his jurisdiction, or acts illegally, other convenient and practical modes are provided by which the wrong done can be remedied by this court. The original judgment appealed from by devolutive appeal in case of *Same Plaintiffs v. Same Defendants* (No. 11,408) 15 South. 386, having been this day annulled and reversed, the interlocutory order distributing the proceeds falls with the judgment, and no distribution of the funds can therefore be made as ordered by the court. The appeal is dismissed.

(46 La. Ann. 723)

C. S. BURT CO. v. LAPLACE. No. 11,354.¹
(Supreme Court of Louisiana. April 9, 1894.)

SALE OF MACHINERY.—RESCISSON FOR DEFECTS—DAMAGES.

1. The plaintiffs agreed with the defendant to furnish boilers and other machinery for the amount of \$7,330. The bagasse burner, part of the machinery, constituted \$975 of the amount. If the bagasse burner, it was stipulated, did not prove of advantage to the defendant, the plaintiffs bound themselves to pay the grinding season's plantation fuel bill. The plaintiffs claim the unpaid balance of two-thirds of the whole amount, and contend that they have complied with the contract. The defendant, in her reconventional demand, alleges that there was failure of compliance on the part of plaintiffs. The evidence shows that the bagasse burner was the only defective portion of the machinery furnished. She asks from the seller the one-third paid by her, to be relieved from the payment of any balance on the \$7,330, and that he be condemned to remove the machinery, and pay her damages. The purchase price of the bagasse burner being of insignificant amount compared with that of the remainder of the machinery, it (the bagasse burner) is considered as an accessory. The principal things—the boilers and attachments—were not defective, and were in use during the grinding season. The accessory—the bagasse burner—was defective. The contract is annulled as to the latter only.

2. The purchaser is relieved only from paying the purchase price of the burner, which, however, is to be moved away at plaintiff's expense.

3. The obligation to pay damages, if the

¹ Rehearing refused April 23, 1894.

bagasse burner proved defective, is enforced, and damages are allowed.

4. The weight of the testimony shows the absolute defect of the bagasse burner. The judgment appealed from is amended, and, as amended, it is affirmed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by the C. S. Burt Company against B. Laplace. From a judgment for defendant, plaintiff appeals. Modified.

Harry H. Hall, for appellant. Charles J. Theard, for appellee.

BREAUX, J. The defendant, having determined to change the sugar mill and engine, and to erect other evaporating pans, for the purpose of economizing steam in her sugar house, resolved also to buy steam tubular boilers, drums, feeders, spouts, and pumps, together with a Gordon patent hollow-blast bagasse burner. She contracted with the plaintiffs to furnish part of these improvements. The plaintiffs bound themselves to furnish the boilers, to measure 72 inches in diameter and 20 feet long, and erect them on the plantation, and to furnish expert labor for that work; that is, to place them in position to put on the bricks. The defendant agreed to do the brickwork, and furnish the material and labor, to incase the boilers. When delivered and ready for the brickwork, the price of the four boilers and attachments was \$5,825. She also contracted for two batteries with three automatic feeders, to feed and properly distribute bagasse, for the price of \$530. For the Gordon bagasse burner she was to pay \$975. The vendors, in order to fully impress upon the defendant the efficiency of the burner, agreed to pay all coal or other fuel for the crop if the burner did not consume the bagasse as agreed it should, and prove an advantage to the purchaser. The guaranteed stipulation in the contract was limited to the bagasse burner. The terms of payment of the total amount stipulated in the contract were one-third upon delivery of the materials and apparatus at the plantation, one-third after the erection of the burner, and the remainder after its test and use, on the 5th of January, 1893. The plaintiff collected one-third of the amount. The defendant having refused to pay the remainder, the plaintiff brought suit for the amount claimed as due. The defendant interposed a general denial, save certain admissions, substantially that the plant sold by plaintiffs was sold for one price in three equal installments, and that all the machinery sold was dependent upon the satisfactory working of the burner; that the test made proved that the plaintiffs failed to comply with the contract. She avers that she is not bound to pay the amount stipulated in the contract, and that she is entitled to demand the nullity of the contract. In her reconventional demand she

claims damages aggregating \$20,950. The prayer of the answer is that plaintiffs' demand be rejected, and that upon her reconventional demand there be judgment in her favor in one sum of \$2,443, in another sum of \$10,950, and in a sum of \$10,000,—with legal interest on each. The judgment of the district court annuls the contract, orders the return to the defendant of the first installment, of \$2,443, paid by her, and condemns plaintiff, on the reconventional demand, to pay the defendant \$6,750 damages, with interest. A remittitur for the interest was subsequently entered. From the judgment the plaintiff appeals.

Though the Gordon patent hollow-blast bagasse burner proved satisfactory in a number of sugar houses and sugar mills, for causes not clearly demonstrated, it is a failure in defendant's sugar house. Witnesses testify as to the value of the apparatus as a bagasse burner in other localities. The combustion is spoken of by them as being rapid, and that it makes sufficient steam. This, however, is not the case on defendant's place, where it only makes a black, smoky fire, and at times is clogged with bagasse. The plaintiff was notified of the defect. He and others connected with plaintiff's firm repaired to the place, but, it seems, did not succeed in obtaining satisfactory results in the working of the burner. Finally, it was agreed to make a test of the apparatus on the 29th of December, while the sugar house was in operation. At the appointed time the interested parties and a number of witnesses were present, and the test made. The contract contains the stipulation requiring a burner to each battery, with blast bars, intermediate bars, blower, piping gates, complete, to burn bagasse, and with it to generate the full steam capacity of the boilers, supplied with bagasse at the rate of 450 tons daily, or, if less number of tons were supplied, the steam pressure to be proportionally less. The test was made in accordance with the conditions of the contract. No objection was urged to the method adopted for the experiment. It is proved that the bagasse was not different from the bagasse made by other mills. The steam from other boilers than those sold by the plaintiffs was cut off, and the burners fed with bagasse were the only steam-producing power. The burners became clogged with bagasse, and the steam pressure declined, and most of the time the mill was stopped. In 17½ minutes' time the pressure was reduced from 75 pounds to about 37 pounds. There were planters present, of experience, disinterested witnesses, who testify that the bagasse was poorly consumed; that there was but little heat in the burner, and the operations were not those of an efficient burner. There were a number of machinists present, who testified that it burned the bagasse incompletely, and that it was altogether an absolutely defective burner. The plaintiff testifies that he made a test a short time pre-

ceding. It was the evaporation test on scientific principles. It is not shown that this test was made contradictorily with the defendant, or that any disinterested witnesses were called to witness the experiment. The result is that the correctness of that test is not sustained by the weight of the testimony. There was no objection offered to the practical manner followed in testing the power of the steam produced. Though it is not as accurate as the evaporation test, it is that generally followed in testing steam power. It proved, for all practical purposes, that the burner was not the burner plaintiffs agreed to deliver to the defendant. If it was possible to show error, it should have been established contradictorily, or in view of a number of witnesses sufficient to prove its correctness. The contract shows that plaintiffs engaged themselves by the "declaration that coal or wood can be burned better than with the ordinary furnace, if no bagasse is at hand; but in any event they guaranty to give more steam than any other furnace with the same amount of like fuel." The experiments prove that this guaranty failed. The unverified evaporation test of plaintiffs does not suggest that in any respect the burner was efficient, and not a failure. The reconventional demand is more particularly directed against the unsatisfactory and defective burner. The proof shows that all the difficulties in operating the machinery were caused by the insufficiency of heat from the burner. It did not develop the capacity of the boilers. It is not proved that the boilers are defective in material. The workmanship was not objectionable in any particular. They were of the quality and make required by the contract. The defendant's contention on this point is that it is an entire contract, and that a partial failure is equal to a total failure. There was error, doubtless, but the vendors acted in good faith. There is no fraud charged, and the record does not disclose that they knew of the defect of the burner. The defect of the burner caused a partial failure of consideration. The fact remains that the defendant has received and used boilers that are not defective. There was a partial performance, severable from the partial failure. The dividing line between the two is clearly marked. The failure is not so material a point as to affect the entire contract. These boilers were used during the grinding season without the discovery of any defect. They have value and all the power guarantied in the contract. They were sold for a special price. It is distinct from the price of the remainder of the machinery, though included in the same contract, and forming part of the total for the whole machinery. The difference between these prices is great, and suggests that the defective part is not essential. The purchase price of the burner is of insignificant amount compared with that of the boilers. The former—the boilers—are complete in

themselves, and are a consideration without reference to the burners. They are fit for the use intended. The defective apparatus does not in the least detract from their value. The particular burner is not essential to their use. The burner is an accessory. Upon that subject Troplong (*Ventes*, 579) clearly says: With reference to the accessories of the thing sold, they follow the principal. If a horse with saddle and bridle has been sold, in setting aside the sale of the former, that of the latter follows. But if the principal thing was not defective, and the accessory was, the cause to set aside the sale is limited to the latter. "*Mais si la chose principale était saine et entière, et que le vice rédhibitoire tombât seulement sur l'accessoire la réhibition n'aura lieu que pour l'accessoire seulement.*" From Duranton (volume 16, par. 318) we quote: "*D'après ce principe, si je vous vends mon domaine avec les six chevaux de labour qui y sont, je suis garantie des vices dont seraient infectés ces chevaux, ou quelques-uns d'entre eux, quand bien même la vente ne serait faite que pour un seul et même prix. Toutefois il n'y aurait pas lieu, dans ce cas, à l'action rédhibitoire, mais seulement à l'action quanti minoris ou en diminution du prix. Cette distinction est parfaitement établie dans la loi 33, de Aedil edicto, et Pothier l'a adoptée dans son traité du contrat de vente.*" From Laurent (volume 24, par. 292): "*Il ne faudrait pas conclure de là que le contrat doit nécessairement être résolu pour le tout. Cela dépend de l'objet de la vente.*"

The question of partial consideration has been disposed of in a number of decisions of the courts of this state. It is enunciated as correct principle that the right to set aside the contract arises only when the things sold are dependent upon each other, so that the defect of one renders the other useless and without value. It must appear that the interdependence was the principal motive of the contract. *Hale v. City of New Orleans*, 18 La. Ann. 501; *Montan v. Whitley*, 12 La. Ann. 175; *Bertrand v. Arcucl*, 4 La. Ann. 480. The following also applies: "From this provision the inference is clear that the several things sold together are independent of each other, and do not form a whole, and, if the value of each thing is not increased by its union with the rest, redhibitory action can be maintained only for those things which are found defective; and that the contract must stand, and be carried into effect, in relation to the others,"—citing *Andry v. Foy*, 6 Mart. 696; *Roberts v. Rodes*, 3 Mart. (N. S.) 100; *Pothier de la Vente*, Nos. 226-228. The rule is that the redhibitory vice of one of several things sold applies to a limited class of cases. *Huntington v. Lowe*, 8 La. Ann. 378. We realize that the question is not free from difficulty. Our determination in this case was reached after having considered that the boilers and attachments not defective remained and were

used, though the defendant had other steam power within her control, easily disconnected from the four boilers in question. No offer was ever made to return them, and it does not appear that they ever gave cause for objection. Moreover, though alleged in the body of plaintiffs' petition, the prayer is silent, in so far as relates to the boilers and their attachments.

Rejecting defendant's reconventional demand to set aside the sale, and decreeing that there was only a partial failure of consideration, does not carry with it the rejection of defendant's demand for damages. The contract contains a stipulation guarantying the defendant from loss by defect of the burner. In express terms it was made the law of the contract, "Conventio facit legem." The testimony on this branch of the case is not contradicted. The number of barrels of coal and the price paid by defendant are proven. The damages cannot amount to less, under the evidence, than the amount allowed by the learned judge of the district court. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, and that plaintiffs recover of the defendant the balance due on the apparatus (after deducting the price of the burner), and rejecting and striking from the judgment that portion ordering the return of \$2,443 to the defendant by the plaintiffs (amount received on account). It is further ordered, adjudged, and decreed that, upon the reconventional demand, the judgment of the district court be, and the same is hereby, affirmed, and the defendant on that demand is allowed judgment against the plaintiff for \$6,750. The amount of the original contract was \$7,330; from it is deducted the price of the burner and outfit, \$975, and amount heretofore paid, \$2,443,—\$3,912,—with 5 per cent. interest per annum from October 25, 1892, on half of said amount, viz. \$1,956, and a similar rate of interest on a like amount from 5th January, 1893. The \$3,912, plus interest, as just stated, must be deducted from the \$6,750. The remainder is the amount the plaintiffs are condemned to pay to the defendant. It is further ordered, adjudged, and decreed that plaintiffs are the owners of the bagasse burner and outfit covered by the sum of \$975; that the bagasse burner and outfit be delivered to the plaintiffs, and that they remove it at their expense. It is further ordered that defendant pay cost of appeal.

(46 La. Ann. 717)

GRAND LODGE OF LOUISIANA FREE & ACCEPTED MASONS v. CITY OF NEW ORLEANS. (No. 11,380.)

(Supreme Court of Louisiana. April 9, 1894.)

EXEMPTION FROM TAXATION—REPEAL OF STATUTE—VESTED RIGHTS—CONSTITUTIONAL LAW.

The questions involved in this case were decided, and the case remanded in order to hear evidence as to the relative value of the proper-

ty occupied by plaintiff to that leased and yielding a revenue. The district court has complied with the judgment, and fixed the value of the property. The value is not disputed. Though the previous decision remanding the case was final, the principles enunciated were re-examined. Our conviction remains unchanged.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit by the Grand Lodge of Louisiana Free & Accepted Masons against the city of New Orleans to enjoin the sale of land for taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

For decision on prior appeal, see 11 South. 148.

J. Q. A. Fellows and Charles F. Buck, for appellant. E. A. O'Sullivan, City Atty., and Laurence O'Donnell, Asst. City Atty., for appellee.

BREAUX, J. This case received careful consideration, and the principles of exemption enunciated in the decision remanding the case to decide the relative value of the property occupied by the plaintiff to that leased or not in use by the grand lodge received the court's indorsement after mature deliberation. The case was remanded to carry out the purpose just stated. The extent of the exemption is defined. The court *a qua* has correctly interpreted our decree, and the appellant has no objection to urge against the amount allowed in the judgment appealed from, if the court's views regarding the exemption itself remain unchanged. The plaintiff appeals from this judgment fixing the respective amounts, and settling the value of the property upon which taxes are due, in order to reiterate defenses heretofore decided. On appeal, a reconsideration is asked by appellant of the identical questions heretofore decided.

In the previous suit the plaintiff claimed that its exemption from taxes, under legislative grant, had the force of a legislative contract, which could not be repealed or impaired by subsequent constitutional provision or statutory enactment. On the part of the defendant it was pleaded that the exemption claimed conferred a mere gratuity, subject to repeal, and that this exemption was repealed by article 207 of the state constitution, exempting property of charitable institutions, not used or leased for purposes of private or corporate profit or income, inasmuch as part of plaintiffs' property is leased for corporate revenue. These issues were argued orally and by brief. The effect of the article of the constitution (207) upon the exemption was the prominent issue. This court's previous decision includes that point. In answer to the proposition again argued,—that charitable institutions, strictly speaking, can realize no private or corporate profit or income,—we can only reiterate, in different language, that this court, many years since, established a difference

in the matter of taxation between the property of a charitable institution yielding a revenue and that property which the institution occupies for the purposes of its charities. It was held that the former was subject to taxation, and that the latter was exempt from taxation. *City of New Orleans v. Congregation Dispersed of Judah*, 15 La. Ann. 339. A similar question was considered in the case of *City of New Orleans v. New Orleans Mechanics' Soc.*, 27 La. Ann. 437. The court held that, as a charitable society, the property actually used by itself for purpose of charity would be exempt, but that the property not being used for the specific purpose expressed in the act of incorporation was not exempt, from taxation. The permissive article of the constitution of 1868 to the legislature to exempt property in the actual use of charitable institutions has received judicial interpretation in a number of cases. In two cases, however,—*City of New Orleans v. Poydras Orphan Asylum*, 33 La. Ann. 850, and *Orphan Asylum v. Houston*, 37 La. Ann. 70,—a different view was expressed. In one of these cases—the *Poydras Asylum*—Judge Fenner, in his dissenting opinion, says: "I think that, under the terms of the constitution, and under the jurisprudence of the courts established thereunder, the exempting statute was unquestionably repealed so far as inconsistent with the rule of taxation provided by article 118." (Italics ours.) The organ of the court in the *Poydras Orphan Asylum Case* gave his concurrence to the principles enunciated in the case at bar. Judge Manning was equally as emphatic in expressing his dissent in *Orphan Asylum v. Houston*, 37 La. Ann. 70. As maintaining uniform interpretation upon the subject of repeal by article 118, he cited *City of New Orleans v. St. Patrick's Hall Ass'n*, 28 La. Ann. 512, and others to the same effect. The uniformity of interpretation was absolutely unbroken in 1879, and the limitation of exemption from taxation of property actually occupied by charitable institutions clearly announced. In the face of the article of the constitution (118) itself, and of the decisions limiting the exemption as before stated, the article of the present constitution was adopted, containing the following: "Provided, the property so exempted be not used or leased for purposes of private or corporate profit or income." This proviso is as broad and comprehensive as was the article (118) of the constitution of 1868. The plaintiff in the case at bar seeks to reopen the question of the effect of the proviso of article 207 of the constitution of 1879. The repealing effect of the article was pleaded when the case was tried. It was controverted from different points of view, and the repealing effect of the proviso was argued and reargued. But waiving, *argumenti gratia*, the final disposition heretofore made of the case, and reconsidering the

proposition argued, we do not discover that too great a scope is given to the proviso. The property of charitable institutions leased and yielding a revenue had never been construed, prior to the constitution of 1879, as part of the institution not subject to taxation. It was property not free from taxation. The present constitution has not materially changed the exemption in this respect from what it was under the preceding constitution. Under both, charitable institutions have not in themselves elements of property, as understood in commerce, unless they choose to invest in property and collect revenues. But such property, when they choose to invest in property and collect revenues, is not exempt from taxation. Counsel for the plaintiff argue that the proviso in question cannot, in the article of the constitution, relate back to the word "property" in the third line before the word "used." As to "public property," which cannot be within the scope of the proviso, we think it sufficient answer to state that the proviso may apply to part of the property exempt in the body of the article, and that it may be that it cannot, in the nature of things, be made a limitation in exempting other property. Public property and its revenues are not subject to taxation, and therefore not within the intendment of the proviso. The state, for obvious reasons, does not impose taxes upon her property and upon its revenues. This property would be exempt without any law on the subject. It does not follow that the other institutions referred to are not within the scope of the article when they own property yielding a revenue. "Utile per inutile non vitiatur." Questions of the great good accomplished by charitable and other similar institutions, however much they appeal to our sympathies, should have no weight in determining the meaning of an article of the constitution. A rigid adherence to the fundamental law recommends itself as highly proper in enforcing any of its provisions. It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed, at appellant's costs.

(46 La. Ann. 773)

SUCCESSION OF BEY. (No. 11,390.)

(Supreme Court of Louisiana. April 23, 1894.)

WILLS—VALIDITY—PRESUMPTIONS AS TO SANITY—DEATH BY SUICIDE.

1. When the will is established to have been made by the testator himself, or by a notary at his instance and dictation, in presence and hearing of the subscribing witnesses, unaided by others, and its provisions and expressions are sage and judicious, containing nothing sounding to folly, these facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and impose on those who attack the will the burden of proving insanity at the moment when it was made.

2. Death of the testatrix, by suicide, does not raise a presumption of insanity at date

the will was executed. Even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time previous is invalid.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Application for the probate of a will of Elizabeth Bey. From an order refusing a probate of the will the testamentary executor appeals. Reversed.

Dinkelspiel & Hart, for appellant Henry Schipman, testamentary executor. Farrar, Jonas & Kruttschnitt, for appellees legal heirs and administrator. Frank Zengel, for appellees absent heirs.

WATKINS, J. The legal and presumptive heirs of the deceased resist the probate of her last will, on the ground that she was insane at the time of its execution, and incapable of making a legal and valid testament. The introduction of evidence took a wide range, and at the trial there was judgment in favor of opponents, annulling the will, as having been made by an insane person; and it decreed that, "by reason of her insanity," the testatrix died intestate. The testamentary executor propounded the will for probate, and had an inventory taken, but the probate of the will was resisted by the attorney for absent heirs, who had theretofore been appointed at the suggestion of the public administrator, who had undertaken the administration of the succession, as a vacant estate.

The theory of opponents seems to be that the testatrix was afflicted with that species of insanity known in medical jurisprudence as "melancholia," the effect of which was to render her incapable of transacting the business affairs of everyday life, and, consequently, of making a testamentary disposition; and the fact of her having committed suicide shortly subsequent to the execution of the will is referred to, and relied upon, by opponents, as confirmatory proof of her previous insanity. And it is asserted in the brief, as well as in the oral argument of appellant's counsel,—without denial from the other side,—that the judge below assigned the fact of her suicide as being a weighty, if not a conclusive, proof of her previous want of capacity to make a will. Counsel for the appellees made reference to the proceedings which were inaugurated for the interdiction of the deceased, shortly previous to the making of her will, as a circumstance corroborating her state of confirmed insanity at that time. To these facts, or incidents, rather, in the life of the unfortunate young woman, all of the testimony on either side seems to have been directed, other evidence being merely corroborative. Arranging these three events in the order of their occurrence, we find from the record that the interdiction suit was filed on the 16th of August, 1892, the

will was executed on the 18th of November, 1892, and the suicide occurred on or about the 3d of January, 1893. As it is evident that the test of the sanity of the testatrix at the time of making her will is of the greatest importance,—in fact, is the crucial question in the case,—the terms of the will, and the circumstances surrounding its execution, must be examined at the outstart; this court having decided that the test of the law is whether, at the moment of making a will, the testator was of sufficiently sound mind to fully understand the nature of the testamentary act, and appreciate its effects. *Kingsbury v. Whitaker*, 32 La. Ann. 1055. An examination of the will discloses that it was executed in the presence of F. D. Charbonnet, a notary public, and four witnesses, two of whom were practicing lawyers. It appears from the testimony, that on the 18th of November, 1892, during the business hours of the day, the deceased appeared at the notary's office pursuant to a previous agreement to that effect; and that, at the time and place agreed upon, said notary received her last will and testament, in the presence and hearing of the four witnesses, as dictated to him by said testatrix.

A fair synopsis of the testament is as follows, viz.: That the testatrix bequeathed to one of the legatees an improved city lot; to another, a sum of money that was to her credit in a designated homestead association, and a lot of household furniture, etc.; to another, certain shares of stock in the Merchants' Mutual Insurance Company; to another, certain other shares of stock in the same company; to another, certain other shares of stock in the same company; to another, certain other shares of stock in the same company; to another, the family tomb in the St. Vincent de Paul cemetery; and, to another, the vaults in the Odd Fellows' Rest. It was concluded by appointing an executor without bond, denominating him "her good friend." The circumstances under which the testament was executed are detailed by the notary and subscribing witnesses. The notary states that the will was made at his office, during the business hours of the day, and in the immediate presence and hearing of the four witnesses who subscribed their names to the act. That same was executed by him in pursuance of a previous agreement with the testatrix. That, previous to the execution of the will, the deceased had called at his residence to see him, and, learning of his absence, she left with his wife a message for him, to the effect that she desired to see him about making a will. That, accordingly, he visited her, and they had a conversation upon the subject, and agreed upon the price. "She wanted," so the witness states, "the will to be made at her house. I told her what I would charge. She hesitated, and jewed me down. * * * She asked me if I could not do it any cheaper (naming a

price); and I told her if she wanted it at that price to come to my office, and she came a day or two afterwards." This witness further states that, when the deceased came to his office, she stated that it was for the purpose of making her will, and the will "was dictated to [him] by Miss Bey's own lips." That "she appeared to be in a condition such as any ordinary person would think that would come to make a will." That, when completed, the will was read to her in the presence and hearing of the witnesses, and she seemed to perfectly understand its provisions, and signed in his presence and that of the subscribing witnesses. That, after its completion, she handed to him the exact amount of the fee agreed on between them some days previously, without any discussion, or suggestion from any one. During the course of the notary's examination, the following occurred with relation to his visit to the residence of the testatrix, viz.: "Q. But you afterwards went to her house? A. Yes. Q. Did she seem to thoroughly understand the object of your visit? A. I asked her if she sent for me; and she said 'Yes.' Q. Did she tell you she wanted a will made? A. Yes." And, with reference to her visit to his office, he said: "Q. If there had been the slightest doubt in your mind as to her sanity, would you have made the will? A. No, sir; I would not. Q. You have known this lady, how long? A. I have known her a long time. I lived in the neighborhood for some time." In speaking of the deceased as she appeared on the occasion of his visit to her, and on that of her visit to his office, he says she was well dressed, and made a nice appearance. Again, he says, in speaking of what transpired at the time the will was executed, the following occurred, viz.: "Q. Did she have any hesitation in declaring her intentions to make a will before you? A. None at all. Q. Did any one help her or aid her in making the disposition? A. No; I would not have written what I did, if anybody had. * * * Q. Did Miss Bey have any papers or memorandum from which she read when dictating the will? A. I never saw any. Q. When you read [the will] aloud to her, and to the witnesses, did she have any paper before her to [enable her] to follow the reading? A. I never noticed any." The testimony of this witness is entirely supported, and confirmed throughout, by that of the four subscribing witnesses, they being interrogated and cross-interrogated at length. The testament, dictated as it was by the testatrix, bears internal evidence of judgment, forethought, and careful preparation, as well as accurate knowledge of her property, and the means she possessed at the time of its confection, as well as perfect acquaintance and familiarity with the different persons who are mentioned as legatees. Not only so, but it evidences a sentiment of affectionate interest in, and

concern for, the persons she considered her special friends; and she seems to have apportioned her bounty relatively to their nearness to her. And in the dispositions of her will, taken as a whole, she seems to have exercised reasonable care for the mutual interests of all, without making any unreasonable or unusual bequest to any. The only thing preferred against it is that the testatrix instituted friends, instead of collateral relations, as her heirs. But, in the light of the law, she had a recognized right to thus dispose of her property; and her collateral relations resided abroad, and were unknown to her,—no intimacy, or even acquaintance, seeming to have ever existed between them during her lifetime. Certainly, this testament possesses no internal evidence of the insanity of the testatrix at the date of its execution; and the circumstances detailed by the notary and subscribing witnesses negative that idea.

With regard to the interdiction proceedings that were instituted in August, previous to the making of the will in November, nothing need be said beyond the fact that they were but the culmination of a sentiment that prevailed in the community in which she lived, during some months previous, to the effect that she was insane; and the further fact, that they were discontinued, voluntarily, 10 days before the will was made, by the parties who inaugurated them, without the assignment of any reason or excuse. Of themselves, they cannot furnish any evidence of insanity, as they did not result in a judgment of interdiction. The person in whose name the interdiction suit was brought states that he had known the deceased for a long time; and that during her father's lifetime she was "a very sensible, fine young lady." He says, "She was of good, sound mind before [he] saw her at Mrs. Roper's." His testimony is that her father died in February or March, 1891, and soon afterwards she removed to the house of one Dr. Keltz, on an invitation of the latter, carrying all of her furniture, clothing, and effects. Another witness states that the deceased was removed from the residence of Dr. Keltz to her own on the 2d of June, 1892, more than two months previous to the institution of the interdiction suit; and, inasmuch as most of the evidence appertaining to her insanity relates to the period of time she resided in Dr. Keltz's house, it is well to look into the circumstances of her arrival at, and her departure from, his house—a period of something more than one year. The witness last referred to states that she had known the deceased about seven years previous to her death, and very intimately. That the deceased and her father lived in a tenement adjoining the one which witness and her husband occupied, there being only a partition wall between them. That, during the seven years of their acquaintance, the greatest intimacy existed between the two fami-

lies. That she was present when the testatrix's father died, and she describes the death scene and surroundings graphically. That the deceased remained, alone, in her father's house about three weeks, when she moved to the house of Dr. Keltz to live. That, in speaking with witness on the subject, she said: "Well, Dr. Keltz says for me to break up housekeeping, and go to his house, and I will fall into grand society." That witness replied: "All right, Lizzie; just as you wish." That the deceased responded: "Well, I am going to try it; it may be better and it may be worse." Up to this date there is no suggestion of her insanity, the first intimation of it coming from Dr. Keltz, in May, after her installment in his house in March, though it remained undisclosed until the rumor had become flagrant in the neighborhood. About six months later she stated to Mrs. Roper that she wished she had broken her neck before she went to Dr. Keltz's house; making many serious complaints, and, among others, that she had been drugged by the doctor, and affirming "that she had not felt well since Dr. Keltz drugged her with those pellets." This lady, Mrs. Roper, states that the first she heard of Miss Bey's alleged insanity was through Mrs. Heitzman, in the spring of 1892. That, about that time, Miss Lizzie Bey sent for her to come to see her, and she went; but that she first met Dr. Keltz, who stated that Miss Bey was "going from bad to worse, was losing her mind." That, on afterwards meeting Miss Bey, she exclaimed: "O, Mrs. Roper, Mrs. Roper, I should have broken my neck the day I first put my foot in this house. * * * I have been taking those pellets; I have been taking too much of those morphine pellets." Soon after this occurrence, the rumor of Miss Bey's insanity was publicly discussed in the vicinity of Dr. Keltz's residence, and it created quite a sensation among the people of her acquaintance. Many people visited Dr. Keltz's house for the purpose of seeing the insane girl, without protest or objection on the part of any member of Dr. Keltz's family. On the contrary, these visits were apparently encouraged by them. A day or two after the occurrence above related, Dr. Keltz called Dr. Castellanos to see Miss Bey professionally; and he held a short interview with her, in the presence of a number of persons who seem to have been attracted there through curiosity, and afterwards gave it as his opinion that she was suffering from melancholia. The day following the interview, Mrs. Roper carried Miss Bey to her house to live, said removal being made at the instance of Dr. Keltz's wife. On the occasion of Miss Bey's removal from the house of Dr. Keltz, he stated to Mrs. Roper "that, if anything happens to her," she must let him know; qualifying the observation by the remark that she might die, or that she might have to be strapped down. All of this occurred in Miss Bey's presence.

Dr. Keltz, as a witness, states that he had been the family physician of Miss Bey's father, and had known the family for several years prior to her coming to his house to live; but the first symptoms of insanity developed in May, 1891,—two months after her coming into his house to live. He speaks of having only seen her once after she was removed to Mrs. Roper's, and that was in October, 1892. In speaking of her capacity to make a will, he says: "The disease may have abated, but I do not think she was ever after of sound mind." Notwithstanding the fact that Miss Bey was removed from his house on the 2d of June, 1892, and he had not seen her afterwards until October, Dr. Keltz admits that he had first suggested her interdiction, and that the suit was filed at his request in August. Though Dr. Seaman had seen Miss Bey, professionally, after her removal to Mrs. Roper's, and he testified, at the commencement of the trial of the interdiction suit, that she "had been subject to fits of melancholia" for six months previous, yet it is a fact that the interdiction suit was discontinued, at his suggestion mainly, 10 days prior to the making of the will, and subsequent to the delivery of his testimony therein. But it does not appear that Dr. Seaman ever made a careful examination of Miss Bey with a view to making a test of her insanity; and hence the conclusion is that his opinion was based upon casual observation.

Dr. Szabary was called, and interrogated by opponents, as a medical expert on matters of insanity, and he testifies that he visited Miss Bey professionally during the time she was at Mrs. Roper's house, and he states that her disease was nervous prostration. He states that he visited her twice, and found no other sickness except emaciation and prostration. Those two visits were made on June 4 and 8, 1892, respectively; that is, immediately after her removal to the residence of Mrs. Roper on the 2d of June. The doctor states that he questioned her critically as to her condition, and that she answered him simply and satisfactorily, giving no evidences of insanity. The following interrogatories and answers will best discover the true situation, viz.: "Q. During the entire conversation, was there anything which she said that would lead you, as a medical man of standing and reputation, to think that she was out of her mind? A. No, sir. Q. Then, on the other hand, speaking affirmatively, as a medical man, was there, or was there not, sufficient evidence that she was an intelligent person? A. Yes. Q. A person of good common sense? A. Yes. Q. She spoke to you lucidly and plainly? A. She answered all my questions. Q. And answered them sensibly? A. Yes. * * * Q. Did she have the appearance that would indicate, in the slightest degree, that her mind was disordered or disarranged? A. None whatever. * * *

Q. are you prepared to say, doctor, that you made an examination of her mental condition, and that you are prepared to testify as to its condition at that time? A. Yes, sir. Q. As an expert? A. Yes; as the physician in charge of the insane asylum, years ago, I can tell you something about it. * * * Q. If there had been, in your judgment, the slightest indication tending toward insanity in this woman, would you, or not, have noticed it? A. I would. Q. Would it not have come directly under the investigation you were then making? A. Yes. Q. Did you notice anything of the kind? A. There was nothing to be noticed tending to show that she was insane. Q. From her looks, demeanor, and general conduct, was she, or not, in your opinion, as an expert, capable of attending to her business, and attending to the ordinary affairs of life? A. She was." It is a noteworthy fact that this doctor was first called to see Miss Bey the day after she had been removed to Mrs. Roper's, and that Dr. Castellanos was called to see her the day previous to her departure from Dr. Keltz's residence; and, while their statements are diametrically opposed to each other in respect to the lady's mental condition on those two occasions, we are of opinion that the difference is mainly attributable to the radical change in her situation and surroundings, occasioned by her removal from Dr. Keltz's to Mrs. Roper's house. Under the circumstances detailed, we are disposed to attach greater importance to the testimony of Dr. Szabary than to that of either of the other medical experts, owing to his special fitness to testify in reference to insanity, and to his having made a most careful examination of the testatrix, and under more favorable conditions.

Outside of the isolated expressions of opinion by Drs. Seaman and Castellanos,—we do not include that of Dr. Keltz,—none of the opponents' leading witnesses testified to facts or circumstances which occurred subsequent to Dr. Szabary's examination of Miss Bey, though all of the executor's witnesses devote almost exclusive attention to such subsequent facts and circumstances. These witnesses state that they had known the deceased for 10 or 20 years, and they concur in the opinion that she was not insane, while admitting that she did evince some idiosyncracies while she resided at Dr. Keltz's house. All of them join in the statement that she was generally right-minded and sensible while she lived with Mrs. Roper, and was at all times capable of attending to her own affairs; and it is in proof that she did attend to the payment of her taxes, the collection of her rents, and the management of her investments. And it is also in proof that, on the day the interdiction suit was fixed for trial she was present at the wedding ceremony of Mrs. Roper's son, and participated in the wedding feast. Even Dr. Keltz admitted that Miss Bey had given

him promissory notes in liquidation of her board while at his house. A careful examination of the evidence, embracing the dates above given, has satisfied us that Miss Bey was, at the moment of making her will, of sufficiently sound mind to fully understand the nature of the testamentary act, and appreciate its effects; whether the will was made during the existence of a lucid interval, or by a person of absolutely sound mind, it is comparatively unimportant to inquire. The theory of the medical experts favoring the insanity of the testatrix is that she was afflicted with melancholia, which in its nature is incurable, and not susceptible of lucid intervals. Such is the opinion of authors on medical jurisprudence, and it was likewise a precept of Justinian, which has been recognized in the jurisprudence of this court. *Aubert v. Aubert*, 8 La. Ann. 104. But it is our opinion, accepting this theory, that the evidence does not make a case against the testatrix of melancholia; but, conceding for the argument, that the evidence tends in that direction, the clear and indisputable proof of the will having been made at a time when the testatrix was perfectly rational and apparently sane contradicts it, and renders it an unacceptable theory, or proves her sanity altogether. Our Code recognizes the validity of a will made by an insane person during the existence of a lucid interval. Rev. Civ. Code, art. 1788, § 9.

The rule in reference to the power and strength of mind necessary to make a will is well stated in *Chandler v. Barrett*, 21 La. Ann. 58, thus: "So far as the latter is concerned [the amount of intellect required in a testator], a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator should have more mental vigor and a more lucid memory than a person who makes a contract." The court states the French jurisprudence to be the same as our own, or, rather, that our jurisprudence has followed the treatises of the French commentators; the rule being that, if the testament presents a series of wise and judicious dispositions, it is for the heirs who attack it to prove the unsoundness of mind at the date of the testament; if, on the contrary, it contains dispositions such as would cause insanity to be presumed, it is for the legatee to prove the sanity of the testator, as against the terms of the testament. *Coln. Delisle, Don. & Test.* p. 82. The legal presumption is always in favor of the sanity of the testator. 8 *Droit, C. C.* p. 44; 3 *Marcade*, p. 403; 8 *Dur. Dr. Fr.* p. 167. The presumption of sanity does not cease because the testator has experienced some transitory intellectual derangement at a time anterior to the testament. 2 *Trop. Don. & Test.* p. 56. The English jurisprudence is the same. *Cham-*

bers v. Queen's Proctor, 2 Curt. Ecc. 415; Ray, Jur. Ins. 272; 1 Jarm. Wills, p. 72; Fulleek v. Allison, 3 Haz. Reg. 527; Halley v. Webster, 21 Me. 461; Clark v. Fisher, 1 Paige, 174; Jackson v. Van Dusen, 5 Johns. 144. In the instant case, the circumstances that are recited and relied upon as indicating the mental unsoundness of the testatrix are not nearly so strong or so convincing as those recited in the Chandler Case, while those surrounding the testatrix at the time of making the will are very much the same. The opinion in the Chandler Case is thus concluded: "If the acts of insanity are rare, and occur at periods distant from each other and from the date of the testament, the testament, if not destitute of good sense, and betraying no folly on its face, will sustain itself, [and] be presumed to have been the offspring of a healthy relation and a lucid memory." The will under consideration fulfills all of those requisites completely. The proven acts of folly occurred some months previous to the execution of the will. The will is sensible throughout, and was by the testatrix dictated to the notary, without any memorandum or suggestion from any one, and betrays no folly on its face. The extrinsic evidence of insanity of Bowditch, on which the court decided the case of Kingsbury v. Whitaker, 32 La. Ann. 1057, was in our opinion much stronger than it is in this case against Miss Bey, and yet the judgment annulling the will of Bowditch was reversed, notwithstanding three of the most distinguished physicians of the city of New Orleans testified that the testator was insane, and the Boston physicians testified in the same tenor, and Bowditch had been regularly interdicted by a judgment of court, and he was incarcerated in the asylum. The court said: "When physicians tell us that Bowditch must have been insane on the 24th of June, 1876 [the date on which the will was executed], we turn to the will, written entirely by himself, as shown by the testimony of two witnesses of unimpeached character and veracity, who saw and conversed with him on that day and at that moment, to whom he spoke very rationally of his will, and we must conclude that the physicians were mistaken," etc. The will of Miss Bey contained more convincing proof of her sanity, and the notary four subscribing witnesses testify, most circumstantially, to its dictation by her in a manner clearly indicative of her sanity. In the Kingsbury Case the rule of interpretation, as formulated from the consensus of opinion on the subject, is thus stated: "The real question is whether the brain or other physical organ, whatever it may be, which is the medium through which the action of the mind is manifested, is so diseased or impaired as to make it an untrustworthy vehicle for the conveyance of the true wish or will of the testator, unbiassed by any delusion which may be the result of disease. The law fixes the time for the ap-

plication of this test at the moment when the will is made, and expressly recognizes the capacity of persons subject at times even to complete dementia to make a will in lucid intervals. When the will is established to have been made by the testator himself, unaided by others, and when its provisions and expressions are sage and judicious, containing nothing sounding to folly, the facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and imposes on those who attack the will the burden of proving insanity at the moment it was made." This rule is more accurately stated than the one formulated in the Chandler Case, and we prefer to follow it. But the will of Miss Bey sustains all the requirements of this rule, as well as of the former; for, in our view, her will is good and valid, whether it be interpreted by intrinsic or extrinsic evidence. But if we go further, and look into the evidence surrounding the suicide of the testatrix, it is impossible to conclude that, even if she were confessedly insane at the time, it evidenced her previous insanity at the time of making her will.

The following is the full text of the letter that was found on the person of the deceased after her death, viz.: "New Orleans, Jan. 3d, 1893. Dear Friends: I wish to inform you that I am tired of living, so concluded to take my life. Dr. Keitz and Dr. Castellanos said that I was insane, and going from bad to worst, that I would not live longer than two or three days after they took me out of his house to Mrs. Roper's they would have to strap me down; it is going on to eight months and have not been strapped yet, and am no more insane than he is, When dead I ask of Dr. Seaman, the Corner, to examine my brain and let the public know what he said about me. I am not sick, and not well; I do not know what ails me; he must have drugged or got some one to harm me, for it is not natural what I have; I cannot live any longer, for I am in misery and cannot help myself. I have my will made some months ago to my friends with the exception of ten shares of stock of the Mutual Ins. Co., to pay my funeral expenses, by my adopted brother Henry Schippmann who is my testator, if there is any left to keep it and give Margaret \$50.00. It is hard for me to take my own life, but I hope God and my friends will forgive me, for I could not live longer, there is not another person in this City that is like I am, the party who did that to me I hope will have no luck and follow me soon. When my body is found let Mrs. Roper be notified, and let Mr. Dupres, the Undertaker, bury me. Mrs. Roper's address is 675 North Rampart Street. Yours, truly Elizabeth Bey." This letter evidences care and thought; and it corresponds throughout with the whole pitiful story that is detailed by other witnesses. It evinces an exact memory of former transactions,

especially the occurrence of the 2d of June, 1892, when, in the presence of a number of persons, she was examined by Dr. Castellanos; and of the 3d of June, when she was removed to Mrs. Roper's house. Its reference to her will is quite significant indeed; and the exactness of her recollection as to the reservation of certain shares of insurance stock for the purpose of defraying the expenses of her funeral is even more remarkable for its tenacity. Instead of this letter, dated on January 3, 1893, proving her insanity, it furnishes additional evidence of the sanity of the deceased.

Dr. Ray makes the following observations on the question of the suicide of a testator as affecting the validity of his will, on the theory that suicide raised a presumption of insanity: "At present," says that author, "the fact of suicide has no other importance than what it derives from its connection with the mental derangement which must be supposed to have given rise to it. Courts would very justly refuse to consider it as *sufficient proof of insanity*, in the absence of other proofs, because it might have been the act of a rational mind, and because, too, if it really had sprung from insanity, the delusion had been so circumscribed as not to have prevented the judgment in regard to testamentary dispositions and other civil acts. The principle adopted in the ecclesiastical courts is that in case of *doubtful sanity*, among which those of suicide must always be ranged, the validity of the individual's testament must be determined *solely by the character of the instrument itself*." (Our italics.) "Here is a difficulty that courts will never be very anxious to encounter, and that is to determine the exact connection of suicide with insanity in point of time, supposing the latter to be admitted. When this act is the only proof we have of mental derangement, we are left without the means of ascertaining where this connection began to exist or to disappear; and, consequently, nothing can be more difficult than to decide within what time, either before or after the suicidal attempt, the individual can be pronounced insane. It not uncommonly happens that a person kills himself, or makes the attempt, shortly after making his will, when the question requires judicial decision whether or not the insanity which led to the fatal act existed at the time of making the will. The practice has usually been, if there were no other evidence of unsound mind, either in his conduct, in his conversation, or in the testamentary dispositions themselves, not to impeach the testator's sanity. In a certain case it was said by Sir John Nicholl that when there was no evidence of insanity at the time of giving instructions for a will, the commission of suicide three days afterwards did not invalidate the will by raising an inference of previous derangement." *Burrows v. Burrows*, 1 Haz. Reg. 100. Chief

Justice Parker, also, held that suicide committed "fifteen days after the date of the person's will was not sufficient, in the absence of other evidence, to prove him insane, and thus invalidate the will, on account of the difficulty just mentioned." *Brooks v. Barrett*, 7 Pick. 94. "Similar views prevailed in *Duffield v. Robeson*, 2 Har. (Del.) 383; *Chambers v. Queen's Proctor*, 2 Curt. Ecc. 415. In both of those cases, suicide occurred the next day after the execution of the will; and, in the latter, delusions were proved to exist on the three [days] next previous to the will." Ray, Jur. Ins. p. 448, § 460. In the *Brooks Case*, the court maintained the principle that, "if the evidence be doubtful the presumption of the law in favor of sanity is to have its effect." Dr. Ray lays down the general proposition that, even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time of it is invalid,"—that is to say, if the will be reasonable. Ray, Jur. Ins. p. 449, § 461. "If the will be a rational act, rationally done, a suicidal act, or attempt, ought not to invalidate it, because the presumption is either that the will was made before the mind became impaired, or that the derangement was of a kind that did not prevent the judgment from using ordinary discretion in the final disposition of property." *Id.* p. 450, § 452. Other authorities and text writers might be cited with advantage, but we prefer to rest our conclusions on this branch of the case upon the opinion of Dr. Ray, on account of his exceptionally concise and correct conclusions of law, as well as on account of this court having, in other cases, cited his works with approval. On this branch of the subject, as on the one previously argued, our conclusion is clear to the effect that, even conceding for the argument that Miss Bey was insane on the 3d of January, 1893, when she penned the letter that was afterwards found on her person, after her death by suicide, there is nothing to show any causal connection between the act of suicide and the circumstances surrounding the execution of her last will. Altogether, our conclusion is that on the 18th day of November, 1892, when Elizabeth Bey executed her will, she was of sufficiently sound mind to fully understand the nature of the testamentary act she executed, and appreciated its effects, and that, consequently, her will is good and valid. Hence, the judgment appealed from must be annulled and reversed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the will of Elizabeth Bey, which was executed on the 18th of November, 1892, be declared legal and valid, and entitled to probate and registry. And it is further ordered and decreed that the aforesaid last will and testament of Elizabeth

Bey, deceased, be and the same is ordered to be probated, registered, and executed; and that opponents pay all costs of both courts.

(46 La. Ann. 629)

UNION NAT. BANK v. CHOPPIN et al.
(No. 11,436.)¹

(Supreme Court of Louisiana. March 12, 1894.)

JUDGMENT AGAINST HEIRS—RENUNCIATION OF
SUCCESSION—SALE BY LICITATION.

In a suit brought by the Union National Bank, as one of the joint owners of a plantation, against three brothers, each holding an undivided one-fourth interest in the property, one of the defendants died, leaving, as his presumptive heirs, his mother, a sister, the two brothers already in court, and a fourth brother. The mother died without either accepting or renouncing as his heir. On motion of plaintiff the three brothers and the sister were made parties, and cited as heirs of their mother, and also of their brother. After "judgment by default" against all the defendants, but prior to the confirmation thereof, the parties so cited appeared, and announced that they had renounced, and did renounce, the succession of their mother, and suggested that no further proceedings could take place until the succession of the mother was represented by an administrator. The court, thinking otherwise, rendered a decree for the sale of the property, and a partition. The defendants appealed. *Held*:

1. That the "judgment by default" did not conclude the parties, and cut off a renunciation by them of their mother's succession, such a judgment not being definitive in its character.

2. The tacit admission resulting from the judgment by default disappeared at once upon the filing of the disclaimer, without the necessity of a formal setting aside of the default by motion.

3. It was not necessary, in order to prevent judgment being rendered against these parties as heirs of their mother, that they should have renounced her succession by notarial act. The paper filed by them sufficed for that purpose. Defendants owed no duty to plaintiff, were not its debtors, and could not be forced, against their will, to accept the succession.

4. The parties cited, having, however, not disclaimed being heirs of their brother, but allowed a definitive judgment to be given against them as such, must be *held* to have accepted his succession; and they, as such heirs, represent directly an interest in the interest formerly held by him.

5. The immediate heirs of the mother having renounced her succession, and there being no others known, plaintiff and the court are warranted in acting upon the assumption that the interest which had been cast upon the mother had devolved upon the sister and the three brothers by reason of accretion, and the indivisibility of their acceptance of their brother's succession.

6. A sale by licitation, made contradictorily with the parties now before the court, will convey a legal title to the purchaser.

(Syllabus by the Court.)

Appeal from district court, parish of St. James; Walter Guion, Judge.

Action by the Union National Bank against J. E. Choppin and others. From a judgment for plaintiff, defendants appeal. *Affirmed*.

¹ Rehearing refused April 9, 1894.

Pugh & Lambremont, for appellants. Sims & Poche and Carleton Hunt for appellee.

NICHOLLS, C. J. The plaintiff corporation, in 1889, as owner of an undivided portion of the Home plantation, in the parish of St. James, brought this suit against the original defendants, Dr. Pierre F. Choppin, Louis H. Choppin, and Joseph E. Choppin, then the owners of the other undivided portions of said plantation for the purpose of obtaining a judicial partition of the property. The three defendants were cited, and, in due course, P. F. and L. H. Choppin filed their answer. J. E. Choppin not answering, a judgment by default was entered against him. Subsequent to this, Joseph E. Choppin died, leaving, as his legal representatives, his mother, Eugenie Forstall, widow of Valerien Choppin; his sister, Mrs. Adele Choppin, wife of Robert G. Dugue; his brother Fernand Choppin; and his two brothers Pierre F. and Louis H. Choppin, the two latter being, as we have seen, originally defendants in the case. On the suggestion of the death of J. E. Choppin, plaintiff obtained an order of court making his legal representatives parties. A copy of this order was served on these representatives, but no citation was served. Subsequently, one of these representatives (Mrs. Valerien Choppin, the mother) died, without having appeared or filed answer, whereupon plaintiff obtained another order making her heirs parties. A copy of the order was served on said heirs on the 29th and 30th May, 1891, also without citation. On the 2d June, 1891,—only two days after service of the above order,—the cause was, on plaintiff's motion, set down for trial on June 10th. On that day (over the objection of counsel of P. F. and L. H. Choppin, who thereupon withdrew, and refused to take part) the case was taken up, tried, and decided. The two original defendants, surviving, appealed. On appeal the judgment rendered was avoided and reversed, and the case remanded for further proceedings (see *Bank v. Choppin*, 44 La. Ann. 171, 10 South. 597); the court holding that, where the defendant in a cause has "not answered," further proceedings against his heirs must be conducted in conformity to article 120 of the Code of Practice, and the citation or notice and the delays therein prescribed must be allowed. After the case had returned to the district court, the plaintiff filed a petition setting forth the death of J. E. Choppin and Mrs. Valerien Choppin, and the names of the legal representatives of both of them,—the legal representatives being the same persons in each case, viz. P. F. Choppin and L. H. Choppin (the two original defendants), Fernand Choppin, and Mrs. Robert G. Dugue,—and praying that, as such, they be duly cited to appear, etc., and that the decree of partition be rendered contradictorily with all parties in interest. Service having been

made on these new parties, and no answer having been filed by them, a judgment by default was entered against all of the defendants on the 7th February, 1893. On the 14th February the defendants appeared, and filed the following document: "Into court now come Robert Fernand Choppin, Pierre F. Choppin, Henry L. Choppin, and Mrs. Robert G. Dugue and her husband (to authorize and assist his said wife), solely and exclusively for the purpose of suggesting and informing this honorable court that they have renounced, and do hereby renounce, the succession of Widow Valerien Choppin, their mother; that the succession of said Widow Choppin has been opened, and prayer for administration thereof made in this honorable court; that, until said administrator is appointed, this suit should not be proceeded with, as there 's no person capable of standing in judgment for said succession." On the day the case was fixed for trial, plaintiff moved to take it up pursuant to assignment, but defendants objected to doing so "by reason of the filing of their suggestion February 14, 1893;" and thereupon the court ruled that it would hear evidence upon the suggestion, as it considered that the proper mode for proceeding with the case would be first to hear evidence upon the character of the renunciation relied upon as in the nature of an exception peremptory in its character. The only evidence offered by the defendants named in suggestion was an application filed by Henry L. Choppin to be appointed administrator of the succession of Widow Valerien Choppin, and for an inventory also filed by the same person on the 13th day of February, 1893. In the last petition it is stated that "petitioner had heretofore applied to be appointed administrator, and for an inventory, but although the latter had been ordered to be, it had not yet been, taken by Robert G. Dugue, notary." Upon this application the district judge ordered an inventory to be made by the district clerk, ex officio recorder. After hearing the evidence the court ruled that the suggestion filed on February 14, 1893, should not be entertained, as it did not amount to a renunciation of the succession of Mrs. V. Choppin; that even had a renunciation, in due form, been shown, the trial should not be arrested, there being no personal judgment sought against the suggestors, the action being simply to partition an estate. The court ordered the case to be proceeded with, whereupon counsel for defendants announced that he would take no part in the proceedings, for the reasons stated, and reserved a bill of exceptions. The case was submitted to a jury, a verdict rendered in favor of plaintiff as prayed for, and a definitive judgment of partition ordered. From this judgment the defendants prosecute the present appeal, and plaintiff, for answer to

the appeal, prays for damages in the sum of \$500, on the ground that it is frivolous.

The syllabus of defendants' brief, with the authorities there referred to, concisely shows the positions taken by them. Their contention is:

(1) That, in an action of partition, all parties in interest must be joined or represented, and, on issue by one of the defendants, plaintiff must show that the proper parties are before the court. Rev. Civ. Code, art. 1139; Man. 42; 2 Hen. Dig. 1076, par. 7; 30 La. Ann. 182; 31 La. Ann. 394; 2 La. Ann. 446; 16 La. 157.

(2) The heir is only considered as heir as long as he does not manifest the will to divest himself of that right by renouncing the succession. Rev. Civ. Code, art. 1014; 31 La. Ann. 261.

(3) Heirs, by renouncing, become strangers to the succession, the same as if they had never been heirs, and cannot stand in judgment touching or concerning any right of the deceased. This renunciation retroacts to the opening of the succession, and in point of law the heirs have never been heirs. 31 La. Ann. 261; 33 La. Ann. 100.

(4) Article 1017, Rev. Civ. Code, is not exclusive of every other mode of renunciation. A succession may be legally and validly renounced by a judicial declaration to that effect, if, in his pleadings, in obedience to any action of any party in court, the court is called upon to say whether he accepts or renounces. If the heir renounces in open court by his pleadings, he is not required to comply with article 1017. 33 La. Ann. 101; *Hansell v. Hansell*, 44 La. Ann. 553, 10 South. 941.

(5) The heirs of Mrs. Choppin, in a fit and appropriate proceeding, informed the court that they had renounced the succession of their ancestor, "and do hereby renounce the same." This judicial admission is binding on them, and constitutes full proof against them, and the court should have upheld the renunciation. 83 La. Ann. 101; Rev. Civ. Code, arts. 1036-1038, 2290, 2291; 31 La. Ann. 261; 1 Hen. Dig. 519, par. 2; Id. 520, par. 22; 43 La. Ann. 729, 822; 34 La. Ann. 815; 23 La. Ann. 309; 13 La. Ann. 409. Having renounced, the defendants were strangers to Mrs. Choppin's succession, and no further proceedings should have been taken until the succession was represented. 38 La. Ann. 243; 2 La. Ann. 466; 42 La. Ann. 880; 21 La. Ann. 486; 31 La. Ann. 574; 35 La. Ann. 289; 13 La. Ann. 487; 18 La. Ann. 282; 34 La. Ann. 323, 591.

(6) On the trial of their plea, defendants showed that the succession of Mrs. Choppin had been opened in St. James. It was not necessary to offer in evidence the pleadings. 9 Rob. (La.) 22; 27 La. Ann. 537.

(7) The renunciation contained in the pleadings constituted full proof against the defendants. Rev. Civ. Code, art. 2291; 1 Hen. Dig. 519, par. 2.

(8) Mrs. Choppin's interest in the property sought to be partitioned being unrepresented, no valid judgment of partition could be rendered, for want of proper parties. 31 La. Ann. 394.

(9) Plaintiff complains of delay, but, as said in *Bank v. Choppin*, 44 La. Ann. 170, 10 South. 597, the precipitate proceedings of plaintiff were in disregard of the legal rights of appellants. Plaintiff can blame no one for its own illegal acts.

Plaintiff's contentions are set forth in the syllabus of its brief with equal conciseness, as follows:

(1) The defendants and appellants are estopped from denying the fact of their being the legal representatives of Mrs. Choppin, or their capacity, as such, to stand in judgment in this case. They assumed that quality in their appeal before this court, No. 10,972 of the docket. They cannot now shift their position to a contradictory one to defeat the action of the law upon it. *Bank v. Choppin*, 44 La. Ann. 171, 10 South. 597; 1 Hen. Dig. pp. 519, 520; 6 Mart. (La.) 280; 4 La. Ann. 416; 11 La. Ann. 710; 5 La. Ann. 8-18; 6 La. Ann. 719; 11 La. Ann. 501; 12 La. Ann. 558; Id. 445; 14 La. Ann. 308.

(2) The document filed February 14, 1893, is not a plea. It contains no prayer, and is neither an exception nor an answer. It merely suggests nonaction by the court upon a statement unsupported by proof. Disclaimer of heirship is matter of privilege, and must be presented and urged by plea. 7 La. Ann. 239.

(3) If said document be considered in the light of an exception, it is of the dilatory kind, and must be pleaded in limine, and could not be pleaded after issue joined. The object of the plea was to secure personal immunity by disclaimer of rights of heirship, so as to affect the legal status of the pending partition suit then at issue, with all parties in interest. This the defendants could not do after default, which is equivalent to issue joined by answer. 2 Hen. Dig. 1163; Code Pr. art. 333; 12 La. 618; 6 Rob. (La.) 484; 11 Rob. (La.) 7; 10 La. Ann. 140; 1 La. Ann. 117; 11 La. Ann. 686; 14 La. Ann. 658; 8 La. Ann. 73; 7 La. Ann. 239; 19 La. 429; 1 La. 113-283.

(4) No proof adduced of fact of renunciation. Application of one of defendants for letters of administration and for inventory in succession of Mrs. Choppin implies acceptance under benefit of inventory. Duty of beneficiary heir to provoke inventory. Rev. Civ. Code, art. 1035; 12 La. Ann. 610; 2 La. Ann. 268.

(5) The default entered February 7, 1893, against all of the defendants, was not set aside. By failure to answer, defendants presumed to confess justice of plaintiff's demand for partition. Code Pr. 360. Delays having expired after default, the judge correctly "decreed the partition." Id. 1027.

(6) In partition suit, the heirs must be

parties. They alone are capable of standing in judgment. Executor or administrator cannot. Rev. Civ. Code, art. 1329; Code Pr. 123-1024; 2 La. Ann. 341; 7 La. Ann. 477; 30 La. Ann. 177; *Boutte v. Boutte*, 26 La. Ann. 606; *Veazy v. Trahan*, 4 La. Ann. 571; 17 La. 348; 19 La. 36; 4 La. Ann. 56-571; 16 La. 157; 4 La. Ann. 260; 15 La. Ann. 250. All rules governing partitions of successions applicable to partitions between ordinary coproprietors. Rev. Civ. Code, arts. 1289, 1290. No inventory necessary. 36 La. Ann. 318; *Hansell v. Hansell*, 44 La. Ann. 550, 10 South. 941. Heir considered seised of succession from date of parent's decease, and becomes undivided proprietor of its effects. Right of possession of deceased continues in heir, and latter holds in common with coheirs until division is made. Rev. Civ. Code, art. 1292; 5 La. Ann. 561; 21 La. Ann. 253.

(7) Appeal is frivolous, and appellee is entitled to damages. 1 Hen. Dig. pp. 101-102; 3 N. S. 248; Code Pr. 907; 31 La. Ann. 427.

The parties who filed the paper referred to had been, upon the motion of the plaintiff itself, cited and made parties as heirs of Mrs. Choppin. They were therefore not strangers to the controversy, but had an interest in not permitting a final judgment to be rendered contradictorily with them, as heirs of their mother. They had the legal right to appear in court, and disclaim any interest in that capacity in the suit, just as a lessee or any other person would have the right to disclaim. Whether their disclaimer, at the time, and as made, would be available to them, is a different question. If, in point of fact and law, they were not at that time the legal heirs of their mother, and if it would be legally necessary to thereafter make such heirs parties, the suggestion made in the paper would bring the court and the plaintiff itself to confront, not a mere question of form or of pleading, but a fact, and one of such a character as possibly to radically affect the legality of any sale which might subsequently be made in the partition proceedings. Not only were the two surviving original defendants standing upon their original rights as joint owners interested in the legality of the proceedings, but plaintiff itself was concerned in the result. The court properly considered the paper as having been legally filed, and properly acted upon it.

Article 1329 of the Revised Civil Code declares that, where a partition suit is brought by one heir who wishes the partition, the coheirs or their representatives must be cited; and the decisions have been, as far as we know, unvarying, that in all partition proceedings all parties in interest must be before the court. When we say the proper parties must be before the court, we mean that the action must have proper parties, not only at its beginning (*Dugas v. Truxillo*, 15 La. Ann. 117), but throughout, to its close. If during the progress of a suit an interest

which the law necessarily required to be represented, and which at one time was represented, should cease to be so, either by death or other legal cause, steps would ordinarily have to be taken to replace its representative, and to cause it to be again represented, no matter how much delay might result from carrying out this legal requirement. Plaintiff concedes that that portion of the joint interest held by J. E. Choppin which devolved upon his mother, as one of his heirs, at his death, must be legally represented in the proceedings, and it has attempted to have this done. We are therefore to inquire whether that interest is still represented, or can be held as legally represented, in the present proceedings. If it is not, and it should be, we will be powerless, no matter how apparent defendants' motive in renouncing their mother's succession might be to postpone a partition to which they object.

In the examination of that question the first proposition which meets us is whether, at the time the presumptive heirs of Mrs. Choppin (in what we will style the "renunciation of their mother's succession") declared that they did so renounce, they were precluded from doing so by the time and circumstances under which this was done. In support of the contention that they were precluded, the first reason assigned is that, after having been cited as heirs of their mother, they had permitted a judgment by default to be entered against themselves as such, and that that judgment has never, by motion, been set aside; that that fact fixed their status as such heirs. Defendants meet this by the declaration that they know of no law which prevents an heir from renouncing up to the time that he permits judgment to be rendered against him; that "judgment" is a technical expression, and does not mean judgment by default, as defined in the Code of Practice; that article 1000, Rev. Civ. Code, says when the penalty of liability shall be inflicted on the heir, and that the penalty only springs into existence when the heir, in the very words of the law, "suffers judgment to be given against him;" that penalties cannot be extended, and, when the law specifically fixes and determines when the penalty shall be inflicted, it is a prohibition against it under all other conditions; that judgments by default create a tacit issue, but do not cut off peremptory bars or exceptions; that, pushing the doctrine advanced to its legitimate conclusion, we would have to interpolate and read into article 1000 the words "judgment by default," whereas the article, as it now stands, requires a judgment to be rendered before the heir is liable; that, up to the rendition of the judgment, defendants' right to renounce was given them by law, and they exercised this right at the time and under the conditions laid down by the law. The general rule governing the acceptance of successions

is contained in article 977 of the Revised Civil Code, wherein it is declared that "no one can be compelled to accept a succession in whatever manner it may have fallen to him whether by testament or the operation of law. He may therefore accept or renounce it." This general rule is modified under the special circumstances referred to in articles 1021 and 1071, Rev. Civ. Code, but the contingency for which these articles provide does not arise in this case. Article 1031, Rev. Civ. Code, announces the general rule as to renunciations to be that "so long as the prescription of renunciation is not determined the heir may still renounce provided he has done no act to make himself liable as heir." As bearing upon the question as to the circumstances under which a presumptive heir would, by his own act, render himself liable as an heir, we quote as follows from our Civil Code: "The person called to the succession does an act which makes him liable, as an heir, if when cited before a court of justice as an heir for a debt of the deceased he suffers judgment to be given against him in that capacity without claiming the benefit of inventory or renouncing the succession." Article 1000. "If the heirs thus cited [to declare whether they accept or renounce the succession] declare that they accept the succession or if they are silent or make default they shall be considered as having accepted the succession as unconditional heirs and may be sued as such." Article 1037. "In case the heir makes default on this demand he shall be considered as unconditional heir and be bound as such." Article 1057. In article 1010, Rev. Civ. Code, we find explained the character of the default here referred to. It is there declared that "he [the presumptive heir] must not have been decreed by a definitive judgment to be the unconditional heir nor have accepted at the suit of the creditors instituted to oblige him to assume this quality." A judgment by default not being a definitive judgment, we must hold that the fact of renouncing is not lost by simply permitting such a judgment to be entered, provided the renunciation be filed prior to its confirmation. It was not essentially necessary that the judgment by default should have been "set aside" by motion to that effect prior to the filing of the renunciation. See *Hasam v. McVittie*, Mann. Unrep. Cas. 192. The judgment by default evidences, it is true, a tacit admission; but it necessarily disappears when, prior to such an admission being acted upon, a paper is filed which directly negatives the fact supposed and deemed to have been admitted.

The plaintiff next claims that the defendants were estopped from renouncing for the reason that on the former appeal their heirship was admitted by them, and the only question raised by them was as to the sufficiency of the notice served on them as heirs of J. E. Choppin and Mrs. Choppin. The

defendants filed no pleadings in the former suit. They simply abstained from taking part in the trial of the case, and after the judgment of partition had been rendered they appealed. They did not assume, anywhere in the proceeding, the quality of heirs of either their brother or their mother. Their complaint was not that they, as such heirs, had not been properly made parties, but that the heirs of J. E. Choppin and Mrs. Choppin had not been cited. There were several persons, other than themselves, who were the presumptive heirs, to whom this objection might apply. Plaintiff overlooks the fact that the two surviving original defendants, as two of the three joint owners, had substantive rights of their own in the matter of the regularity and legality of the partition, which authorized them to raise and urge the objection they did, independently of any question of heirship. We do not think they were estopped on the ground urged.

Plaintiff next claims that the defendants have not renounced the succession of their mother; that article 1017 of the Code requires that the renunciation of a succession should be by authentic act; and that an attorney at law has no authority, by pleadings on behalf of his client, to bring about such a result. We will not discuss, in all the various phases which it might take, the question whether an authentic act be necessary to operate the renunciation of a succession. We limit our inquiry to the facts of the particular case before us, which is that of a third person attempting to proceed as plaintiff in a partition suit against defendants, upon the hypothesis that they are the heirs of a person deceased. It is not claimed that defendants are the debtors of the plaintiff, or owe it any legal duty. They are not legally called upon to accept the succession of their mother, and cannot be required to take that position. The plaintiff, by simply suing them, could not force them so to do. The success of plaintiff's attempt was contingent upon either their silence, or upon proof by the plaintiff (should the defendants deny their status as heirs) that they had done some act which had bound them to that status. But the defendants were not only not silent, but they expressly disclaimed; and there is no proof in the record of their having committed themselves, by any act, to being heirs of their mother. By their pleadings, they have certainly estopped themselves from ever setting up, adversely to the plaintiff, any right predicated upon their being their mother's heirs. Had the defendants renounced by notarial act, they could still accept, provided the succession had not in the mean time been accepted by other heirs; but they could not do so to the prejudice of acts done on the faith of the renunciation. Their course here as effectually concludes them as if evidenced by a notarial act.

We are next to consider what the effect, if any, is of the renunciation by the defendants of Mrs. Choppin's succession. If we consider Mrs. Choppin's succession as not being directly a party to the proceedings, as they stand, who are the actual parties defendants, and in what capacity? The two surviving original defendants are in actual possession of the property sought to be partitioned. They are in court, individually, as holders of their original rights as joint owners, and they have not disclaimed being the heirs of their brother J. E. Choppin, who held also a joint interest. Fernand Choppin and Mrs. Dugue are also before the court as heirs of their brother. Therefore, J. E. Choppin's interest is, to a certain extent, at least, actually and directly represented by the three brothers and the sister. A portion of J. E. Choppin's interest—that portion which devolved at his death upon his mother—is either still outstanding, vested in her vacant succession, or in some heir who is, up to date, unknown, and has not presented himself, or it has been cast upon the two original defendants (the brothers of the deceased), Fernand Choppin, and Mrs. Dugue, who have accepted his succession by reason of accretion and indivisibility of such acceptance. Rev. Civ. Code, arts. 986, 1022-1024. The portion of J. E. Choppin's interest which devolved upon Mrs. Choppin was never accepted by her. During her lifetime she took no action in the matter, as far as we are advised; and when she died this interest was transmitted as a right belonging to her succession, subject to acceptance or rejection, unless controlled by exceptional facts. Such we understand to be the present position of affairs in this matter.

The present action, it must be remembered, is not one, *inter se*, of coheirs holding under a common or single title, but the action of a third person holding a joint interest in real estate by distinct title, suing the heirs or supposed heirs of a person who held another joint interest in the property, which heirs, as between themselves, hold under a common or single title that joint interest. Under the peculiar circumstances of this case, is it essentially necessary that matters should be stayed either until a curator should be appointed to the succession of Mrs. Choppin, as a vacant one, or until the persons who, upon the renunciation of the defendants, would (if such were possible) become her heirs, should be made parties? Or are the brothers and sister who have accepted as heirs of their deceased brother, J. E. Choppin, to be held, for the purposes of this suit, to represent his entire succession, and his entire interest in the property, sufficiently to make the title which would be conveyed under a licitation sale in these proceedings a safe and valid one? In the consideration of the subject, we have not overlooked the provisions of article 1320 of the Civil Code, which is to the effect that "it is not nec-

essary to support the action of partition that the co-heirs or the parties commencing it should be in actual possession of the succession or of the thing to be divided, for among co-heirs and co-proprietors it is not the possession, but the ownership which is the basis of the action." There are two articles of the Code which strike us as being entitled to some weight in reaching our conclusions. They are articles 1381 and 1031. They are as follows: "If after the partition, an heir appears whose death has been presumed on account of his long absence or whose right was not known, as if a second testament unknown until then should entitle him to inherit with the others, the first partition must be annulled and another must be made, of all the property remaining in kind and of the value of whatever has been consumed or alienated in order that he may have the share to which he is entitled." Article 1381. "So long as the prescription of the right of accepting is not acquired against the heirs who have renounced they have the faculty still to accept the succession if it has not been accepted by other heirs without prejudice however to rights which may have been acquired by third persons upon the property of the succession either by prescription or by lawful act done with the administrator or curator of the vacant estate." Article 1031. It will be seen by article 1381 that there are some circumstances under which a sale made in partition proceedings, in which a person who had actually rights of ownership in the thing partitioned was not represented, would still hold good, and the rights of this unrepresented person would be restricted to a partition of the property remaining in kind, and of the value of whatever may have been consumed or alienated. The doctrine here announced is but the application of the doctrine of article 1031, under which subsequently known and asserted rights are made to be asserted in subordination to rights lawfully acquired under dealings prior to their own being presented and advanced. The facts of the present case do not bring it under either of the articles cited, but they have none the less attracted our attention, as we have stated. If there be any possible heirs to the succession of Mrs. Choppin, they are not known, so far as the record would go to show; and while we could not absolutely and positively say that there is no one who could or would accept that succession, what we do see of the succession impresses us with the moral conviction that there is no such heir, and no one who will ever do so. No rights of creditors of Mrs. Choppin's succession appear to be involved. We are of the opinion that a sale made in the proceedings as they stand, with the parties as they are, would convey to a purchaser such a title as would protect him against eviction based upon any rights which might hereafter be advanced upon a claim in or

upon property sought to be partitioned under and through Mrs. Choppin's succession.

We find a case—that of *Buret v. Lefebure*, decided by the French court of cassation in 1865 (*Journal du Palais* 1865, p. 645)—which, though its issues were much wider and broader than those in the present proceeding, bears some resemblance to it. The facts of that case were these: The widow Collet died in 1842. The only persons who at that time presented themselves to receive her succession were Courgibet and Trouffle, heirs in the paternal line. These made a donation of a portion of their rights to a Mrs. Croissant and a Miss Moullies. On the 15th of June following, there was a partition of the succession, under which the real estate was allotted to Miss Moullies. In 1852, Reutiere and others, alleging themselves to be the sole heirs of the widow Collet, in the maternal line, brought a suit against the paternal heirs (not including Courgibet), asking a new partition of the succession, or the restitution of one-half of the value of what had been allotted to them. In this suit they recovered from defendants, by judgment under date of 16th August, 1852, the sum of 44,000 francs. In 1859, 28 new heirs in the maternal line, majors and minors (the latter represented by their tutors), revealed themselves, and brought a subaction of partition solely against the heirs of the maternal line who had figured in the suit of 1852, without even making the heirs of the paternal line parties. On the 19th December, 1859, judgment was rendered in their favor. In 1862 several of the maternal heirs who had obtained the last judgment brought a suit against the heirs of Widow Collet in the paternal line, having in view the definitive partition of all the movable and immovable property of the succession. The heirs so cited contended that the partition of 1842, having been made in good faith, and executed since by the maternal line, was beyond attack. In December, 1862, the lower court rendered a judgment condemning Courgibet to account to the maternal line for one-half of the amount he had received in the succession of Mrs. Collet, and then (distinguishing between the majors and minors) rejected the prayer of the majors for a new partition, and reserved to the minors or their tutors the right to bring an action when they should have been legally authorized to do so by a family meeting. The court of cassation held, when the case was brought before it, that the plaintiffs (already bound by the judgment of 1852, executed, as to themselves, by reason of the subaction of partition granted upon their prayer in 1859) could not ask a new general partition; that they could not take advantage of the fact that Courgibet had not figured in the judgment of 1852; that all that the plaintiffs were entitled to would be to exact from Courgibet (who had not, as yet, paid anything back, of the

amount he had received) one-half of what he had received from the partition of 1842; that especially were plaintiffs not permitted to have a licitation sale of the real estate which had been allotted in the first partition to Miss Moullies. The court held that the lower court was wrong in discriminating between the majors and the minors, stating that the course pursued by the tutors of the minors in asking a subpartition from those heirs in the maternal line (Reutiere and others) who had recovered the 44,000 francs from the heirs in the paternal line, was the precise course which, legally, under the circumstances, they should have taken. In announcing its decision the court used the following language: "Ces partages [those of 1842 and 1852] ainsi consommés de bonne foi devaient être considérés comme irrévocables entre toutes les parties qui étaient toutes majeures, au moins à l'égard des héritiers paternels. S'il existait d'autres héritiers maternels, quoique saisis de plein droit de la succession, ils n'étaient pas obligés de se porter héritiers, et jusqu'à ce qu'ils se fussent fait connaître en prenant qualité, la ligne maternelle avait été représentée vis-à-vis de l'autre ligne, par ceux qui avaient fait valoir leur droit; les héritiers inconnus de l'autre ligne ne pouvaient plus désormais agir que contre leurs cohéritiers de la même ligne, à fin d'être admis au partage des valeurs recueillies à leur préjudice par ces derniers; c'est ce qu'ils ont fait lorsqu'en 1859, au nombre de 28, majeurs et mineurs, ces derniers représentés par leurs tuteurs, ils ont demandé un sous-partage contre les seules héritiers de la ligne maternelle qui avaient figuré dans l'instance de 1852 sans même mettre en cause les héritiers paternels." It will be seen that the French court placed two partitions which had been carried on in the absence of unknown parties having actually existing rights (which, however, had not been advanced or asserted) in the same situation that our Code, under article 1381, places partitions which have been carried on under the erroneous idea that one of the coheirs, who was still living, had died, or had been carried on in ignorance of the existence of a will which created rights in the property sought to be partitioned, and had given to the party in whose favor they were created a legal interest in the partition. It will be seen that, in the second suit, two of a great number of heirs in the maternal line were permitted, quoad the heirs in the paternal line, to represent the entire interest of the maternal line; that the transfer of the real estate which had been made in the first partition to Miss Moullies was maintained; and that the unknown or non-appearing heirs (even the minors) in the maternal line were restricted in their remedy to a suit against the coheirs of their own line for their pro rata of what had been received by them, and to a contribu-

tion in money from one of the coheirs in the paternal line who had never paid back to any one the overplus he had received in the first partition.

In the case at bar, finding that four of the presumptive heirs of J. E. Choppin have been duly cited, and are in court; that they have permitted judgment to be rendered against themselves as such in the lower court, disclaiming neither there nor here their heirship; finding that certain known heirs of Mrs. Choppin have renounced, and that if there be any other heirs they are unknown (at all events that they have certainly not presented themselves); and finding no rights of creditors involved,—we are of the opinion that, under the exceptional circumstances of this case, plaintiff, as joint owner of the property, is justified and warranted in proceeding contradictorily against these four heirs of J. E. Choppin, as representing his entire interest in the property, and in assuming that the apparent interest therein of Mrs. Choppin has been cast upon the four heirs now in court by reason of accretion and of the indivisibility of their acceptance of the succession of their brother. In the examination of this case, that of *Savage v. Williams*, 15 La. Ann. 252, has not escaped our notice. Should any claims be hereafter presented under a claim of right under and through Mrs. Choppin, the sale which will be made in this proceeding will none the less stand. For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, affirmed.

(46 La. Ann. 383)

SCHMIDT et al v. ITTMAN et al. (No. 11, 452.)

(Supreme Court of Louisiana. May 7, 1894.)

PARTNERSHIP—EVIDENCE TO ESTABLISH—LIABILITY OF UNKNOWN PARTNER—CONTRACTS WITH INSANE PERSON.

1. The plaintiffs sued on open account, and alleged that the account had been acknowledged by promissory notes. The defendants severed in their defense.

A Partner.

One of the defendants contended that he was not a partner.

Plea of Insanity.

The executrix representing the succession of the other defendant contended that he was not sane at the time the goods were bought, and subsequently, when the notes were furnished.

Bill of Exceptions.

By the first,—The Surviving Partner,—objection was made to the admissibility of evidence as to him on the ground that it was an attempt to hold him for another person's debt, and that the open account had been novated by the notes in question. The partnership was sued, and from it the amount due was claimed. The notes were furnished by the partnership. Evidence was admissible to prove that the defendant was not a third person, but a partner.

Evidence of Partnership.

2. There was a partnership formed many years ago between the two brothers. At the time stipulated in the formal act of partnership for ending the partnership, it does not appear to have been dissolved. The property, under the formal act of partnership, was the joint property of the partners.

3. It is not satisfactorily established that the joint ownership was dissolved. The property in which the partnership business was conducted was leased to the defendants jointly. The partner who defends on the ground that there was no reconduction of the partnership obtained extension for the payment of partnership debts. His active management and control of the business were such as to create the belief, on the part of others at the place of business, that he continued as a partner. The amounts he has drawn, and the acknowledgments, indicate a continuous partnership business.

Though not Known to Creditor.

4. The partnership being established, the principle applies that, whenever one is a partner, he is responsible for the debts of the partnership, though it may not have been known by the creditor that he was a partner.

Plea Untimely Filed.

5. The other defendant, the executrix, was without right to raise an issue of fact by pleading it after the case had been argued and submitted for decision.

6. The issue is passed upon on the plea of general denial, originally interposed.

Facts not Notorious or Known to Creditor.

7. It is not proved that the defendant who died since the suit was instituted was insane at the times the goods were bought. If he was insane, it was not a notorious fact. It is not shown that the plaintiffs were aware of any insanity on his part.

8. The fact of insanity became known at the date the notes were furnished. They are of no avail,—valueless,—and plaintiffs are without right to charge him with the price of goods sold to him on the day the notes were executed, and goods sold subsequent to that date. The judgment appealed from is amended by deducting the price of the goods sold on the dates just stated. In all other respects the judgment is affirmed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Schmidt & Ziegler against G. B. Ittman and others. Judgment for plaintiffs, and defendants appeal. Modified.

James J. McLoughlin, for appellant succession of George B. Ittman. Henry P. Dart, for appellant Jacob Ittman. William S. Bendict and Hugh C. Oage, for appellees.

BREAUX, J. Plaintiffs brought this action to recover the sum of \$2,246.71, and interest, they claim as due by defendants, who are, they allege, commercial partners. They averred that it was for goods and merchandise sold by them to the defendants. They declared upon an account, and alleged in their petition, that in recognition of their indebtedness the defendants have furnished them with a number of notes, maturing at intervals of 30 days, which remain unpaid. One of the defendants, George B. Ittman, had been interdicted at the date suit was brought. His cur-

ator was cited as party defendant. After suit had been instituted, this defendant died. His daughter, as testamentary executrix of his estate, was made defendant. Each defendant pleaded a general denial. They separated in their defense. No evidence was offered by the executrix. The other defendant defended on the ground that he was not a partner, and offered evidence to prove that he was not responsible for the debts, as he was not, he contended, a member of the firm sued. The testimony discloses that in January, 1881, the two brothers, George B. and Jacob, formed a partnership to end on October 31, 1882. It was not expressly renewed at the end of the term stipulated. The style of the firm under the contract of partnership was "George B. Ittman," and the plaintiffs contend that the partnership continued by tacit reconduction, and that the goods, the price of which they sued for, were sold to a commercial firm of which George B. Ittman and Jacob Ittman were partners; that they were used by the firm in operating a barroom. In the formal articles of partnership it is stated that Jacob was the owner of one-half of the interest in the business, stock, fixtures, and appurtenances. He put in the concern an amount stated, and thereby acquired a half interest. The records do not show that there ever was a final settlement made between the partners, and that the firm was dissolved at the time for its dissolution stipulated in the written agreement of partnership. The business was conducted, during all the years succeeding the stipulated term of the partnership, as it had been conducted originally under the formal contract. The prominent facts showing the continuance of the partnership are that the property in which the partnership business was conducted was leased by the partners jointly; that, in a matter of bank accommodation, Jacob Ittman represented himself as one of the partners, and as a partner obtained an extension of time for payment; that the debits and credits of the partnership accounts were kept as they had been kept under the formal article of partnership, and that Jacob Ittman received his portion as a partner; that he, on different occasions, acknowledged his interest as a partner. After the sickness of his brother, in 1892, he had entire charge of the business, to the date of the brother's interdiction, in June, 1893. All the testimony except his own shows that his management was that of a partner. His statement regarding the character of his management is not only contradicted by witnesses, but is inconsistent with the history of the business, as made manifest by the books of the firm. The evidence of plaintiffs consists of their accounts sued on, and the notes signed by the defendant firm. They also offered the interdiction proceedings in the suit in which one of the defendants was interdicted. The note of evidence was closed, and, after argument of counsel for both plaintiffs and defendants, the case was

taken under advisement by the court. While it was under advisement, the executrix filed a supplemental and amended answer and peremptory exception, in which she alleged, in substance, that plaintiffs could not recover on their accounts, for they held notes which had been introduced in evidence, and that those notes had been signed by the late George B. Ittman after he had become notoriously insane; also, that he was thus affected at the times (previous to the execution of the notes operating an acknowledgment) the goods described in the open accounts were sold and delivered. On plaintiffs' motion, averring that it was not a peremptory exception, but an amended and supplemental answer, it was treated as of no effect, and excluded from the record. The district court pronounced judgment for the plaintiffs, and against both defendants in solido. From the judgment, both defendants have appealed.

Bill of Exception.

The defendant Jacob Ittman, through his counsel, argues that the notes were signed by George B. Ittman, and that there is no allegation that they were taken in error; that the suit was brought against the defendants as commercial partners. He invites attention to the fact that at the opening of the case he interposed the objection that, upon the face of the papers, it was an attempt to hold the defendant Jacob Ittman for another person's debt, and that the open account had been novated; that this objection was overruled, and a bill reserved. Had the evidence supported the contention that Jacob Ittman was not a partner, and that he was only an employee, the points urged would be unanswerable. The testimony leaves that theory of the defense unsupported by the facts. There was no error committed in admitting the testimony offered to prove that a partnership existed, and in not sustaining the plea of novation urged as an objection to the admissibility of testimony.

The Existence of the Partnership.

At the risk of some repetition, we resume a statement of the facts regarding the partnership, as follows: There was a partnership originally in the name of George B. Ittman. This is undisputed. The property belonged to the partners in equal shares. There was no settlement of the partnership. The partner Jacob Ittman obtained extension of time for payment of partnership debts. Those near him, occupying desks in one of the apartments occupied in conducting defendants' business, looked upon him as a partner because of his active management and control of the business. He has actively and interestedly attended to the business of the partnership. He has drawn amounts from the partnership funds, not consistent with his statement that he was an employee. His signature in one of the books in evidence, together with that of his brother and

copartner, at the end of the statements of amount received, indicates, not a receipt for wages, but an agreement between partners as to amounts received by one of them from the partnership funds.

May have been Unknown as a Partner, and Yet Responsible.

With reference to the knowledge of the creditors. The responsibility of a partner may exist, though it was not known by the creditor that he was a member of the partnership. Whenever the parties intend a partnership between themselves, they are, or at least may be, held to be partners as to third persons. Story, Partn. par. 49. The existence of a dormant partner may be unknown to the creditor, and yet he may be held liable to the extent of his responsibility as a partner. 1 Lindl. Partn. p. 339. The secret partner can escape liability only by the failure of the creditors to discover the relation he holds to the business. *Chaffraix v. Lafitte*, 30 La. Ann. 631. Commercial partners are bound in solido. They were commercial partners, and bound for the payment of the debt.

An Answer Involving Issue of Facts Filed Too Late to be Considered.

The other defendant, the executrix, could not be heard to raise an issue of fact after the case had been argued and submitted for decision. The question of insanity *vel non* of the late George B. Ittman at the time the debt was contracted was purely one of fact, and, if the executrix desired to avail herself of that defense, it should have been seasonably presented. But she contends that the record in the interdiction proceeding, introduced in evidence by plaintiffs, without limitation, established more than the mere fact of interdiction and the appointment of a curator. This manifestly was the purpose of plaintiffs in introducing this record. The omitted limitation of the effect it should have is seized upon by the defendant as cause sufficient to enable her, some time after argument, to plead the absolute incapacity of the defendant at the date the purchases were made. We are compelled to decline all consideration of the exception tendered. It was really an answer, and was not filed in due time. Code Pr. arts. 419, 420; *Boagni v. Anderson*, 32 La. Ann. 920; *Cohn v. Levy*, 14 La. Ann. 355; *Guilbeau v. Thibodeau*, 30 La. Ann. 1099.

The Plea is Considered Under the General Issue.

This conclusion, however, does not exclude all consideration of the defense presented. Had the plaintiffs, while proving up their claim against this defendant, proved that he was notoriously insane, the executrix would have a right, under her plea, originally interposed, of general denial, to a judgment of nonsuit.

The Evidence Does Not Prove Insanity at the Time.

There is no proof of record that he was notoriously insane at the date the goods were sold to the defendant firm. He became ill in October, 1892, and from that time his family seriously considered his mental condition. It was only a short time prior to his interdiction that his mental condition became generally known.

There was no Notorious Cause for Interdiction, nor was it Proved that Plaintiff Knew of Any Aberration of Mind.

It is announced in French jurisprudence that acts anterior to the interdiction may be annulled if there was notorious cause for interdiction at their date. Cass 11, March, 1862 (section 63, tit. 136, pp. 63-634). Proof of a notorious cause for interdiction must be made in order to defeat payment of goods purchased at their value in due course of trade. 5 Laurent, p. 376. In the two cases cited by counsel for defendant,—*Fecel v. Guinault*, 32 La. Ann. 91, and *Lagay v. Marston*, Id. 170,—the insanity was evident, and the causes for interdiction well known to those who were parties to the contract annulled. The record discloses an entirely different state of facts in the case at bar. The mental condition of the sadly afflicted man was, so far as appears of record, a cause of concern and sorrow to the family, becomingly undivulged until secrecy was no longer possible.

Price of Goods Not Allowed, Purchased for Business After Creditor is Aware of Insanity, and Cause for Interdiction Had Been Well Known.

The defendants, in argument, urge that plaintiffs sued on the notes they hold, and not on their account. The fact is that they declare on their account; that without defense or objection on that score they proved the correctness of the account, and used the notes in corroboration of its correctness. Had they brought action on the notes, they would not have recovered, for the drawer was notoriously insane on the 1st day of June, 1893, the date they were made. The insanity of George B. Ittman was notorious on the 1st day of June, 1893, and the fact known to the plaintiffs on that day. The price of the goods sold to him and charged to his account on that and days subsequent cannot, under the law, be recovered, and to that extent the judgment must be amended, in so far as he (the interdict) is concerned. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by deducting the sum of \$98.46 from the amount of \$2,246.71, the executrix was condemned to pay, and that in all other respects it be affirmed, with costs of appeal to be paid by the plaintiffs and appellees, and those of the lower court as directed in the decree.

(33 Fla. 636)

DANIEL v. TAYLOR et al.

(Supreme Court of Florida. May 15, 1894.)

TAX DEED—VALIDITY—ASSESSMENT—TAX SALE—NOTICE—TITLE ACQUIRED.

1. A tax deed executed by the clerk of the circuit court, he signing it "Frank Phillips, County Clerk," and the concluding clause of the deed describing him as county clerk of the county, and the deed being sealed with the seal of the circuit court of the county, is in substantial compliance with the requirements of section 60 of the general revenue act of 1874, c. 1976, as to the signing and sealing of tax deeds by the county clerk.

2. An assessment of land under the general revenue act of 1874, c. 1976, as unknown, such land being occupied at the time, is void. The assessment should have been in the name of the owner or occupant.

3. The record in the clerk's office of the advertisement of a sale of lands for taxes under section 50 of the general revenue act of 1874, c. 1976, is admissible as evidence to show that land claimed under a tax deed as sold at such sale was not advertised, when the land is not included in such record.

4. The omission to advertise land for sale for taxes as required by statute is not a mere irregularity, but is a vital defect; and the validity of all subsequent proceedings depends upon at least a substantial compliance with such statutory requirement.

5. The prima facie evidence of regularity of proceedings as to the assessment and the advertisement or notice of sale which a tax deed is made by section 60 of the tax act of 1874 is overcome by a tax roll showing a void assessment of the land, and a record, made under section 50, of the advertisement of lands to be sold on the day on which the land is stated in the deed to have been sold, which does not include the land described in the deed.

6. A tax sale took place February 4, 1878, on a tax assessment of 1877, under the revenue act of 1874, which assessment was void because not made in the name of the owner or occupant of the land, and the tax deed was executed March 8, 1879, and recorded on March 12, 1884. The party owning the land from 1862 to her death died in December, 1884, in possession of the land. The tax purchaser, R., was never in possession. M. bought the land, and obtained sheriff's deed thereto, on August 4, 1884, under execution sale on judgments rendered July 3, 1883, against R. M. did not have possession during the life of the owner. During such last illness, K., a son and heir of the owner, told M. that his tax title was good, and agreed to rent the land from M. After the owner's death, K. continued to live on the land, and remained in possession until the fall of 1886, having rented the land from M. in January, 1885, after the owner's death, at which time also M. agreed by bond for title to sell K. the land for \$40, payable in November, 1885. On March 2, 1885, C. G. C. obtained judgment against K., and on June 4, 1885, the land was sold, as K.'s property, under execution issued on such judgment, to D. In November, 1885, M. conveyed the land to the wife of K., and the only natural conclusion justified by the evidence was that the purpose of the conveyance to the wife was to defeat K.'s creditors. *Held*, (a) that the tax sale conveyed no title to R., and the sale of the land as the property of R. no title to M.; (b) that the title of D. was superior to that of Mrs. K.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; James F. McClellan, Judge.

Ejectment by W. J. Daniels against James

R. Taylor and others. Judgment for defendants, and plaintiff appeals. Reversed.

This is an action of ejectment instituted by the appellant against the appellees, James R. Taylor, Cofield B. King, and his wife, Mary King, February 2, 1889, to recover possession of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, township 4, range 11, N. and W., situate in Jackson county, and containing about 40 acres.

The plaintiff, to maintain his case, proved title from the United States, by patent and mesne conveyances, in Louisa C. King, wife of Henry C. King, on January 2, 1862; and that on March 2, 1885, the Chesapeake Guano Company recovered judgment in Jackson circuit court against Cofield B. King for \$118.40 and costs, in an action in which the praecipe was filed January 12, 1885, and the writ is dated the same day, and served on the 23d of the same month; and that on June 4, 1888, the land in controversy was sold to plaintiff under an execution issued on such judgment, levied upon the land in dispute as the property of Cofield B. King, and was conveyed by the sheriff to such purchaser on the same day. One Thomas G. Dickson testified, on November 18, 1889, in behalf of plaintiff, that he was familiar with the land and Mrs. L. C. King; that she died in January, 1885, leaving surviving her a son, Cofield B. King, and a daughter, Lizzie, witness' wife, and her husband, J. B. Gilbert, she having married again; that she (Mrs. Gilbert) was living on these lands at the time of her death, and afterwards her son, Cofield B. King, continued to live upon and cultivate the same, and was in possession thereof during the year 1885, and in 1886, until the fall of the year, when he moved from the place, some miles away. On cross-examination he stated that C. B. King rented the land in controversy from A. McNealy in 1885; that on the division of the estate of Mrs. Gilbert witness and J. B. Gilbert gave to C. B. King a mule for his interest in the estate, and witness, for his wife, and Gilbert, took one 40 each of the land, King taking a mule; that they knew at that time that McNealy claimed the land in question by purchase, and that King said he could buy it from McNealy. Here there was read in evidence an instrument under seal, executed by J. B. Gilbert, C. B. King, and Mary F. King, dated December 26, 1885, which purports to relinquish unto T. G. and Lizzie Dickson all their right, title, and claim of the former parties, they "being heirs of said estate," in the southeast quarter of the northwest quarter of the above-stated section of land, belonging to the estate of Mrs. L. C. Gilbert, deceased.

Here the plaintiff rested, and the defendants offered in evidence a certain tax deed from the state, purporting to convey the land to one J. N. Richardson, and bearing date March 8, 1879, and reciting that J. W. Calloway, collector of revenue of the county of Jackson, sold the land at public auction on

February 4, 1878, at Marianna, in said county, for the nonpayment of taxes assessed and levied thereon for the year 1877, and remaining unpaid on the day of sale, together with the costs and charges, to J. N. Richardson, for the sum of \$6.66, which sum Richardson had paid. The deed is signed "Frank Phillips, County Clerk," and purports to have been executed in the presence of two subscribing witnesses, and is sealed with the seal of the circuit court of that county. The concluding clause of the deed also describes the named officer executing it as "county clerk of Jackson county," and states that he has subscribed his "name officially, and affixed the seal of the county court of the said county of Jackson, at Marianna, in said county of Jackson." The deed was filed for record March 11, 1884, and recorded the next day, proof of its execution having been made before the clerk on the former day by one of the subscribing witnesses. His affidavit states that he "saw Frank Phillips, clerk of the circuit court, sign and seal the foregoing, and for the uses and purposes therein expressed, and that he and Samuel J. Erwin signed the same as witnesses." To the admission of this deed the plaintiff objected, because it was not executed under the seal of the county court, as required by law, but under the seal of the circuit court; and, second, because it appeared by the affidavit proving it for record that it was executed by the clerk of the circuit court; and because it was never legally executed. The objections were overruled, and due exception taken, and the deed read in evidence.

The bill of exceptions then states that the defendants read in evidence judgments from the circuit court of Jackson county, Fla., against James N. Richardson,—one in favor of Richardson, Mason & Co., one in favor of J. A. Lewis & Co., one in favor of Goodall, McLester & Co., one in favor of Brown & Farrell, and one in favor of A. Mohr, agent. These judgments appear to have been rendered July 2, 1883, and provide for a stay of execution until November 1st following. Defendants then offered in evidence certain *fi. fas.*, dated the day last mentioned, in favor of J. A. Lewis & Co., Brown & Farrell, Goodall, McLester & Co., A. Mohr, agent, and McKenzie & Co., respectively. On each of these executions there is indorsed a levy by the sheriff on the land in controversy as the property of Richardson, and a transfer of the writ to Adam McNealy with power to collect the same; the transfer of the Lewis & Co. execution bearing date January 16, 1884, that of Brown & Farrell, November 26, 1883, that of A. Mohr, agent, December 13, 1883, that of McKenzie & Co., January 16, 1884, and that of Goodall, McLester & Co. the same day. The admission of these writs of *fi. fas.* in evidence was objected to, because they "showed only a levy upon the lands contained in the sheriff's indorsement, and did not, by said return, show a sale, and a purchase by

Adam McNealy." The objection was overruled, and the executions read in evidence, an exception being noted.

The defendants then offered in evidence an instrument purporting to be a deed from Andrew Scott, sheriff of Jackson county, dated August 4, 1884, conveying to Adam McNealy the above and other lands levied on "by virtue of the following executions issued from the circuit court of Jackson county, Florida, against James N. Richardson, to wit, one in favor of Richardson, Mason & Co., one in favor of J. A. Lewis & Co., one in favor of Goodall, McLester & Co., one in favor of McKenzie & Co., one in favor of Brown & Farrell, and one in favor of A. Mohr, agent; such deed also reciting the advertisement of the property, and its sale on August 4, 1884, at public outcry, to McNealy. Plaintiff objected to the admission of this instrument, because it did not identify the executions and judgments read in evidence, nor show the date, amount, and "from what court the judgments supporting the executions mentioned in the deed were issued." The objections were overruled, and the deed admitted, exception being duly taken and noted.

Defendants then offered a deed from Adam McNealy and wife, conveying the land in dispute to Mary F. King, the same bearing date November 30, 1885, and recorded November 6, 1889. The admission of this deed was objected to on the ground that, "though executed in 1885, it was never recorded until November, 1889, and consequently was never brought to the knowledge of the plaintiff until after suit brought." The objection was overruled, and the deed read to the jury, and exception was duly taken and noted.

Here the testimony referred to in the opinion was adduced, and then the plaintiff placed in evidence the Jackson county tax roll of 1877. On page 118 of this roll the last name under the head "Names of Taxpayers" is that of James Yates. The intervening page to page 119 is blank. Page 120 has on its first line, under the head "Names of Taxpayers," the word "Unknown." Opposite this word, on the same line, and on all subsequent lines, under the heading "Description of Land," are descriptions of land by section and parts of section, township, and range, down to the third line of page 127, on which there seems to have been originally the following entry: "N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, section 4, T. 4, R. 11, 120 acres." As the book now stands, a line is drawn through the letters and figures "N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$," and through "S. $\frac{1}{2}$ " and "S. W. $\frac{1}{4}$ " is written above the stated "S. $\frac{1}{2}$."

The plaintiff introduced also the advertisement of the collector of sale of lands in Jackson county for taxes of 1877 on February 4, 1878, recorded January 31, 1878, in Book H, Record of Deeds of said county. The only part of section 4, township 4, range 11, appearing in this advertisement, is the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$.

Hereupon the plaintiff moved to strike from the evidence the stated tax deed, for the reason that it was null and void, and conveyed no title, because the evidence in rebuttal established that the tax sale was a nullity; the land was never legally assessed, nor legally advertised and sold; that the notice of sale and proof of advertisement showed the sale to be a nullity; and because the deed had never been properly and legally recorded. The motion was denied, and plaintiff excepted.

Francis B. Carter, for appellant. W. O. Butler, for appellees.

RANNEY, O. J. (after stating the facts). The first and seventh assignments of error, and those involving instructions given the jury and instructions asked but refused, will be considered together. The first and seventh assignments are as follows: "(1) That the court erred in permitting the tax deed to J. N. Richardson to be read in evidence over plaintiff's objection." "(7) That the court erred in refusing plaintiff's motion to strike this deed from the evidence." The instructions referred to need not be set out.

The objections urged in the trial court under the first assignment were: First, that the deed was not executed under the seal of the county court, but under that of the circuit court; second, because it appeared by the affidavit proving it for record that it was executed by the clerk of the circuit court; and, third, because it was never legally executed. The motion referred to in the seventh assignment was after the introduction by the plaintiff of his evidence in rebuttal, including the Jackson county tax roll of 1877, and the advertisement of tax sales made February 4, 1878, of which roll and advertisement there is an explanation in the statement preceding this opinion. The grounds of this motion were that the deed was null and void, and conveyed no title; the land was never legally assessed, nor legally advertised and sold; that the notice of sale and proof of advertisement showed the sale to be a nullity; and that the deed had never been properly recorded.

It is unnecessary to review what has been heretofore said by this court as to the clerk of the circuit court being the county clerk, within the meaning of the latter expression, as used in the revenue laws passed under the constitution of 1868, which constitution (section 19 of article 6) provided for a "clerk of the circuit court who shall also be clerk of the county court." *Sams v. King*, 18 Fla. 557; *Stockton v. Powell*, 29 Fla. 1, 10 South. 688; *Brown v. Castellaw*, 33 Fla. 204, 14 South. 822. In our judgment, the cases just named are conclusive of the objection made to the introduction of the deed. In *Sams v. King* the tax deed was executed under the general revenue law of 1874—the statute now under consideration—by the clerk of the cir-

cult court, he describing himself as such, and affixing the circuit court seal; and the objection urged to the deed covered both the use of that seal and the officer's acting and signing as such clerk, the contention urged here being, as shown by the files, that the law required the use of the seal of the county court, and that he should have acted and signed as clerk of the latter court. But the deed was held valid, and our understanding of the decision is that it was intended to cover the entire objection, and hold the deed valid against it, and as the exclusive official act of the clerk of the circuit court. The fact that the clerk, in executing the deed now before us, has described himself as "county clerk," and has, in the concluding clause, defined the seal used as that of the "county court," when he has used the seal of the circuit court, are immaterial irregularities; and the deed must be held a substantial compliance with the provisions of section 60 of the general revenue act of 1874, c. 1976, notwithstanding what is said there as to the county clerk and the seal of the county court. The expression "county clerk," as used in the statute, or in any official act under it, must be held to mean the same as clerk of the circuit court; and the use of the seal of the circuit court cannot be regarded otherwise than as a substantial compliance with the prescribed form of deed without disturbing a rule of property.

As to the motion to strike the tax deed from the evidence, it is urged in behalf of the appellant, the movant, that the assessment was void. The effect of the tax roll is to show that the land was assessed as "unknown." The revenue statute referred to provides: "All lands shall be assessed in the county * * * in which the same shall be, and every person shall be assessed in the * * * county * * * in which he resides when the assessment is made, for all lands then owned by him within such county * * *; but lands owned by one person and occupied by another may be assessed in the name of the owner or occupant, and lands not occupied or cultivated may be assessed as non-resident." Section 6. "Unoccupied lands, if the owner is unknown, may be assessed as such without inserting the name of any person." Section 7. The ownership of the land during the year 1877 was in Mrs. Louisa C. King, and J. M. Barnes occupied it; and, this being so, the assessment should have been made in the name of either such owner or such occupant. The assessment was illegal and void. *L'Engle v. Railroad Co.*, 21 Fla. 353; *L'Engle v. Wilson*, Id. 461; *Brown v. Castellaw*, 33 Fla. —, 14 South. 822.

The second ground of this motion is founded on the record of the advertisement made by the collector of lands for sale for taxes. The fiftieth section of the statute (chapter 1976), after providing for the sale of land for taxes, and for the publication of a notice of

sale, and the form of such notice, enacts that the publishers, proprietors, or foreman of any newspaper publishing any such notice shall forward a copy of each number of his paper containing such notice to the collector of revenue and clerk of the county by mail, and shall make an affidavit setting forth a copy of such notice, with the date of the first publication thereof, and the number of insertions, sworn to and subscribed before some officer authorized to administer oaths in the county in which said newspaper is published, and shall send such affidavit to the county clerk of the county where such land is situated, who shall record the same among the records of his office, and, after such recording, deliver it to the collector of revenue. There was no objection to the admission of the record referred to, nor do we perceive any defects that are fatal to its use for the purpose of the plaintiff, which purpose was to show that the land in controversy was never advertised for sale. This land does not appear in such record of the advertisement, and we think it was legal evidence that the land was never advertised for sale. The statutory requirement (section 50, *supra*) was that the advertisement should be published in the manner provided by law for legal advertisements, and shall be published once in each week for four successive weeks. "The manner provided by law for legal advertisements" includes publication in a newspaper published in the county. *McClell. Dig.* p. 102, § 1; *Id.* p. 522, § 11. The omission of notice of the sale is not a mere irregularity, but a fatal defect, the validity of all subsequent proceedings depending upon a substantial compliance with the law in this regard; and the provision of law as to it must be complied with at least substantially, if not strictly. *Black, Tax Tit.* (1st Ed.) § 78; *Id.* (2d Ed.) §§ 205, 210; *Blackw. Tax Tit.* (5th Ed.) §§ 396-398, 413; *Cooley, Tax'n*, pp. 482-487. The notice required by law is jurisdictional. This, says the last author cited, is one of the most important of all the safeguards which have been deemed necessary to protect the interests of parties taxed, and nothing can be a substitute for it, or excuse the failure to give it; and, being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them; and mere informalities or unimportant variances in an attempt to comply with the law may not be fatal, but variance in substance cannot be overlooked. In *Scales v. Alvis*, 12 Ala. 617, it was held, even, that consent of the landowner to a defective publication of notice would not bind him, as he could not in that manner confer authority upon the officer of the law; nor could he pass title to his freehold by a mere waiver. *Blackw. Tax'n*, § 451.

The *prima facie* evidence of regularity of proceedings as to the assessment and the ad-

vertisement or notice of sale under which the deed is made by section 60 of the tax act of 1874 (*Sams v. King*, supra) is overcome by the above tax roll and record of the advertisement or notice; but it is contended that appellant is precluded from setting up any such defects by the provisions of the sixty-third section, which enacts that no suit or proceeding shall be commenced by a former owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside any deed made in pursuance of any sale of lands for taxes, or against the grantee in such deed, his heirs or assigns or legal representatives, to recover the possession of such lands, unless such suit or proceeding be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not subject to taxation, or that the taxes were paid or tendered, together with the expenses chargeable thereon before sale; and the recording of such deed shall be deemed such assertion of title or such entry into possession by the grantee, his heirs or assigns, as to authorize such suit or proceedings against him or them as for an actual entry. There was a saving clause in favor of persons of unsound mind, under guardianship, or imprisoned, of one year after the disability shall cease.

It was said of this section in *Bank v. Brittain*, 20 Fla. 507, 513, 515, that it did not contemplate that the recording of the deed should be held equivalent to an actual entry, and that the section could be made applicable only to a case where the former owner is proceeding to set aside the deed, or to recover the land from the tax purchaser, his heirs or assigns. The act of 1883 (chapter 3413, § 61) enacted that no suit or proceeding should be commenced by the former owner or claimant, his heirs or assigns, or his or their representatives, to set aside any deed made in pursuance of any sale for taxes, or against the grantee in such deed, his heirs or assigns, or legal representatives, to recover the possession of such lands, unless such suit or proceeding be commenced within three years after the recording of such deed in the county where the lands lie; and it was held in *Graham v. Mortgage Co.*, 33 Fla. 356, 14 South. 796, that the statute did not of itself vest such possession of the lands in the grantee named in the tax deed as to authorize the former owner to sue for a recovery of the same at law, and to defeat his remedy in equity to remove the tax deed as a cloud when it was such.

In the case before us the tax sale took place February 4, 1878, on a tax assessment of 1877, and the tax deed to Richardson was executed March 8, 1879, and filed for record on the 11th, and recorded on the 12th, of March, 1884. Mrs. King, who at her death was Mrs. Gilbert, was the owner of the land from 1862 until her death, which was in the latter part of December, 1884, or in January,

1885, and she was living on it when she died; and, though she had not been living there long then, the testimony is that she had been controlling the rents for several years prior to her death. A proper inference to be drawn from the evidence is that Richardson was never in possession of the land, though he may have paid some tax on it. McNealy claims to have bought under an execution sale made August 4, 1884, under judgments rendered against Richardson July 3, 1883, the former of these dates being also the date of the sheriff's deed to McNealy. McNealy had no possession during the life of Mrs. King. The statement of Cofield B. King to McNealy as to the latter's title "by tax deed" being good, and his agreeing to rent the place, made in the last illness of Mrs. King, had no effect as against her. McNealy says he did not tell Mrs. King that he had the tax deed.

Under the circumstances detailed above, our opinion is that the tax sale conveyed no title to Richardson, nor the execution sale any to McNealy. Neither had any effect upon Mrs. King's title, and at her death the title was in her, and it descended to her three heirs, who were the defendant Cofield B. King, her son, and the daughter and the surviving husband, Gilbert. If we concede, for the purposes of this case, that Mrs. King was barred of any relief in equity against the illegal tax deed as a cloud upon her title, such title was nevertheless of no effect against her title or possession, and it is no basis for any claim in favor of Richardson or McNealy. Neither of these two parties had any title to the land when Mrs. King died, and, unless there are other circumstances in the record to change the result, the legal title, in so far as it descended to Cofield B. King, became subject to the lien of the judgment of March 2, 1885, against him and in favor of the Chesapeake Guano Company.

The testimony to be noticed as capable of having the effect suggested is as follows: Dickson, a witness for plaintiff, says that after the death of Mrs. King, who was then in possession, the defendant Cofield B. King continued to live upon the land, and cultivate the same, and was in possession during the year 1885, and until the fall of 1886, when he moved some miles away; and that King rented from McNealy in 1885. McNealy says that in January, 1885, after Mrs. King's death, King rented the land from him, and agreed to pay \$16 rent for 1885. That witness was acquainted with the land, and it was worth \$20 to \$25 per year rental. He thought the latter a fair rental value. That he acknowledged his title to be a good one, and rented the land from him. That King was unmarried at this time, but said he expected to marry soon. That at this time witness agreed to sell King the land for \$40, payable in the fall of 1885. Gave him a bond for title, and in November, 1885, made the deed to his wife, Mary F. King, and took

up the bond. This deed bears date November 30, 1885, but was never recorded till November 6, 1889, or a few days before the trial, and nine months after the institution of this suit. King told witness when he took the bond that he expected to marry, and would want the deed in his wife's name. His wife paid the money herself, and at the same time paid the rental for 1885, King being not "right present, * * * but near by, —somewhere around the house." Another witness said \$25 was a fair rental, and that there was a dwelling on the land in 1885, and that the fences were in better repair than when he was testifying. J. R. Taylor testified that in the fall of 1885 Gilbert came to him to borrow some money for Mary F. King, saying she wanted to borrow it, and that he (Taylor) loaned him \$56 for her, and took security for it on a mule. It was the mule referred to hereafter. Gilbert says he was requested by her to borrow it. It also appears that in 1885 there was a voluntary division of the estate of Mrs. Louisa C. King (Gilbert) between Gilbert and the daughter, Mrs. Dickson, and the defendant C. B. King, in which division the husband and the daughter each took a 40 of land, and King took a mule. Gilbert, the husband, states they knew at that time that McNealy claimed the land in question by purchase, and that King said he could buy it from McNealy. An instrument executed on this division by Gilbert and King and wife, and relinquishing to Mrs. Dickson, the daughter, the interest of the former parties as heirs of the mother, Mrs. Louisa C. King, to the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the same section of land, bears date December 26, 1885. Gilbert says the division was in 1885, and, he thought, in the fall; that Mrs. Dickson and King executed a paper to witness, showing the 40 he took; and he and King executed one to Mrs. Dickson, showing the 40 she took. B. S. Liddon, who was one of the attorneys of the Chesapeake Guano Company, says they dunned King repeatedly, and threatened suit against him, and, after judgment was obtained against him, King offered to sell them the land, but would never do so, and they advertised it for sale under execution; and not long before the sale day he married, and presented his claim to an exemption of the land, and for this reason they did not sell. That, before they advertised the land for sale, King told them that McNealy was claiming a tax title on the land, and had threatened to sue him unless he would pay rent; and witness told him the tax deed was void, and that they would buy the place on the debt. That King claimed the land at that time, and took his exemption on it when they offered to sell it.

It is entirely clear, if Mrs. Mary F. King, wife of C. B. King, is eliminated from this controversy, that the defendant C. B. King has no standing. The tax deed was void as to him, and he could not defeat a creditor

by the simple recognition of a pretended title as superior to the valid interest inherited from his mother. What would be the effect of King's attornment to McNealy if the latter still held the tax title, and the tenancy continued, or if McNealy, or some bona fide assignee of his title, were in possession of the land, is a question we need not decide. In disposing of such question we would have to consider the effect of King's having possession at the time of the attornment upon the creation of an estoppel upon him to deny McNealy's title (Sedg. & W. Tr. Title, Land, § 357), and also the nature of King's holding and interest as a coparcener in all the lands of his mother. Had King taken title to himself from McNealy, the latter's title being, as it was, void in law, and not a basis of recovery against him or his coparceners, for all of whom he held, such title, and the transaction resulting in it, could certainly have no effect upon King's title. In the lifetime of the mother, Mrs. Louisa C. King, the tax deed was a nullity as to her title, and so it was as to the title of her heirs after her death. As to King and his creditors, the title in King, after her death, was that derived from her. He derived none from McNealy; and when the judgment was rendered on March 2, 1885, against King, the title was in him and his coparceners, and not in McNealy; and, as between King and his coparceners, the purchase of McNealy's title would have inured to the benefit of the several coparceners as a purchase by him of an outstanding title. Had the deed from McNealy been to King, instead of to his wife, it is clear that it would be no obstacle to the sale of June 4, 1888, at which Daniel purchased; nor would it have changed the character of Daniel's title. The conveyance to Mrs. King does not present much difficulty. We see that when King made the contract of purchase he intended to marry, and stated that he would want the conveyance made to his wife. Such, however, we do not understand to have been the written contract. The deed to Mrs. King must be held to have been made in pursuance of the original desire of King. The money used in paying the rental and purchase money agreed to be paid by him was raised on the security of King's property,—the mule he had obtained from his mother's estate. There is no evidence that Mrs. King ever parted with anything of her own for this money. Any personal contract she made to pay the \$56 was not binding on her. The reliance of the lender was necessarily the lien on King's mule, and, under all the circumstances of the case, the only natural conclusion the jury could have reached is that the conveyance was made to the wife in pursuance of the original intention of King, and to defeat his creditors. There is nothing to justify the conclusion that she did not take the title to this end.

Whether or not an assessment of the kind

presented by this case, or a failure to advertise, will overcome or preclude the defense of the statute of limitations prescribed by section 63 of the act of 1874, c. 1976, supra, in favor of a tax purchaser or his assignee, who has duly recorded his deed, and is in bona fide possession, we do not say. There is no such case before us. No tax purchaser or his assigns has ever been in possession. The real possession has been in Mrs. King and her heirs, or in King himself, all the time, in so far as King's creditors and the appellant are concerned.

While there was no error in permitting the tax deed to be read, nor in refusing the motion to strike it out, as to have done this would not have been proper practice, still the court did err, under the facts of the case, in ignoring, as it did, both in instructions given and in refusing to give instructions asked, the principles announced above.

Judgment reversed.

(32 Fla. 539)

RIVAS v. SUMMERS.

(Supreme Court of Florida. May 1, 1894.)

PARTITION—TRIAL OF TITLE—RIGHT TO JURY—PARTIES.

1. A proceeding for the partition of lands under the statute, is not at law, but in chancery, and was not intended as a substitute for, or equivalent of, an action of ejectment, or to be used for the sole purpose of testing a legal title, or trying an issue as to the same. *Street v. Benner*, 20 Fla. 700, reviewed and distinguished.

2. In a proceeding for a partition of land, the defendant not only remained silent as to any right to a trial of the title at law, but, after the testimony had been taken before an examiner, the cause was tried by a referee appointed by the chancellor on the application of the parties plaintiff and defendant for such reference. *Held*, that by such reference and trial the defendant waived any constitutional right he might have had to a trial of the question of title by a jury.

3. A defendant in a suit in equity, under the statute, for partition of land, died, leaving a will, and appointing his codefendant and partner, J. R., his executor. By the will the testator gave to J. R. all his personal and real estate, to be held in trust for the benefit of J. R.'s children; the will stating it to be the testator's wish and request that J. R. should continue the partnership business, and have the sole and exclusive use and control of all testator's interest in the business, both real and personal, until the children should arrive at the age of 21 years, and that then J. R. should either pay over to each of the said children their proportion of testator's estate, both real and personal, or should hold or invest the same for their exclusive benefit until he should deem it safe, and for their interest. After such death the cause was revived against the executor, and proceeded against J. R. in his own right, and as executor. The record did not show that the land was partnership assets. *Held*, that on the death of the testator the children and devisees became parties for the purposes of partition, and the executor was not a sufficient party, as the representative of their interests.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; James M. Baker, Judge.

Bill by Owen J. H. Summers against Joseph Rivas and Henry Koopman for partition. Judgment for plaintiff, and defendant Rivas appeals. Reversed.

The bill was filed December 28, 1886, by the appellee, and, as amended (Joseph Rivas and Henry Koopman being defendants), shows that Charles Summers, late of Duval county, died testate October 22, 1862, and solvent, leaving a large estate, and naming his widow as executrix, and that the will was admitted to probate in Duval county, and she qualified as executrix. The will is annexed to the bill, as a part thereof; and from it we see that it directed that all the testator's debts be paid, as soon as possible after his decease, out of the first moneys that should come into the hands of his executrix, thereafter named, from any portion of his estate,—real or personal. It gives and bequeaths unto his wife and children, Charles H., Mary S., Francis V., Michael T., and Owen J. H., all his estate, of every kind whatsoever, the proceeds and income of which to be devoted to the support and maintenance of his wife, and for the support and maintenance and education of his children; and he commits and disposes unto his wife (reposing special confidence in her) the custody, tuition, care, and education of his children from his decease until they shall, respectively, attain the age of 21 years, and then directs that the portion of his property remaining from their support and education be given to each, on attaining majority, as shall be meet and proper, in the discretion of his beloved wife. Expressing a desire that there shall be no letters of administration taken out on his estate, but that the sole control and management of the same shall be and remain in the hands of his wife, and directing that if any question or controversy shall arise concerning any gift, bequest, or other matter or thing in his will given or bequeathed, expressed or contained, it shall be settled by referees to be selected by his wife,—they to have power to choose an umpire,—the will then reads: "I further will that, should it be deemed necessary or expedient by my executrix, hereinafter named, to sell and dispose of any portion or the whole of my real or personal estate for the purpose of the support and maintenance of herself, or the support, maintenance, and education of my said children, to effectuate my intention I do hereby vest in my said executrix full power and authority to dispose of my real estate in fee simple, and my slaves and personal property, in as full and large a manner, in every respect, as I could myself do, if living; hereby directing my executrix to retain in her hands the whole proceeds of such sale, to be disposed of as I have before ordered and willed." The bill also states that the executrix, after entering on her duties, died, but previous to her death she duly filed an account of her doings as such. This report, with the vouchers therein referred to,

is made a part of the bill, and is alleged to show a balance due the estate. The vouchers are not in the record. The account was filed in the county court June 1, 1869, and runs from 1862 into December, 1868; the amount received being \$5,565, and the amount paid out being \$5,484.48, and the balance due the estate, \$80.64. No action appears to have been taken on it by the county court except to file and record it. The bill then alleges that the complainant is the son and one of the heirs of the testator, and was born March 22, 1860; that he has an indefeasible title, in fee simple, to an undivided two-eighths part or share of the eastern half of lot 1 in block 21 in the city of Jacksonville, according to the I. D. Hart map (such property lying on the north of Bay street, with a frontage thereon of 50 feet, and running back 105 feet), and that the testator died seised and possessed of the same; and that, to the best of complainant's knowledge and belief, Joseph Rivas and Henry Koopman, the defendants, are each a cotenant with him in the ownership of said property, and each holds an undivided three-eighths interest therein, and that they are his cotenants, and have, as such, received, and applied to their own use, the rents and profits of the property, to the exclusion of complainant's rights in the premises,—they having appropriated the rents and profits arising therefrom, continuously, since March 3, 1873, the same amounting to \$40,000. The prayer is that the land be partitioned, and the said share of complainant be allotted to him, and the defendants required to account for his share of the profits.

The defendants, Joseph Rivas and Henry Koopman, answered; their answer, and the amendment thereto, admitting the death of the testator, his will, and the appointment and qualification of the executrix, but averring the want of any information as to the filing of the alleged account,—not admitting it was filed, or was correct, and denying that it was a final accounting,—and stating that the executrix died on or about May 20, 1870, without having closed the administration of the estate, and, on about July 20th of the same year, letters of administration cum testamento annexo on the estate of the testator were issued to Michael Hartley, who duly qualified as such administrator, a copy of which letters is annexed.

They deny that the complainant has an indefeasible title to an undivided two-eighths interest in the described land, or that he is a cotenant with them therein, or that he has any right, title, or interest, either in law or equity, of any kind whatsoever, in or to the land, or any part thereof. Defendants say: That they not only own, each, three-eighths interest in the land, but that they each own four-eighths interest in it, and that they are joint tenants, and own together the whole of the land, in fee simple. That the land was sold and conveyed to them by John H. Burton, a commissioner appointed by order of the judge

of the county court in and for Duval county, Fla., in probate, in the matter of the petition of Michael Hartley, administrator de bonis non of the estate of Charles Summers, deceased, praying a sale of the land to pay the debts of the said estate, a copy of the deed being annexed as a part of the answer. The deed bears date March 14, 1873, and appears to have been recorded on the next day. That the petition was filed by such administrator in said court in January, 1873, and prayed the sale of the lands to pay the debts of the estate of said Charles Summers, and thereupon such proceedings were had thereon that on the 13th day of said month an order was made by the judge of said county court, whereby the lands were ordered to be sold for the purpose of paying the debts of said estate, and the said Burton was appointed a commissioner to make such sale upon due and legal notice. That the commissioner, in obedience to such order, did publish a notice of the time and place of sale for 30 days in the Florida Union,—a newspaper published in said county,—and on March 3, 1873, in accordance with such notice, offered the land for sale, before the courthouse door in the county, at public auction, to the highest bidder, at which time and place the land was sold and struck off to these defendants for the sum of \$10,125, bid by them, and being the highest sum bid therefor, which price was a fair and full value for the property; and thereupon, a report of the sale being made by the commissioner, the said judge, by an order made March 8, 1873, ratified and confirmed the sale, and ordered the commissioner to convey the land to defendants, which was done, upon the payment of the stated purchase price by the defendants, by the execution of said deed by the commissioner,—a certified copy of which proceedings is annexed as a part of the bill. That, upon the execution of the deed to them, they were let into the possession of the property, and from that time to the present have owned, occupied, possessed, and held the same, claiming under said deed of conveyance the whole of said property, in fee simple, adversely to the complainant, and all other persons whomsoever.

Further, that complainant has received his proportion of the money arising from the sale of the land, being the balance remaining over and above the amount necessary to pay the debts of the estate.

That, whatever power of sale of the realty of said estate may have been in the said executrix, no such power was vested in said administrator, upon whose petition the land was sold, as heretofore stated, which petition made a case within the jurisdiction of the county court, and the facts giving jurisdiction to the county court were by it adjudicated and determined, as appears by its order based upon said petition; and the facts as set forth and adjudicated cannot now be inquired into collaterally in these proceedings.

between the parties thereto. The answer concludes with the usual general denial.

Complainant filed replication, and on November 9, 1887, the cause was referred to an examiner to take testimony; and on April 15, 1889, the examiner filed his report of the testimony taken under such order. On June 21, 1889, complainant filed in the office of the clerk of the circuit court of Duval county a notice, entitled in the cause, and dated two days previously, to Joseph Rivas, to the effect that on the 22d of the same month he would move the court for an order reviving the cause against said Rivas, as the executor of Henry Koopman, deceased; and on the last-named day complainant filed a petition stating that Koopman had died on April 20, 1889, as would appear from an annexed certified copy of the letters testamentary issued to said Rivas on the last will and testament of Koopman,—such letters purporting to have been issued by the county judge of Duval county April 24, 1889, and such petition praying that the cause be revived against Rivas, as such executor, and proceed in the same manner as if it had been instituted against such representative. And on the 22d day of June, 1889, the circuit judge made an order that the cause be revived "against the said executor, and be proceeded in as though the suit had been originally instituted against the said executor," the order reciting that due notice of the motion had been given. Afterwards, the cause proceeded in the name of O. J. H. Summers, as complainant, and in the name of Joseph Rivas, in his own right, and Joseph Rivas, as executor of Henry Koopman, as defendants.

On November 29, 1889, the cause was referred to R. M. Call, Esq., a practicing attorney, for trial by him as referee; and on December 11th of the same year the referee filed his findings and judgment, of which filing due notice was given; such findings being that the complainant is the owner in fee of an undivided one-fourth interest in the property (describing it), and that the said defendants are his cotenants, each owning an undivided three-eighths, and that the defendant Joseph Rivas, in his own right, and his testator, Henry Koopman, during his lifetime, have applied to their own use the rents, income, and profits of the said land since March 15, 1873, and it being adjudged: (1) That the said parcel of land be partitioned, and one-fourth thereof set off and allotted to complainant, and appointing commissioners to make partition as herein decreed, they to take the oath and proceed according to the statute in such cases made and provided. (2) That the cause be referred to a named special master to take and state an account of the rents, income, and profits of the premises during the time the defendants have received the same, and the complainant has been excluded from the land by his cotenants; the master, in stating the account, to charge the defendants with one-fourth of the rents, income, and

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profits, and give them credit for one-fourth of all proper disbursements for taxes and assessments, insurance on tenements, necessary repairs; interest to be allowed on each item on each side of the account from the date thereof to the date of the report. There was a provision as to costs, which it is not necessary to mention.

In the proceedings had before the examiner there is an entry made December 2, 1887, to the effect that the counsel for complainant and defendants agreed on that day that, if the court should decree a partition of the property sought to be partitioned, then, upon such decree, testimony might be subsequently taken as to the rents and profits of the property, subject to all proper and legal objections thereto, and in accordance with the prayer of the bill for an accounting.

On December 16, 1889, Rivas, in his own right, and as such executor, filed a petition praying that the decree be opened, and for a rehearing, 15 grounds therefor being set forth in the petition; and on January 6, 1890, the referee filed his findings and judgment thereon as follows: It recites that the cause came on to be heard on December 31, 1889, upon the petition; that complainant appeared by his solicitor, William B. Young, and the defendant by his solicitors, Fleming & Daniel, C. S. Adams, and A. W. Cockrell & Son. That complainant offered in evidence the certified copy of the last will and testament of Henry Koopman, deceased, and the probate thereof, certified by the county judge of Duval county, to meet the objection of want of proper parties, raised for the first time by the petition, and that the defendant objected to the introduction of the same on the ground that it was not the proper time for the introduction of evidence,—the testimony having been closed,—and on the further ground that no predicate had been laid for its introduction. The paper, findings, and judgment then read as follows: "The will is admitted in evidence, whereupon, it is agreed by counsel for both parties that two of the children of Joseph Rivas, referred to in the will of Henry Koopman, to wit, Joseph M. Rivas and Henry Lee Rivas, are of full age. The said petition was argued by counsel for complainant and defendant, and after due consideration the referee holds that there is no reason to open the decree herein, dated 7th day of December, A. D. 1889." And then follows an order denying the petition; such order bearing date January 4, 1890.

The other facts, in so far as they need be stated, are set forth in the opinion.

Fleming & Daniel, Chas. S. Adams, and A. W. Cockrell & Son, for appellant. W. B. Young, for appellee.

RANEY, C. J. The sufficiency of the bill was not questioned in the circuit court, but the bill was answered, and, upon replication

being filed, testimony was taken by an examiner; and then there was a trial by referee, a decree in favor of complainant being reached without any objection being made to chancery as the forum. Nor is the sufficiency of the bill, standing alone, brought in issue here. On the contrary, it is charged to have been so framed for the purpose of precluding any such controversy. The contention, however, of counsel for appellant, is that the facts presented by the answer, and developed by the testimony, show such a case as is exclusively for the adjudication of the title by a court of law, and ousts the jurisdiction of equity. The defense made by the answer is, in short, a denial that complainant has any interest in the property, or any cotenancy therein with the defendants, and a title to the entire property acquired by defendants at a sale made in March, 1873, under an order of the county court of Duval county, applied for by an administrator *de bonis non cum testamento annexo* on the ancestor's estate, for the payment of debts of the estate, and an entry into possession under such title, and a retention of possession, from then until the commencement of the suit, adversely to the complainant and all persons; it being further alleged that the price bid and paid by them for the property was its fair value, and that the complainant received his share of the money remaining over and above the amount necessary to pay the debts of the estate.

Our statute (sections 2, 5, pp. 801-803, *McClel. Dig.*) provides (section 2) that the bill or petition may be filed by any one or more of several joint tenants, tenants in common, or coparceners, against their cotenants, coparceners, or others interested in any lands to be divided, and shall set forth the description of the lands, of which partition is prayed, by metes and bounds, or other sufficient description, and shall state, according to the best of the knowledge and belief of the petitioners, the names and places of residence of the several owners, joint tenants, tenants in common, or coparceners, or others interested in the land, the quantity or proportionate share claimed by each, and such other matters, if any, as may be necessary to enable the court to adjudicate fully upon the rights and interests of the parties; and where the names, residence, quantity, or interest or proportionate share of any of the owners or claimants of such land are unknown to the petitioners or complainants, then it shall be so stated, and the suit may proceed as if such unknown persons or defendants were named in the bill or petition, and such bill or petition shall be sworn to by some one or more of the petitioners. And (section 5) upon the bill being taken as confessed, or upon the coming in of the answers of the defendants, the court shall proceed to ascertain and adjudicate the rights and interests of the parties, either by a reference to a master, by a hearing upon the pleadings and proofs, or in such other

way or manner as may be most convenient, and according to the ordinary rules and practice of the court, and shall also decree that partition be made, if it shall appear that the parties are entitled to the same: provided, however, that when the rights and interests or proportions of the petitioners are clearly established to the satisfaction of the court, or are undisputed, and also when the rights and interests of some of the defendants, but not all of them, are ascertained or established to the satisfaction of the court, or are undisputed, the court may, by decree, order partition to be made, and the shares, proportions, or interests of the complainant or complainants, and such of the defendants as have established and satisfactorily proved their respective shares, interests, or proportions, to be set off and allotted to them; leaving for future adjustment, by further proceedings in the same cause, the rights, shares, and interests of the other defendants.

This statute has received the consideration of the court in two cases: *Street v. Benner*, 20 Fla. 700, and *Kell v. West*, 21 Fla. 508.

In the former case (decided in 1884) the bill was dismissed by the circuit court without stating its reasons for doing so; and it is said in the opinion—which concludes, very properly, that such dismissal was because of the legal title attempted to be tendered by the plea and answer—that the bare denial of complainants' title by plea or answer was no obstacle to the court's proceeding according to the ordinary practice of courts of equity in partition, and did not necessitate a reference to a court of law to try the legal title; and then, observing that a defendant must answer the bill, and if he sets up a title adverse to the complainants, or disputes the complainants' title, he must discover his own title, or show wherein the complainants' title is defective, it says that the defendants, *Benner* and others, merely deny complainants' title, and allege adverse possession "founded on a written instrument," but do not disclose the defect in complainants' title, nor discover the written conveyance under which they claim adversely to the complainants. It is then observed that the general practice in chancery, as established by the books, uncontrolled by statutes, is that when the complainant's title or the cotenancy is denied, or the answer sets up an adverse holding, and the defense is substantiated by proof, to require the plaintiff to establish his title at law, and to retain the bill a reasonable time to enable him to do so by such an action. The court then proceeds to consider the statute with reference to the power of the court of chancery to try and determine a contested legal title in a suit brought "for the sole purpose of effecting a partition of lands." *Street v. Benner*, 20 Fla. 711. Disposing of *Mattair v. Payne*, 15 Fla. 682, by remarking, *inter alia*, that there the statute was not referred to, nor its construction required, and, further, that the bill itself showed the absence of complainants'

right, and that the very nature of the proceeding contemplates a division of land among owners in common, it is then said that, where the object of a suit is to try a question of legal title, the proper forum is a court of law, and where the object is a partition of lands among common owners, or parties severally interested in an undivided estate, a court of equity is the forum, and unless the statute otherwise provides the practice has generally been as stated above. Then, after quoting from the act, it says, of its direction to ascertain and adjudicate the rights and interests of the parties, that it is "nothing less than a direction to decide and decree what these respective rights are, as they may appear from the law and the testimony; that there is nothing in the act requiring the court of chancery to ascertain what the verdict of a jury might be upon the facts, but the court must ascertain and decide the rights and interests of the parties upon the evidence before it; * * * that the plain meaning of the statute seems to be that all proper issues made in a suit for partition of lands shall be tried and determined by the court in which the proceeding is commenced, and according to its rules, and whatever investigation is necessary to enable the court to adjudicate the rights and interests of the parties may be conducted by it; that, having the power, the court should exercise it."

In *Kell v. West* (decided in 1885), in discussing the allegation of the bill as to complainants' seisin in the light of the law governing the question, it was observed that the court does not say that a bill which shows, in compliance with the rule in such cases, that a defendant is in possession of the premises, claiming them adversely to complainants, would not oust the equitable jurisdiction; but, on the contrary, as no such case was presented, it said nothing on the subject. Again, in the same case, reiterating the rule announced above as to the defendants' answer, it is said: The titles being spread upon the pleadings, if the court could see that there was no valid legal objection to complainants' title, there was then no reason why the court should not proceed to order partition. When the statement of the title showed a disputed or doubtful legal title, the court could dismiss the bill, and send the complainant to law, or retain the bill till a court of law had settled the title. Following this, the construction of the statute in *Street v. Benner*, as set forth in the head-note thereto, is stated.

The meaning of the former of these decisions is that whenever the case is properly one of partition,—one whose bona fide object is the partition of lands among the common owners thereof,—then all controversies as to the legal title may be settled by the chancellor, under our statute, but that it was not intended by the statute that a proceeding under it should be used as a substitute for

or equivalent of an action of ejectment, or for the sole purpose of testing a legal title, or trying an issue as to it. It is not to be lost sight of that the proceeding, under our statute, is not one at law. The statute is merely a regulation of the proceeding in chancery, which forum had long possessed concurrent jurisdiction with that of the law courts over the partition of land. The opinion in *Street v. Benner* does not attempt to mark, further than we have indicated, the line of division between the jurisdictions, or the point at which the chancery court will at least arrest its progress, and await the result of an action at law to be promptly instituted by the complainant. It is certain, however, that the case there was one whose facts placed it in the class where, according to the classification made by the opinion, the chancellor was to settle all questions as to legal title. The complainants set up title to an undivided interest in the land, a grant from the king of Spain to one Delespine, and showed that they, and certain others named, were heirs of Timothy Street, and of his son Henry, and as such claimed an undivided half interest in the land, which half interest Street had acquired by deed from one Michael Lazarus, to whom Delespine had conveyed the same on a stated day. Delespine had conveyed an undivided tenth to John Drysdale in October, 1824, and 18,454 acres to Enoch Wiswall in December, 1827. The grant had been confirmed by the United States supreme court in 1838, and a patent for the land embraced in the grant by survey was issued in October, 1873, to the heirs of Delespine, Lazarus, Wiswall, and Drysdale. The defendants derived their interests, by conveyance or otherwise, from Drysdale and Wiswall, and, by a mortgage of June 14, 1825, from Delespine to Bancroft & Pope, of New York. The above facts were all shown by the bill. The defective nature of the answer is explained above. There was replication to the answer, and to a plea of similar deficiency. The bill was dismissed after there had been an improper reference to the commissioners, and a report by them as to the rights and interests of the several parties; and the conclusion of this court, that such dismissal by the circuit court was on the ground of the tender by defendants of the issue of a legal title, is well supported by evidences in the record, which it is unnecessary to mention. The case is clearly one in which, according to the statement of the bill, there were common owners of the described property; and the object of the complainants was to have the undivided interest or share belonging to the Street heirs assigned to a distinct half of the land, and that half vested in them, and discharged of any ownership of the other parties. We must admit it to be the law of the case, in *Street v. Benner*, that in all future proceedings therein the issues of fact, as well as of law, as to the legal title, should

be settled by the chancellor. The opinion clearly justifies such an inference by all concerned in it. But the observation on the same point in *Kell v. West*, though not sufficient to overrule the former case, is at least suggestive of some doubt in the mind of the court as to what had been said in the former case, and of a disposition to withhold further expression on the point until circumstances should constrain it. There is nothing in the pleadings that suggests that the relation of common owners had never existed between the complainants and defendants, or that the primary interests of the defendants were such as to make their possession hostile, in its incipency, to that of the complainants. These conclusions are also sustained by the results of the inquiry made by the commissioners. It is not a case in which the complainants are seeking relief against defendants whose interests have been acquired solely in hostility to complainants' interests, nor a case where one of a class of heirs who have been owners of the property is seeking relief by partition against a defendant who has entered into possession of the land under a deed purporting to convey to him the entire estate therein; and the circumstances are such that, if the deed was ineffectual to convey the sole complainant's interest, it was equally ineffectual in passing the interest of the others of the same class.

In the case before us the complainant claims as heir of his father, whose title the defendants assert they bought at the administrator's sale, made on the application of the administrator. Filing a replication as he did, the plaintiff manifested that he was unwilling to submit the question of title to the chancellor, as a mere matter of law, upon the facts presented by the pleadings, but wished to join issue upon the allegations of fact made by the answer. In so far as any issue of fact is concerned, it cannot be overlooked that the right to have the same tried by a jury was waived by the defendants. In *Mississippi* the obtaining doctrine is that the right to relief by partition implies joint ownership between the complainant and defendant, and can be enforced only between those in actual or constructive possession, and that other claimants must establish their right by action at law (*Spight v. Waldron*, 51 Miss. 356); yet in *Black v. Washington*, 65 Miss. 60, 3 South. 140, where the bill sets forth the source of title of the plaintiffs, and how they derived title, and alleged that they were entitled to one-half interest, and that the defendant owned a specified interest, and the defendant answered, claiming all the land by adverse possession, the decision was that the object of the bill, being, in effect, an action of ejectment, as the complainant had neither actual nor constructive possession of the land, was waived by the silence of the appellant on the subject in the lower court. In the case before us, we do not have to, nor do we, go so far; for here there has not been mere sil-

lence on the question of the trial of the legal title, or of any issue of fact which there might be in the record concerning the same, but we find that after the testimony had been taken before an examiner the cause was tried by a referee on the application of the parties plaintiff and defendant, made to the chancellor by their respective solicitors of record. After such a reference and trial, none of the parties should be heard as to a denial of an alleged constitutional right to a trial by jury. By such reference and trial, they waived any such right, and, after having a trial in the mode preferred by them, they should remain silent on the subject, at least until the decree shall be set aside for some other cause. *Carr v. Thomas*, 18 Fla. 736, 743; *Sammis v. L'Engle*, 19 Fla. 800.

This conclusion brings us to the question of parties, as the next one in proper order. The facts developed by the pleadings and testimony are that the common source of title, Mr. Charles Summers, died testate, leaving surviving him a widow and five children: Charles H., Mary S., Francis V., Michael T., and the complainant, Owen J. H. The will made the disposition shown by it of his property. We are not informed by the record whether or not he owned the land in question at the time of making his will. If he did own it then, he died testate as to it; and, if he did not, his children took the land as heirs, and not as devisees. It is true the complainant describes himself as an heir, yet the pleading is not so definite as to justify the inference that it was intended to allege such intestacy. The bill does not explain how he became the owner of as much as two-eighths of the property. As devisee, he would have taken one-sixth, and as heir, originally, one-fifth, subject to dower if the widow did not take a child's part, or, if she had taken such a part, to one-sixth. In view of her death, it may, for the purposes of this opinion, be assumed that he was entitled to a fifth, as against the other children. The effect of the testimony, as construed by the complainant and the referee, is that one of the daughters, Mary, who married Mr. Hildebrandt, had, prior to her death, which occurred in 1871 or 1872, relinquished all claim to or interest in this land; and hence, if this be correct, it would be that he and the other children—Charles, Francis, and Michael—each became entitled to one-fourth of the property. The testimony shows that Charles died before November 27, 1887, leaving a wife and a son surviving him. Whether he died testate or intestate is not known. In the absence of any statement to the contrary, it must be assumed that his widow and son are still living; and the same assumption is true as to Francis and Michael. The only theory upon which complainant's case, according to the pleadings and testimony, can be sustained, is that the sale proceedings were ineffectual to vest the title of the testator in the defendants, or, in other words,

that they were void, and consequently assailable collaterally. They must be void, to be assailable in the manner sought here. If void, they were so not any less as to any other one of the several heirs or devisees of the testator than as to the complainant; and in the absence of any statement, either in the bill or upon the whole record, showing how the interests of Charles, Francis, and Michael became vested in the defendants, we think there is an entire deficiency of parties. If the sale, including, of course, the conveyance, does not cut off their interest by vesting the title in the defendants, then, in the absence of any additional showing of facts barring their rights, they are part owners with the complainant of the property, and should have been made complainants with him, or defendants to the bill. With them as complainants, the case would have presented the spectacle of all the heirs seeking to enforce partition among themselves, when the sole defendant was in adverse possession, and had been for nearly 14 years, under a title deed purporting to convey to Rivas and Koopman all the title of the complainants' immediate ancestor and devisor; and, were they defendants, the peculiarity of the case, as one of partition among common owners would be no less palpable.

This brings us to the question of the necessity that the devisees of Mr. Koopman should have been made parties defendant on his death. After the testimony had been taken, but before the reference of the cause for trial, it appears that Henry Koopman, one of the defendants, died testate April 20, 1889, naming the other defendant, Joseph Rivas, his executor, and the cause was revived by an order of June 22, 1889, against such executor, to be proceeded in as though the suit had been originally instituted against him; and afterwards the cause proceeded against Rivas in his own right, and as executor of Koopman. The order reviving the cause was made on petition supported by a copy of the letters testamentary. From a copy of the will, which was introduced into the record on the application of the complainant in proceedings instituted by the defendant for a rehearing, and in which a rehearing was denied, we find that the will, which was executed March 30, 1877, and admitted to probate, with issue of letters testamentary, on April 24, 1889, makes the following provision as to the testator's property: "First, after my funeral expenses and all my just debts shall have been paid, I give and bequeath unto my dear, long, and well-trying friend, and partner in business, Joseph Rivas, all my personal property and real estate, of every kind and nature, that I may die possessed of, to be held by him in trust for the benefit of Joseph M. Rivas, Henry Leo Rivas, and Alphonso M. Rivas, children of the above-named Joseph Rivas and Emma Rivas, his wife; and it is my wish and request that the said Joseph Rivas shall continue the

business now being carried on under the name and firm of Rivas & Koopman, having the sole and exclusive use and control of all my interest in said business, both real and personal, until the above-named Joseph M. Rivas, Henry Leo Rivas, and Alphonso M. Rivas shall arrive at the age of twenty-one years. Then the said Joseph Rivas shall either pay over to each of the said children their proportion of my estate, both personal and real, or shall hold or invest the same for their exclusive benefit until he shall deem it safe, and for their interest, to pay the same over to them." Then the will orders and declares that, in case of the death of said Joseph Rivas before the said children shall become of age, then the executors and administrators of the estate of said Rivas, whether appointed by him, or by the court of probate, shall be required to give good and sufficient bonds, to be approved by the judge of probate, to an amount of double the amount that may be coming from the estate to each of the children, and the said executor or administrator shall be required to act in the same manner and form as the said Rivas is required to do. Then it appoints said Joseph sole executor. Two of the children, Joseph and Henry, were admitted, on the rehearing proceedings, to be of full age.

In our judgment, such devisees became, on the death of Mr. Koopman, necessary parties, for the purposes of partition. His executor was not a sufficient party for such purpose, as the representative of their interests. In view of the fact that the executor was made a party defendant without the will being before the court, we conclude that the chancellor thought the executor to be rendered a sufficient party by the general nature and powers of the office of executor. Still, in disposing of this question, we shall, for the purposes of this case, but not as a precedent, regard the will as properly before us, notwithstanding any error there may be in such assumption; and we shall pass upon the question of parties with reference to its several provisions. Generally, or independent of provisions of a will endowing an executor with special interests or powers as to real property devised to others, such an executor was entitled, as the law stood at the time of Mr. Koopman's death, to the possession and control of such property as assets, and he could maintain ejectment to recover possession of the same. *Sanchez's Adm'r v. Hart*, 17 Fla. 507; *Eppinger v. Canepa*, 20 Fla. 262. But we do not think such a trustee to be either an owner, or representative of the heirs or devisees of a testator, for the purpose of a partition. In such a case, neither the legal title nor the beneficial interest is in him, and he cannot be held to have authority to stand for those who have such interests in a proceeding whose purpose is a permanent division of property among the real owners. Under the

provisions of the will before us, Joseph M., Henry L., and Alphonso M. Rivas became, upon the death of Henry Koopman, the beneficial—and in the eyes of a court of equity the real—owners of the interest of Mr. Koopman in the property sought to be divided. Neither the devise to the executor nor the powers conferred upon him, have deprived the devisees of such ownership. Any partition of the land, so far as the interest which the bill imputes to Mr. Koopman is concerned, must be for the benefit of the devisees; and, being the beneficial owners, they are necessary parties to such a division. *Fridenberg v. Wilson*, 20 Fla. 359; *Perry Trusts*, §§ 328, 873, 881; *Whitlock v. Willard*, 18 Fla. 156. Neither the pleadings nor the record show that the land in question was partnership assets, or is held as such by the appellant. No such case is before us, whatever may be its rule as to parties. *Loubat v. Nourse*, 5 Fla. 350; *Freem. Coten*. §§ 111–120, 443.

The decree must be reversed, and the cause remanded for proceedings not inconsistent with this opinion. It will be so ordered.

(33 Fla. 625)

ROGERO et al. v. ZIPPEL.

(Supreme Court of Florida. May 15, 1894.)

EVIDENCE—PROOF OF FOREIGN STATUTES.

1. Under the act of March 15, 1843 (section 4, p. 514, *McClell. Dig.*), enacting that the printed copies of the statute laws of any of the United States or the territories, if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts of law and on all other occasions in this state as prima facie evidence of such law, a printed volume purporting to contain the statute laws of another state is not admissible as evidence unless it purports to have been published under the authority of such other state, or is proved to be commonly admitted and read as evidence in the courts of that state. Our courts do not take judicial knowledge of the fact that a volume not purporting to have been so published is commonly admitted and read as evidence in the courts of the state or territory whose statutes it purports to contain.

2. The seventh edition of the Revised Statutes of New York, edited by Montgomery H. Throop, and published by Banks & Brothers, A. D. 1882, held inadmissible here in the absence of proof that it is commonly admitted and read as evidence in the courts of New York, and this notwithstanding the printed certificate therein of the secretary of state of New York as to such volume's containing a correct transcript of the Revised Statutes as originally published.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; J. J. Finley, Judge.

Action by Gustavus E. Zippel against Mary A. Rogero and others. Judgment for plaintiff, and defendants appeal. Reversed.

Calhoun, Gillis & DeWitt, for appellants. Geo. P. Fowler, for appellee.

RANNEY, C. J. Appellee sued appellants, who are husband and wife, in ejectment, to

recover a described portion of lot 1, in section 12, township 10 S., range 26 E., situate in Putnam county, and they pleaded the general issue. On the trial before a jury, the plaintiff, after showing title from the United States to his father, Gustavus E. Zippel, offered in evidence an instrument in writing, purporting to be a deed of conveyance in fee of the locus in quo, executed August 14, 1883, by Gustavus E. Zippel and Julia M. Zippel, his wife, the former of the city, county, and state of New York, and the latter of the township of East Orange, county of Essex, state of New Jersey, to Gustavus E. Zippel, Jr., of the stated township. There is but one subscribing witness to the instrument. Its execution appears to have been acknowledged before a notary public in the city of New York on the day mentioned above. The attorneys for the defendants objected to the introduction of the deed, on the ground that it purported to have been executed in the presence of only one witness, instead of two witnesses, as required by the laws of Florida; and, upon the objection being sustained by the court, the plaintiff testified that the deed was executed in the state of New York. Then the plaintiff, to prove the law of the state of New York in relation to conveyances of realty, and that the deed was executed in accordance therewith, offered in evidence a certain series of books consisting of three volumes, numbered volumes 1, 2, and 3, and designated on the back of each: "Revised Statutes of New York. Banks & Brothers' Seventh Edition." The title page of each of said volumes being, says the bill of exceptions, "in words and figures as follows, with the exception as to the statement of the contents of each volume (which statement of contents contains no authority for publication): 'The Revised Statutes of the State of New York as Altered by Subsequent Legislation; Together with the Other Statutory Provisions of a General and Permanent Nature now in Force, Passed from the Year 1778 to the Close of the Session of the Legislature of 1881, Arranged in Connection with the Same or Kindred Subjects in the Revised Statutes; to which are Added References to Judicial Decisions upon the Provisions Contained in the Text, Explanatory Notes, and a Full and Complete Index. Edited by Montgomery H. Throop, Counselor at Law. Seventh Edition, 1882. Banks & Brothers, Law Book Sellers, 473 & 475 Broadway, Albany, N. Y. 144 Nassau Street, New York.' " Volume 1 contains a printed certificate by Joseph B. Carr, secretary of state of New York, certifying "that so much of the matter contained in the text of this edition of the Revised Statutes as purports to be a copy thereof is a correct transcript of the text of the Revised Statutes as originally published under the authority of the state, except such typographical errors in the original as have been corrected in the copy, and except such parts as have been altered by acts of the leg-

lature, and that, with respect to such parts, it conforms to the acts by which such alterations have been made." Its conclusion, omitting the signature and title of office, is: "In witness whereof I have hereto set my signature at the city of Albany this 12th day of December, 1881." To the introduction of these books defendants objected, because the books did not purport to be authentic and properly authorized publications under the authority of the government of the state of New York, and because plaintiff had not shown that said publication, so offered as such proof, was commonly admitted and read as evidence in the courts of the state of New York. The court overruled the objection, and admitted such "books, published as aforesaid, as evidence, and as properly authenticated publication of the statute laws of the state of New York;" and to this ruling defendants excepted. Plaintiff's counsel then read from volume 3, art. 4, tit. "Of Alienation by Deed," § 137, p. 2194, as follows: "Every grant in fee or of a freehold estate shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to be passed, or his lawful agent; if not duly acknowledged, previous to its delivery, according to the provisions of the third chapter of this act, its execution and delivery shall be attested by at least one witness, or if not so attested it shall not take effect as against a purchaser or incumbrancer until so acknowledged." Defendants objected further to the introduction of said deed on the ground that plaintiff had not proved by such publication, or by other proof, that the deed was executed according to the laws of New York in force at the date of the alleged execution of such deed, viz. August 14, 1883, such publication as read and proven only purporting to be the statute law of New York in force at the close of the session of the New York legislature of 1881. The objection was overruled, and exception duly noted, and the deed was read and filed in evidence. Plaintiff then testified that the land described in the deed was the same as that described in the declaration, and, defendants offering no testimony, there were verdict and judgment for the plaintiff.

The volumes referred to have not been sent up to this court, but what is stated as to them is taken entirely from the bill of exceptions. It is provided by section 16, p. 218, McClell. Dig. (Act Feb. 24, 1873), that deeds executed in this state of lands, or any interest in lands, therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such, and, after designating the officers before whom the execution of any such deed or conveyance may be acknowledged, it is further provided that if any such deed or conveyance of land shall be executed in any other state, territory, or district of the United States, such deed may be executed according

to the laws of such state, territory, or district, and the execution thereof may be acknowledged before certain officers there designated. The act of March 15, 1843 (section 4, p. 342, Thomp. Dig.; section 4, p. 514, McClell. Dig.), enacts that the printed copies of the statute laws of any of the United States or of the territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts of law, and on all other occasions, in this state, as prima facie evidence of such laws. We cannot see that the volumes offered in evidence are printed copies of the statute laws of New York, purporting to be published under authority of the government of the state of New York. They do not purport to be published under such authority. The certificate of the secretary of state does not so state, nor does anything presented by the bill of exceptions. If it be that these volumes are commonly admitted and read in evidence in the courts of New York, there is no evidence in the bill of exceptions to prove the fact, nor can we take judicial notice of the fact, if such it be. It is unnecessary to notice the other question. The judgment is reversed, and a new trial awarded.

(33 Fla. 573)

JACKSONVILLE, T. & K. W. RY. CO. v. LOCKWOOD et al.

(Supreme Court of Florida. May 1, 1894.)

WIFE AS WITNESS — CONSTRUCTION OF DEED — TRESPASS — DAMAGES — EVIDENCE — CROSS EXAMINATION — CREDIBILITY OF WITNESS — ADMISSIONS — TRESPASS — DAMAGES — REFERENCE — ADDITIONAL PLEADINGS.

1. In an action by husband and wife, and really in right of the latter, the wife was a competent witness in her own behalf, as the law was on September 20, 1889.

2. In a grant of land abutting on a highway, a description bounding the land granted by the highway conveys to the center of the highway, where the grantor has title to such center. The presumption arising from a deed so bounding the land granted is, in the absence of proof to the contrary, that the grantor owned to the center of the highway.

3. In an action of trespass *quare clausum fregit*, a witness was asked what the property was worth before the railroad company placed the track on it, and she answered that she could have sold the three lots for \$6,000. The answer was objected to, but the grounds of objection are not stated in the bill of exceptions. *Held*, that it cannot be urged on appeal as an objection to the admission of such evidence, either that she was not qualified to testify to the value of the property as an expert, or that the amount for which she could have sold the land was not relevant, or that she had not been asked any questions to test her qualifications to give an opinion as to the value of the property.

4. Plaintiff's witness was asked on cross-examination if it was not a fact that he had testified in no less than a dozen suits against defendant in the last 15 months, and the question was excluded by the referee. The ground urged here in support of the question is that its purpose was to show, in connection with the fact that he had a suit pending against the de-

fendant for obstructing a highway, his bias and animus. *Held* not error.

5. A letter and conversation of the president of the defendant company as to the construction of the railroad *held* relevant and admissible on the issue whether such company or another constructed the railroad.

6. In an action of trespass *quare clausum fregit* against a railroad company for constructing and operating a railroad over plaintiff's land covered by the street, the entire damage done to her property by the construction and proper operation of the railroad may be recovered in an action, and the recovery should not be limited to damage sustained anterior to the commencement of the action; and it is not error to admit testimony as to the market value of the property before and after the construction of the road. *Railroad Co. v. Jackson*, 21 Fla. 146, and *Railroad Co. v. Brown*, 1 South. 512, 23 Fla. 104, approved. *Railway Co. v. Davis*, 7 South. 29, 25 Fla. 917, disapproved, in so far as it is inconsistent with this rule.

7. The statute gives a referee the same power as to filing additional pleadings as the court making the reference may have; and an order of reference, made pursuant to and in the terms of an agreement that the cause, and all matters in controversy therein, as the issues are now made up, be submitted to a named attorney, as by the statute in such cases made and provided, is not a limitation upon the statutory power of the referee as to filing of additional pleading.

8. The refusal of a referee, on the trial of a cause, to permit a defendant to file a plea of the statute of limitations will not be held error where neither evidence tending to establish such a plea has been introduced by one of the parties, nor an offer of such evidence been made by the party asking leave to file the plea.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; Jesse J. Finley, Judge.

Action by Mrs. Lockwood and her husband against the Jacksonville, Tampa & Key West Railway Company. Judgment for plaintiffs. Defendant appeals. *Affirmed*.

J. R. Parrott and T. M. Day, Jr., for appellant. Geo. P. Fowler, for appellees.

RANEY, O. J. Mrs. Lockwood and her husband, Arthur H. Lockwood, the appellees, sued the appellant, a body corporate under the laws of Florida, on May 7, 1888, in an action of trespass *quare clausum fregit*, alleging that such railroad company, on June 25, 1885, and on divers other days intervening that day and the institution of the action, with force and arms, and without the leave or license of plaintiffs, and against their will, broke and entered upon a certain close of the plaintiffs in the town of Palatka Heights, in Putnam county, and described as lots 1, 2, and 3, in block 10, as shown by a plat of the town recorded in the clerk's office of the county, such lots being bounded on the east by Thompson street, and on each of the other three sides by a named street; and also all that land lying in Thompson street, in said town, adjoining and abutting said lots, to the middle and center of such street,—all of which land the plaintiffs are alleged to have been the owners of, and in lawful possession of. The substance of the trespass alleged is grading the street for a

railroad track for the distance of 381 feet in length, by 40 feet in width, and digging, excavating, and carrying away dirt, and laying down wooden ties and iron rails, and constructing a railroad track on such street, and using the same as a railroad track for the period above stated, the street as thus used being alleged to be the property of the plaintiffs; and that by such means and the use of the track for daily and frequent passage thereon over the land and close of the plaintiffs of defendant's railway locomotives, cars, and trains, the public road and street aforesaid to and from and over the land and close of plaintiffs was then and there impaired, impeded, and obstructed, so that plaintiffs could not have ingress and egress or passage to and from and over and across their land and close aforesaid, to wit, Thompson street, for the passage and travel of carts, wagons, carriages, and other vehicles, and by means whereof the said land and close of the plaintiffs became and continued to be greatly depreciated in value, and injured, and the comfort, convenience, and safety of the plaintiffs' family and property are greatly impaired and endangered; the *ad damnum* being \$5,000.

The pleas of the defendant, upon which issue was joined, are the general issue; (2) that the plaintiffs have no right or title to the property mentioned; and (3) that the premises described in the declaration are not, and were not at the time stated, the property of the plaintiffs.

I. The first error alleged is as to the ruling of the trial court permitting Mrs. Lockwood to testify. The record states that the plaintiffs, to prove the issues on their part, introduced as a witness Mrs. A. H. Lockwood, who, upon being duly sworn, testified that she was a plaintiff in this suit, and then stated the place of her residence and the duration of such residence. Here the defendant objected to her testifying, "on the ground of competency, she being coplaintiff with her husband, and for the further reason that her husband cannot testify." This was September 20, 1889. Under the statutes of this state applicable to the whole period of time covered by this case and its trial, a husband was qualified to testify in his own behalf, and the wife qualified to testify in his behalf where he was a party and could testify, and to testify for herself, independently of his having or not having any interest in the cause. *Haworth v. Norris*, 23 Fla. 763, 10 South. 18. The husband (Mr. Lockwood) was properly excluded as a witness, the suit being really one in right of the wife, and Mrs. Lockwood was properly admitted as a witness in her own behalf. *Haworth v. Norris*, *supra*.

II. The theory of the objections made to certain questions propounded to the witness, and the answers thereto, as to the damage sustained by the plaintiffs, was that, as plaintiffs' grantor was not shown to have owned to the middle of the street, there was no evi-

dence that plaintiffs owned to that point. It is conceded that a description bounding land by a highway conveys to the center of the highway (*Railroad Co. v. Brown*, 23 Fla. 104, 1 South. 512; *Sherman v. McKeon*, 38 N. Y. 266; 3 Washb. Real Prop. 420 et seq.; *Gould v. Railroad Co.*, 142 Mass. 85, 7 N. E. 543; *Clark v. Parker*, 106 Mass. 554), but it is asserted, on the principle of *non dat qui non habet* (*Church v. Stiles*, 59 Vt. 642, 10 Atl. 674), and very properly, that it does so only where the grantor himself has the title. The abutting proprietor is *prima facie* owner of the soil to the middle of the highway, subject to the easement in favor of the public; the rule being founded on the presumption that the ground was originally taken from such proprietors, and for the sole purpose of being used as a highway. *Dunham v. Williams*, 37 N. Y. 251; *Stiles v. Curtis*, 4 Day, 328, 333. In our judgment, the presumption arising from the deed from Hargrove, conveying the land, and bounding it on the east by Thompson street, is, in the absence of proof to the contrary, that Hargrove owned to the center of the street. Unless this presumption prevails, then the title must, in all cases of this kind, where there is such description, be deraigned back to an ownership to such center at the time the street was laid out; for, if the presumption of such ownership does not obtain in favor of one grantor, then it cannot in favor of another. It is not to be presumed that Hargrove conveyed more than he owned, and the deed is as strong evidence of plaintiffs' title to the center of the street as it is of title to any part of the named lots.

III. Mrs. Lockwood was asked what the property was worth before the railroad company placed the track there, and replied that she could have sold the three lots for \$6,000. The record shows that the answer was objected to, but not on what ground. The grounds urged here are that the witness was not qualified to testify to the value of the property as an expert, and the amount for which she could have sold the land was not relevant, and that she had not been asked any questions to test her qualifications to give an opinion as to the value of the property. If there was anything in either of these grounds, they should have been urged at the proper time,—on the trial. There is no evidence that any such objection was made. Such objections cannot be urged primarily in the appellate court as against the admission of evidence. *Gladden v. State*, 12 Fla. 562; *Ortiz v. State*, 30 Fla. 253, 11 South. 611. The case of *Railway Co. v. Coon*, 15 Neb. 232, 18 N. W. 62, does not conflict with this conclusion.

IV. A witness was asked by the defendant's counsel, on cross-examination, if it was not a fact that he had testified in no less than a dozen suits against the defendant in the last 15 months. The ground urged in support of the question is that its purpose was to show, in connection with the fact that

he had a suit pending against the defendant for obstructing a highway, his bias and animus. The question was properly excluded.

V. The same witness was called, in rebuttal, and after stating that he knew one Alfred Bishop Mason, and that he was vice president of the defendant company in 1885, was shown a letter to the witness from Mason as such officer, dated Jacksonville, Fla., October 19, 1885, in which Mason acknowledges a letter from the witness of the 13th of the same month, and states that he thought "our" arrangement was to have the borrow pit fixed within a reasonable time, not within 30 days; and that he finds, on consulting with Gen. Bentley, that Mr. McCarty, "our roadmaster," was instructed a month ago to fill in at that point as soon as it could be done without impeding construction; and that the writer would see that his attention is called to the matter again; and saying: "As a railroad man, you will appreciate better than an outsider could the necessity we are under of pushing the work southward as fast as possible," and praying that he would be patient, as "we" intend to try to satisfy you fully. Witness then testified that the signature was Mason's, and that Mason had acknowledged this signature to be his. Plaintiffs then offered the letter in evidence, and defendant objected, on the ground of irrelevancy and incompetency. The witness was then asked whether he had any conversation with Mason about this time about the building of the track, and defendant objected on the ground of irrelevancy. The witness replied that he had. In each case the objection was overruled and an exception noted. The purpose in introducing the letter and the conversations, subsequently explained, was to overcome the testimony adduced by the defendant to show that another company had constructed the railroad along Thompson street. We think the testimony was relevant to this particular issue, and properly admitted.

VI. The remaining assignments of error, except one, involve the question whether or not in an action of this kind there can be a recovery for the entire damage sustained by the plaintiff, or only for damage incurred anterior to the institution of the suit. It is a proposition on which there is very positive conflict of authority. In *Railroad Co. v. Jackson* (1884) 21 Fla. 146,—a suit by the appellee to restrain the appellant company from continuing to run cars over its road on his land, and in which it was held that he had by acquiescence lost the right to such relief,—it was also decided that Jackson had not lost his title to the land, and could maintain an appropriate action at law to recover damages, and that, the injury being of a permanent nature, the damages recoverable at law might include the whole injury or loss, and such recovery would be a bar to an action for subsequent injuries arising from the same source. The showing as to damages

was that the company entered upon the lot of complainant, and ousted his tenant, appropriated the middle portion of the lot as a roadbed, tore away fences, dug up trees, removed a dwelling house, and built a railroad across the lot, and was running trains on it. Again, in *Railroad Co. v. Brown* (1887) 23 Fla. 104, 1 South. 512, among other points decided was the one that when a person owns a lot on a public street of a town or city, and the fee in the soil as far as the center of the street, the laying of a railroad track along the street, wholly or partly on his soil, without his consent, and without taking it and paying just compensation therefor in accordance with the statute regulating the method by which private property may be taken for public use, is an unlawful appropriation of the property of such owner; and that the owner in such a case was entitled to damages for a depreciation of the market or rental value of his premises, and for annoyances to his business or to family occupation. This case also holds that where an adjacent owner of real estate on such a street is not the owner of the fee to the center of the street, though he is not entitled as against a company laying a railroad along the street, by proper authority, to recover damages for the appropriation of the soil of the street, or to any incidental injury to his property from noise or smoke or like annoyances, yet he is entitled to the use of the street, and may recover damages for any special injury he may sustain, if by reason of the improper laying of the track, or its improper use, his right to use it is unreasonably abridged or impeded; but that, in an action grounded on such injury, the diminution of the value of the estate of the plaintiff is not a ground of damage. In this case the declaration showed that the plaintiff owned to the center of the street, but it did not show that the track was on plaintiff's half of the street, or what its exact location in the street was, nor did it allege any negligent construction of the road, nor anything in the nature of a permanent injury, either by subjecting his soil to the additional burden of the railroad or otherwise; the gravamen of the declaration being that, by running trains faster than the municipal ordinance permitted, and letting cars stand on the track, the building on plaintiff's lot had been rendered unfit for livery stable purposes, and worth but little to plaintiff, and another lot greatly damaged in value. The case was disposed of by sustaining a demurrer to the declaration, which the circuit judge had overruled. In *Railway Co. v. Davis*, 25 Fla. 917, 7 South. 29, decided January 10, 1890, the declaration charged (omitting dates and times): (1) A forcible entry of plaintiff's land, and tearing down, digging up, and destroying plaintiff's growing corn; (2) taking down and removing and destroying plaintiff's fence; (3) cutting down trees, digging holes and trenches, and throwing up huge

embankments upon plaintiff's land, and building a railroad thereon, and thereby rendering the close useless to plaintiff for the purpose for which he had designed them; and (4) building the railroad, and from that time continuously running locomotives and cars thereon, and thereby depriving plaintiff of the use of his close for such time. There was no evidence to sustain \$100 of the \$600 for which judgment was recovered, and the other \$180 which this court allowed to be remitted consisted of items, timber and cordwood, corn, rails, and pasturage, as to which there was no subsequent promise taking them out of the statute of limitations; and the recovery of \$320 was for a continued trespass. It is said in the opinion: "The suit before us was commenced July 7, 1887, and the declaration alleges that the defendant broke and entered the plaintiff's close July 1, 1882, and alleges a continuous trespass upon his land by the defendant from the date of the alleged entry to the commencement of the suit. On the day of such entry by the defendant, an action accrued to the complainant, and he could have brought successive suits against the defendant so long as the trespass continued. But the rule laid down in the cases cited does not authorize the plaintiff to recover in an action for trespass committed upon his land by defendant, regardless of time, simply because it was a continuing trespass, nor do we know of any law authorizing such recovery. * * * But if there was a continuing trespass, and the evidence tends to show that there was, the plaintiff was entitled to recover any damages he sustained in consequence of such trespass at any time within three years before the suit was commenced."

The opinion in *Railroad Co. v. Jackson*, supra, relies on *Pierce on Railroads* (280), and cases cited in note 4, which are: *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83; *Fowle v. Northampton Co.*, 107 Mass. 352, 112 Mass. 334; *Powers v. City of Council Bluffs*, 45 Iowa, 652; *Cooper v. Randall*, 59 Ill. 317; *Railroad Co. v. Stein*, 75 Ill. 41; *Railroad Co. v. Hoag*, 90 Ill. 339; *Railroad Co. v. Carey*, Id. 514; *Railroad Co. v. Mahar*, 91 Ill. 312; *Chase v. Railroad Co.*, 24 Barb. 273; *Easterbrook v. Railroad Co.*, 51 Barb. 94; *Railroad Co. v. Twine*, 23 Kan. 585; *Dickson v. Railroad Co.*, 71 Mo. 575; *Lamb v. Walker*, 3 Q. B. Div. 389; and in *Railroad Co. v. Brown*, supra; *Railroad Co. v. Heisel*, 38 Mich. 62, and *Mix v. Railroad Co.*, 67 Ill. 319, and the authorities cited.

In *Town of Troy v. Cheshire R. Co.*, decided in 1851, the action was case against the railroad company, which had built its road along and upon a highway, and had destroyed a bridge, and erected upon the site thereof a railroad bridge impassable to public travel, and had caused obstruction and injury to the highway, and occupied with its rails, embankments, and excavations a part of the highway; and the doctrine maintained

is that in cases of nuisance, if the act done is necessarily injurious, and is of a permanent nature, the party injured may at once recover his damages for the whole injury; but if the act done is not necessarily injurious, or if it is contingent whether further injury may arise, the plaintiff can recover only to the date of his writ. "To apply this principle to the case before us," says the opinion, "the town is made by law chargeable with the duty and expense of maintaining the road which this railroad company have in part destroyed and in part obstructed. * * * The railroad is, in its nature and design and use, a permanent structure, which cannot be assumed to be liable to change. The appropriation of the roadway and materials to the use of the railroad is therefore a permanent appropriation; the use of the land set apart to be used as a highway, by the railroad company for the use of their track, is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain the highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages." And having stated what these damages were, it is further observed that "these ingredients go to make up the present value of the old road, of which the town has been deprived, and they are to be recovered, not as prospective damages, but as compensation for the injury the town has now sustained." In *Fowle v. Northampton Co.*, the decision of the supreme court of Massachusetts was that a judgment against a railroad corporation for damages not limited to those actually suffered at the date of the writ for locating and constructing their road on the banks of a river, so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause; and in the same case (112 Mass. 334), on a new trial, the conclusion reached was that in an action against a railroad corporation for the construction of its roadbed in such a manner as unnecessarily to turn the current of a stream against the plaintiff's land, and wash away his soil, the plaintiff may recover for the prospective as well as past injury, and a recovery of prospective damages will bar an action for subsequent damage, though caused by an unusual freshet. In the former of these opinions it is said that the embankment was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land; and, further, that this case is not like one of illegally flowing land by means of a mill-dam, where the damage is not caused by the

mere existence of the dam itself, but by the height at which the water is retained by it according to the manner of its use from time to time, as in *Staple v. Spring*, 10 Mass. 72, and *Hodges v. Hodges*, 5 Metc. (Mass.) 205; nor is it the case of an action against a grantee who, after notice to remove it, maintains a nuisance erected by his grantor, as in *McDonough v. Gilman*, 3 Allen, 264, and *Nichols v. Boston*, 98 Mass. 39. In the second opinion it is said that the record of the action, the recovery in which was pleaded in bar to this action, showed that the plaintiff was not limited to the recovery of damages which had actually accrued before the date of the writ, but took judgment for an amount, only the smallest portion of which was for such damages; and, again, that, "as a general rule, a new action cannot be brought unless there be a new unlawful act and a fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable, because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law; and, if it results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that entire damage should be assessed with respect to past and probable future injury. This is the course which appears to have been taken in this case, and to allow a recovery here might subject the defendant to double damages." In *Cooper v. Randall*, supra, the statement of the rule by the Illinois court is: "When, however, a wrongful act is done which produces an injury which is not only immediate, but, from its very nature, is permanent, and must necessarily continue to produce loss independent of any subsequent wrongful acts, then all damages, resulting both before and after the commencement of the suit, may be estimated and recovered in one action;" and in *Railroad Co. v. Stein*, supra, it was held, in applying this rule, that where the erection of a railroad bridge across a river in a city causes a permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes, such injury is a proper element of damages in a suit by the owner against the company, and it is proper to allow the lot owner to show damages by proving the value of his property before the erection of the bridge, and its value after; or, in other words, to prove how much less the property would sell for in consequence of building the bridge; and in *Railroad Co. v. Hoag*, where a railroad company before suit

brought had wrongfully suffered the water escaping from its tank to flow upon the plaintiff's lot, where it spread and froze several feet deep, and the ice did not melt until after the commencement of the suit, the opinion says: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit commenced, and was properly recovered for in this action."

In *Railroad Co. v. Carey* the general doctrine is recognized, and in *Railroad Co. v. Mahar*, where a railroad company placed a protection to a drawbridge in a river, whereby the approach of vessels to a dock was obstructed, and the value of the lot on which the dock was was permanently depreciated, the principle was held applicable, and that one recovery in such a case is a bar to any other suits for damages growing out of a continuance of the cause of the injury, and it was further decided that, where the person owning the lot at the time the property is injured conveys the same to another, the latter cannot maintain an action for the continuance of the cause of the injury, although the former owner may not have brought any suit for the original injury. See, also, *Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, and *Railroad Co. v. McAuley*, *infra*. In *Railroad Co. v. Twine*, the decision, in Kansas, was that where the wrong done by a railroad company is temporary in its nature, as in leaving cars unnecessarily on its track, or while engaged in the work of laying down its track, something existing to-day, and not to-morrow, fluctuating in extent, and dependent upon the ever-repeated action of the company, only such damages as have fully accrued prior to the commencement of the suit are recoverable, and none based on any presumed continuance or repetition of the wrong; but where the wrong is of a permanent nature, and springs from the manner in which the track, as fully completed, affects approach to the lot, then, notwithstanding the right which the state retains to control the manner of use of a highway by a railroad company, even if deemed necessary to compel an entire removal of its track, the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot, and recover as damages the consequent depreciation in value of the lot, and in such cases the recovery of damages is a consent on the part of the lot owner to such manner of occupying the street, and concludes both him and any subsequent owners of the property. *Dickson v. Railroad Co.*, *supra*, a Missouri case, is distinguished by its facts from the cases in which the rule is applicable, but the rule is recognized, at least to some extent, by the following quotation from *Van Hoosier v. Railroad Co.*, 70 Mo. 145: "In cases of nuisance, the rule is well settled that the

plaintiff cannot recover for injuries not sustained when his action is commenced. It is equally well settled that when the injury inflicted is of a permanent character, and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had therefor in a single suit, and no subsequent action can be maintained for the continuance of such injury. But when the wrong done does not involve the entire destruction of the estate or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained." See, also, *Smith v. Railroad Co.*, 98 Mo. 20, 11 S. W. 259. In *Powers v. City of Council Bluffs*, an Iowa case, where the injury was held permanent and the damage original, the city had dug a ditch in such a manner that at a certain point it made a cavity, which cut backwards, or up stream, reaching plaintiff's lot in 1866, when plaintiff began to sustain damage from the action of the water, such ditch having prior to the commencement of the suit become, from such cutting backwards, 50 feet wide and 12 feet deep along the lots. Here the statement of the doctrine is, as in the New Hampshire case, that wherever a nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated. It was further held that successive actions are not allowable for damages resulting from negligence combining with a natural cause, and they will only lie where the defendant is continuously in fault. *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495, holds to the same view, and further decides that a judgment in an action for such an injury would be a bar to a future action to recover for the construction of an embankment which closed the natural channel of a stream, and diverted water from a tract of land, or for the abatement of such embankment; and the fact that in such action the jury were erroneously instructed not to take into account any future injury by reason of the maintenance of the embankment would not alter the effect of the judgment as an adjudication of all questions which were or ought to have been tried in the action. See, also, *Bizer v. Power Co.*, 70 Iowa, 145, 30 N. W. 172. The cases of *Drady v. Railroad Co.*, 57 Iowa, 393, 10 N. W. 754, *Stange v. City of Dubuque*, 62 Iowa, 303, 17 N. W. 518, and *Wilson v. Railroad Co.*, 67 Iowa, 509, 25 N. W. 754, do not conflict with *Stodghill v. Railroad Co.*, *supra*. In *Lamb v. Walker*, an English case, it being an action for injury to the plaintiff's land and buildings by removal of lateral support through mining operations carried on by the defendant on his own land adjoining, it was held that, in addition to existing damage, a future damage, which it was found there

would be, was recoverable; but this decision, which was by the queen's bench division, was overruled, and properly we think, by the court of appeal in *Mitchell v. Colliery Co.*, 14 Q. B. Div. 125, where it was held that no right of action arises in such a case until a damage results from the removal of the support, and that a cause or right of action had accrued on each successive subsidence of the plaintiff's land, and that the statute of limitations did not run as to any subsidence until its occurrence.

Of the cases cited in *Railroad Co. v. Brown*, supra, it can be said, as to *Railroad Co. v. Helsel*, 38 Mich. 62, an action of trespass on the case, that the title of the abutting lot owner did not extend into the street, yet it is declared to be the law that, where a railroad has been built in the street without compensation to such abutting owners as own the soil of the street, they have a right of action for any consequent injury to their freehold, such as injury to its market and rental value, and annoyance to business or family occupation; but that an abutting owner whose title does not extend into the street cannot recover for any injury to his freehold resulting from the presence of a railroad track in the street, but only for damages arising from such misconduct of the company as constitutes a nuisance, such as leaving cars standing for an unreasonable time in front of his premises, unnecessary noises, and running trains at unwarrantable speed; and, in so far as the proper operation of a road diminishes the value of his estate, it is *damnum absque injuria*, and that what is permitted by competent authority is not a nuisance. *Mix v. Railroad Co.* was a condemnation proceeding under a statute.

The right of the owner of the fee to recover for a permanent injury, depreciating the value of his land, is also sustained by the supreme court of Pennsylvania in *Seely v. Alden*, 61 Pa. St. 302; and there is nothing to the contrary in *Bare v. Hoffman*, 79 Pa. St. 71, where the act was held not to be of such a permanent character as to assume it to continue through all coming time, and justify evidence of permanent injury to the market value of plaintiff's land. In Kentucky, the doctrine of the preceding cases, favoring a recovery for the entire damage where the injury is permanent, is sustained. *Railroad Co. v. Combs*, 10 Bush, 382; *Railroad Co. v. Esterle*, 13 Bush, 667.

As intimated above, it is not to be denied that there are authorities which contest the above rule, and hold the measure of damages in a case where a railroad is erected on a street in front of an abutting lot to be the difference in the rental value of the lot before the construction of the road and such value after its construction, and that no damage occurring subsequent to the institution of an action can be recovered therein, but there may be successive actions for subsequent

damage. These cases decide that, where the railroad is constructed without acquisition of the rights and interests of the abutting lot owners in the street, the road is a continuing nuisance as to them, and the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue the road permanently, nor can damages be awarded upon the assumption that it will be so continued, nor, conceding the road was unlawfully constructed, is proof of permanent diminution in the market value of the lots admissible. *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Mahon v. Railroad Co.*, 24 N. Y. 658; *Ford v. Railroad Co.*, 14 Wis. 609; *Blesch v. Railroad Co.*, 43 Wis. 183; *Carl v. Railroad Co.*, 46 Wis. 625, 1 N. W. 295. In *Canal Corp. v. Hitchings*, 63 Me. 140, the filling up of a canal in making a street was held to be such a nuisance. *Hopkins v. Railroad Co.*, 50 Cal. 190; *Ford v. Railroad Co.*, 59 Cal. 290. In the former of these California cases the court said that the complaint was drawn with a double aspect,—to recover damages for trespass on that portion of the plaintiff's lot lying within the limits of the street, and, as to the other portion, to recover special damages caused by an obstruction to the highway,—and that, under the last aspect, proof that the land would sell for less on account of the continuance of the nuisance was not admissible, the reason given being that, under the practice there, the railroad, which had been built in the street without condemning plaintiff's property, could be abated by judgment in the same action, and if so abated, and the lot had been rendered temporarily valueless by reason of the obstruction, the plaintiff would be restored to the full enjoyment of his property, and yet be paid for it besides; and, further, that every injury caused by the continuance of such a nuisance offered a new and distinct cause of action.

Railroad Co. v. Kernodle, 54 Ind. 314, decides that no judgment the court can render in such a case will give the railroad company title to the land, and that damages recovered cannot include the value of the land; and *Thompson v. Banking Co.*, 17 N. J. Law, 480, is to the same effect. Yet, in *Railroad Co. v. Eberle*, 110 Ind. 547, 11 N. E. 467, where a railroad company had widened its embankment in a highway, and put a track on it, the court, in remanding the cause for a new trial, said, as to the question of the plaintiff's recovery for the permanent depreciation in the value of his abutting lot, that where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire as a result of the suit the plaintiff's title to the right appropriated, it could see no reason why the damages might not be assessed on the basis of the permanent depreciation in the value of the property injured,—citing, among other authorities, Hen-

derson v. Railroad Co., 78 N. Y. 423, and City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; and that where the action was trespass to recover for a past injury, treating the obstruction as unlawful, without any recognition of the right of the defendant to continue the obstruction, and acquire the right appropriated from the recovery and payment of a judgment, the principle controlling the case of Uline v. Railroad Co., supra, and the cases cited in it, should govern, and only such damages as accrued up to the commencement of the action were recoverable; and it was said that the complaint did not make it entirely clear which remedy the plaintiff intended to pursue.

In Minnesota, the courts seem in some cases to recognize the right to an entire recovery where the act is necessarily and permanently injurious, yet they hold cases like the one under consideration not to be within that rule, and in them allow a recovery only up to the institution of the action. *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Adams v. Railroad Co.*, 18 Minn. 260 (Gil. 236); *Hartz v. Railroad Co.*, 21 Minn. 358; *Brakken v. Railroad Co.*, 29 Minn. 41, 11 N. W. 124; *Adams v. Railroad Co.*, 39 Minn. 286, 39 N. W. 629; *Lamm v. Railroad Co.*, 45 Minn. 71, 47 N. W. 455.

The right of the owner of the fee in Florida to recover in one action for the entire damage, where the act is necessarily injurious and permanent in its nature, is unquestionably affirmed in the cases of *Railroad Co. v. Jackson* and *Railroad Co. v. Brown*, supra. We do not understand that the case of *Railway Co. v. Davis*, supra, was intended to overrule its predecessors; yet we cannot say that its conclusions on the point under discussion are in keeping with the theories incident to the doctrine of those cases. The case before us was decided in the trial court prior to our decision in the *Davis* Case. That authorities justify the conclusion reached in the *Jackson* and *Brown* Cases cannot be denied; and we think it the better view, and to the extent that the *Davis* Case conflicts with the conclusion reached here and in the *Jackson* and *Brown* Cases it is overruled.

The declaration before us, in so far as it alleges the grading of the street on the plaintiffs' side thereof for a railroad track, and constructing a railroad thereon, and consequent injuries therefrom, shows in our judgment an act which is necessarily and permanently injurious to the land of the plaintiffs, and a damage to the market value of the property. If it be, as held in *Smith v. Railroad Co.*, 98 Mo. 20, 11 S. W. 259, that the intent of the trespasser as to the permanency of the injury may be looked to, we fail to find in the circumstances of this cause any purpose upon the part of the railroad authorities to restore the highway. *Palatka & I. K. R. Co. v. State*, 23 Fla. 546, 3 South. 158. The railroad was completed in front of plain-

tiffs' lot in the summer of 1885, the track having been laid June 25th, and the action was not commenced until May 7, 1888, but there is no evidence that any desire to make any such restoration was ever entertained during this time. It, moreover, must not be forgotten that powers given by the state to railroad companies as to highways are not at all inconsistent with a continuation of the injury done here to the plaintiffs. A casual consideration of the case last cited, and the railroad statute there discussed, will make this apparent.

The plaintiff in the case before us owned to the center of a street 40 feet wide. Beginning opposite the northeast corner of her lots facing on the street, the excavation or grade, the sides of which were dug in a slope, runs south, reaching a depth of 5 feet at or opposite the southeast corner, and about 3 feet intermediate between the two corners, and other testimony represents the grade as rather deeper; and it extends at the former corner 10 feet towards such corner from the center of the street, and 15 feet at the latter corner; or, in other words, the west side of the excavation at the former corner is 10 feet from such corner, and at the latter corner the side of the excavation is only 5 feet from it, and at intermediate points the distance between the east line of the lots and the west line of the excavation is 7 1-2, 5 4-12, 13-12 feet, and, as stated by one witness, so that no one could pass along there with a team since the laying of the track in 1885. Another witness says the grade goes 17 feet to west of center of the street, but does not touch plaintiff's property. Before the building of the road, the entrance was on this street, and since such building there has been no use of the street, and that entrance, which afforded a view of the St. John's river, has been necessarily abandoned. According to one witness, the west rail of the track is 10 inches east of the center of the street opposite the northeast corner of the plaintiff's lot, and in the center of the street opposite the southeast corner; whereas another witness says it lies over the center of the street to the west at this corner, and another says that the west line of the rails is on the Lockwood side, and the street has been practically closed since the track was laid.

Under the feature of the pleadings last alluded to, and the evidence just given, there was no error in admitting testimony as to the market value of the property before and after the construction of the railroad. The excavation and the railroad track, in so far as they were on plaintiff's land, were of themselves, and independent of any use of the same, necessarily injurious to the plaintiff's lots, and were, as was the injury done thereby to the lots, permanent in their nature; certainly as much so as anything short of actual demolition can be in its nature as distinguished from its extent. They of themselves necessarily affected the market value

of the lots, apart from any use which the plaintiff might make of them, and the plaintiff was entitled to have full compensation for such injury. Had any one bought these lots, or any part thereof, at any time after the railroad company had done its unlawful work, such purchaser would have given for the same only a value equivalent to the then value as affected by such excavation and track, and, unless the railroad company makes good the loss in value, how is the owner to be made whole? After selling, he certainly cannot recover for any future wrongful act which the company or any one else may do to the property so sold. In our judgment there was no error in awarding to the plaintiff the entire amount of damage sustained by reason of the construction of the railroad, and the proper operation of the same.

VII. The next question to be considered is the refusal of the referee to permit the defendant to file a plea of the statute of limitations. It is shown by the record that, after the issues had been made up in the manner indicated at the outset of this opinion, the counsel for plaintiff and defendant entered into and filed a written agreement that the "above cause, and all matters in controversy therein, as the issues are now made up in said cause, shall be submitted to the Hon. Thomas F. King, a practicing attorney of this court, as referee, as by the statute in such cases made and provided," and on the next day an order which "submitted" the case to the named attorney was made, pursuant to and in accordance with such agreement, and using its quoted terms. On the cross-examination of Mrs. Lockwood, she stated that the grading in front of her property was done "some time prior to June, 1885," and thereafter defendant's attorney moved to be allowed to file a plea of the statute of limitations on account of what was thus brought out in the evidence, and because the defendant was surprised by the disclosure that the trespass alleged was committed prior to the time laid in the declaration. The statute (section 8, p. 858, McClel. Dig.; § 1231, Rev. St.), gives the referee the same power as to filing additional pleadings or striking out or amending the pleadings as the court making the reference may have. In our judgment, the order referred the cause, and all matters in controversy therein, as the issues were then made up, to Judge King for trial, but this did not take away the power given him by the statute to permit an additional plea to be filed. In *Robinson v. Hartridge*, 13 Fla. 501, where the trial was before a jury, defendant's counsel had misapprehended the effect of the plea of the general issue in trover, and, after the plaintiff had closed his testimony, attempted to introduce evidence in denial of the plaintiff's title, and an objection to its introduction was sustained, and thereupon the defendant asked leave to file a special plea putting the title

in issue, and it was held, under section 74 of Blount's Code (section 97, p. 834, McClel. Dig.; § 1042, Rev. St.), that the application was duly made, the question of title being invoked in the controversy between the parties anterior to the trial. Whether or not the referee erred in his ruling is to be decided upon the record, and, unless it appears affirmatively that he did err, his action must be approved. We think that to justify the allowance of a motion to file a plea of the statute of limitations, on the trial of a cause, either evidence tending to establish such plea must have been introduced by one of the parties, or an offer of such evidence by the party asking the privilege as to pleading must have been made. Here there was neither, for if the fact that the grading was done three years before the time this action was commenced (May 7, 1888), the period stated being that limiting actions for trespass to realty, there is certainly not enough in the quoted statement of plaintiff to justify such an inference or to constitute a basis for allowing the plea. It is true that it does appear elsewhere in the record that the grading was done in the fall of 1884, but there was no renewal of the motion to file the plea, nor would this evidence of itself have entitled the defendant to the plea.

In *Railroad Co. v. Muhlman*, 17 Kan. 224, the action was brought in 1874 to recover damages alleged to have been caused within two years of the commencement of the action, by ditches cut partly on the right of way and partly on plaintiff's land, and leading to culverts in a ravine which the right of way and railroad crossed at right angles, such culverts and ditches having been made prior to 1868. In 1872 and 1873 the land of plaintiff was flooded and his crops destroyed in consequence of the ditches or culverts being unable to carry off the surface water which had usually passed down the ravine after heavy rains, and for this damage the action was brought. It did not appear that the defendant entered upon plaintiff's land, or did any work thereon, within five years prior to the institution of the action, or that there was any unskillfulness in constructing the road. It is said in the opinion that it was evident the operations on plaintiff's land, and not those on the right of way, were the basis of the cause of action. Two years was the statutory period barring actions for trespasses on real property, and it was held that the cause of action dated from the digging of the ditches, and not from the injury to the crops, and hence the action was barred; that the company had committed its trespass when it dug the ditches, and thereupon plaintiff was entitled to recover all damages done by the act, and that since then the company had done no new act or wrong to Muhlman's property, and that an increase in the damage did not add a new cause of action. The opinion distinguishes the case from those in which the

primary act is lawful, or there is no invasion of the plaintiff's rights until damage has resulted to him, or where the unlawful act is considered as a continuing one; and it also questions the conclusions in *Holmes v. Wilson*, 10 Adol. & El. 503, cited by appellant. In *Railroad Co. v. McAuley*, 121 Ill. 160, 11 N. El. 67, the decision was that, upon the construction and putting into operation of a railroad, all damages to contiguous property along the line of the road, present and prospective, from the location and operation of the road, are immediately recoverable, and must all be recovered in one action, and, if no action is brought until after the lapse of five years, the statute will bar a recovery for any sum. The action was to recover damages for the construction and operation of a railroad near by plaintiff's lot, the principal ground of complaint, according to the pleadings and evidence, being the running of trains close to the lot, and the jarring and vibration of his property, and casting dust, smoke, cinders, ashes, etc., on his dwelling and premises, thereby injuring and depreciating the value of his property. In *Railroad Co. v. Combs*, 10 Bush, 382, it is said: "We have heretofore held in actions for injury to real estate by trespassers that the plaintiff can only recover compensation for the injury done up to the commencement of the action, but that was in case of injuries not continuing and permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of;" and, in the Illinois case last cited, it is said that it follows from this principle that the cause of action sued for accrued in 1872, when the road was constructed and placed in operation, and that the action was barred long before the commencement of the action in 1881; and that the only logical deduction from the *Loeb Case*, 118 Ill. 203, 8 N. El. 460, was that, unless an action is brought to recover after it accrues within the period provided by the statute, the cause of action would be barred. *Wood*, Lim. Act. 371. In *Frankle v. Jackson*, 30 Fed. 398, it was held that in all cases in which a cause of action may exist, and in which it springs solely from the laying down of the track and the subsequent running of the trains in an ordinary, proper, and lawful manner, there is but a single cause of action, involving, for the purpose of determining compensation, the question of the diminution in value of the lot caused by the construction of the railroad. It arises at the time of the occupation of the street by the company, and is barred like any other cause of action after the lapse of the prescribed number of years from that date. In this case, and that of *McAuley*, and the citation from *Wood* on Limitations, *supra*, the distinction between permanent and temporary injuries as to the

application of the statute of limitations is drawn. In our judgment, it cannot be held that the statute began to run in the case at bar until after June 25, 1885, when the track was laid, if before the operation of the road was commenced, the date of which is not given, it cannot be said that the structure or work done by the defendant was completed until the track was laid and ready for operation; it does not appear that there was any abandonment of the work between making the excavation and finishing the track. The plaintiff was entitled to damage for the entire trespass involved in building a railroad on plaintiff's property without her permission, and for operating the same. Her right of recovery was not barred, and the referee did not err in denying the motion.

VIII. The only remaining points are as to the sufficiency of the evidence to sustain the amount of the recovery, and as to the railroad having been constructed by the defendant company. As to the former point, there is no doubt whatever; and, as to the latter, we think it sufficient beyond the power of an appellate court to interfere. The theory of the defendant company that the *Palatka & Indian River Railway Company* constructed the road seems too unsatisfactory, in view of the testimony to the contrary, when we consider the statement of the vice president of the defendant that the two companies were the same, and the further fact of the absence of testimony of any managing officers of the companies showing that the defendant company did not, and that the *Palatka & Indian River Railway Company* did, construct it. We do not see that the referee has erred in his findings and judgment, and the same are approved. Judgment affirmed.

(33 Fla. 602)

JACKSONVILLE, T. & K. W. RY. CO. v. GRIFFIN.

(Supreme Court of Florida. May 1, 1894.)

TRESPASS — PLEADING — DAMAGES — APPEAL — ASSIGNMENTS OF ERROR.

1. Where the alleged trespass is one constituting a permanent and necessary injury to the market value of plaintiff's fee in the land trespassed on, the failure of the declaration to allege that the plaintiff was in possession of the land at the time of the trespass does not render the declaration demurrable. *Railroad Co. v. Lockwood*, 15 South. 327, affirmed as to right to recover in one action for the entire damage done by such an injury.

2. The fact that damages for injury of a temporary nature are claimed in the same count with damages for a permanent and necessary injury does not affect the immateriality of possession as to the right to recovery for the latter injury.

3. The fact that there cannot be a recovery under one or more counts is of itself immaterial when there is in the declaration a count which is sufficient to support the recovery.

4. The fact that a count of a declaration may set up many elements that do not enter into the measure of damages is not ground of demurrer. It may be cause, under section

1043, Rev. St., for reforming the count as calculated to embarrass the fair trial of the cause.

5. Assignments of error relating to the permission and rejection of different questions propounded to witnesses will not be considered where neither such assignments nor the briefs point where such questions are to be found in a record of 197 pages of testimony, nor they of themselves enable the court to pass upon the proposition presented.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; Jesse J. Finley, Judge.

Action by Martin Griffin, Sr., against the Jacksonville, Tampa & Key West Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fletcher & Wurts and T. M. Day, for appellant. R. W. & W. M. Davis and Geo. P. Fowler, for appellee.

RANEY, C. J. This action was begun on March 11, 1890. In view of its similarity to that of the same company as appellant against Lockwood, 15 South. 327, with which it has been considered, hardly more than an application of the principles there determined will be necessary.

I. The demurrer is to the amended declaration, but the first ground of demurrer as set forth is that the declaration in the first count does not allege that the plaintiff, either by himself or his agent, was in possession of the premises at the time of the alleged trespass. This ground of demurrer goes, of course, only to the first count. The argument here in behalf of the appellant is that the plaintiff (the appellee) alleges that he was in possession of the premises on January 20, 1884, and that he is still in possession, and the trespass is alleged to have been committed March 15, 1887, but there is in the declaration nothing to show that at the time of the trespass the plaintiff was in possession, and that an inference that he was in possession then cannot be fairly drawn from the language used, as the plaintiff might have sold the premises after 1884, remained out of possession during the time of the alleged trespass, and then repurchased just prior to the institution of this suit. This ground of demurrer is confined to want of possession, and does not extend to want of title to the freehold or fee.

In our judgment, there is no merit in this point. The material trespass alleged to have been committed on March 15, 1887, was one constituting a permanent and necessary injury to the market value of the plaintiff's fee in the land, and he is entitled to recover for such injury to his fee, whether he was in possession at the time or not. It is unnecessary to enter into any discussion of the right to recover for the entire damage in such cases; the question is fully considered, and must be regarded as finally settled by the decision, in the case of Railway Co. v. Lockwood (decided at this term) 15 South. 327.

We are unable to perceive how it can be said that the conclusion announced in Railway Co. v. Lockwood, 15 South. 327—22

way Co. v. Brown, 23 Fla. 104, 1 South. 512, is a dictum of any one judge. It was a solemn adjudication by the entire court of the law to govern future proceedings in the cause, and this is apparent from the opinion of the court, delivered by the then chief justice (McWhorter), and the disposition made of the cause.

The fact that damages for injury of a temporary nature are also claimed in the stated count, and that possession may be necessary to their recovery, do not affect the immateriality of possession as to recovery for a permanent injury. *Seely v. Alden*, 61 Pa. St. 302. Of course, there is in the declaration nothing from which it can be inferred that the land claimed by the plaintiff, or any part thereof, was held adversely to plaintiff's title at the time of the alleged trespass.

II. The third and fifth grounds of demurrer are as follows: "(3) The declaration sets up in its second, third, and fourth counts many elements that do not enter into the proper measure of damages in a suit." "(5) The depreciation in the value of the premises alleged in the fourth count is not an element of damage."

Under these grounds of demurrer it is argued at length that there can be no recovery of damages for depreciation in the market value of the property under the second, third, and fourth counts of the declaration. Obviously, it is immaterial that there can be no such recovery under the named counts—the second, third, and fourth—if there can be under the first count.

It is not denied here that there can be under the first count, but, if it was, we are satisfied that there can be both under it and the second and fourth counts. The fact that the second, third, and fourth counts may, as stated in the third ground of demurrer, set up many elements that do not enter into the measure of damages is not a good ground of demurrer; it is not inconsistent with the fact that such counts state a good cause of action, and ground for the recovery of damages for depreciation in the market value of the property, which it is shown above is good cause for recovery. An objection of the character stated in the third ground of demurrer may, under our practice, have been ground for reforming each of the counts on the ground that it was, in its present condition, calculated to embarrass the fair trial of the cause (Rev. St. § 1043), but, where a count states a cause of action, improper or surplus averments do not render it insufficient in substance or demurrable (Id. § 1050).

The briefs for appellant refer to other assignments of error which are sufficiently covered by the conclusions announced above.

III. There are other assignments of error relating to the permission and rejection of different questions propounded to witnesses, but neither the assignments of error nor the briefs point out where, in a record of 197 pages of testimony, they are to be found, nor

do they of themselves enable us to pass intelligently upon the propositions presented, and we must decline to consider them.

The rest of the 43 assignments of error are abandoned, not being mentioned in the briefs.

The judgment is affirmed.

(33 Fla. 606)

GRIFFIN v. JACKSONVILLE, T. & K. W. RY. CO.

(Supreme Court of Florida. May 1, 1894.)

EJECTMENT—WAIVER OF RIGHT—REVIEW ON APPEAL.

1. Testimony tending to show that the occupation by defendant of that part of the street between the center thereof and abutting blocks of the plaintiff in ejectment was by consent of plaintiff held sufficient to preclude any disturbance of the verdict, although there is evidence of a contrary import.

2. An action of trespass by the owner of abutting lots or blocks, his title extending to the center of the street, to recover damages for the construction of a railroad on the street between the center thereof and such lots or blocks, has, to the extent of being inconsistent with the right to maintain a possessory action against the company, the effect to operate as a consent to the use of the street in operating the railroad in a proper manner or with due care.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; Jesse J. Finley, Judge.

Ejectment by Martin Griffin, Sr., against the Jacksonville, Tampa & Key West Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Randall & Foster and R. W. Davis, for appellant. T. M. Day, Jr., for appellee.

RANEY, C. J. This is an action of ejectment instituted by the appellant January 19, 1891, against the appellee to recover possession of that part of Rose street in the city of Palatka lying between the center of the street and blocks numbered 212, 213, 214, and 215, according to John Dick's map of that city, such blocks abutting on the west side of that street. There was trial by jury, resulting in a verdict for the defendant, and judgment thereon.

There is testimony tending to show that the occupation of the street by the defendant with its railroad was by consent of the plaintiff, and it is of such a character as to preclude any disturbance of the verdict, although there is evidence of a contrary import. Railroad Co. v. Jackson, 21 Fla. 146; Garnett v. Railroad Co., 20 Fla. 889; Railway Co. v. Adams, 27 Fla. 443, 9 South. 29; Id., 28 Fla. 631, 10 South. 465. Moreover, it is clearly shown by the record that the appellant had sued appellee in trespass to recover damages for constructing its road on said street. Such a suit in trespass has, to the extent of being inconsistent with the right to maintain a possessory action against the company, the effect to operate as a consent to the use of the street in operating the

railroad in a proper manner or with due care. Railway Co. v. Lockwood, 15 South. 327, and authorities supra.

For the reasons stated, the judgment will be affirmed.

(33 Fla. 631)

FLORIDA SOUTHERN RY. CO. v. PARSONS.

(Supreme Court of Florida. May 15, 1894.)

APPEAL—REVIEW—ADMISSION OF MAP IN EVIDENCE—TRESPASS—DAMAGES.

1. The question of whether a plat or map offered in evidence is a correct representation of physical objects in reference to which testimony is introduced is for the court to decide primarily, and the decision of the court admitting such plat or map in evidence for the auxiliary purpose of enabling witnesses to explain their testimony will not be reversed unless it is clearly shown that error was thereby committed.

2. In an action of trespass to recover damages for constructing a railroad across lots and streets laid off on a town plat, where the record of the plat is offered to show that the tract of land had been laid off into such town lots and streets, and the plat itself shows that when it was made and recorded the road had been constructed across the lots and streets, it is error to admit the plat for the purpose stated without proof that the land had been platted and dedicated as a town plat before the road was constructed. The damage in such a case is of a permanent nature, consisting in the construction of the railroad; and the railroad company is only liable for the damages to the land as it was when the road was built.

(Syllabus by the Court.)

Error to circuit court, Hernando county; G. A. Hanson, Judge.

Suit by L. B. Parsons against the Florida Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. B. Wall and R. W. Davis, for plaintiff in error. T. M. Shackelford, for defendant in error.

MABRY, J. Parsons sued the Florida Southern Railway Company in an action of trespass, and the declaration alleges, in substance, that the company, through its officers, agents, and contractors, on the 10th day of August, 1885, and on divers other days between that day and the institution of the suit, with force and arms, broke and entered certain closes situated in said county, and described as the W. ¼ of the N. W. ¼ of section 26, township 22 S., range 19 E., and lots numbered 3, 4, 5, 7, 11, 12, 14, 15, and 21 in Parsons' addition to the town of Brooksville, according to the official plat of the same, and situated in the E. ½ of the N. E. ¼ of section 27, township 22 S., range 19 E., of which plaintiff was seised and possessed in fee, and dug excavations and ditches in all of said closes, threw up embankments, made grades for a railroad, and placed cross-ties and iron thereon, and appropriated the said portions of said closes to its own use, and continued to maintain said ditches, excavations, and

embankments up to the commencement of the suit; thereby depriving the plaintiff of the benefits and advantages which he might and otherwise could have derived from the said closes, as well as materially lessening the market value of the same. And, further, that plaintiff was seised and possessed of the soil of certain streets, sixty feet wide, running through the said E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 27, township 22 S., range 19 E., to wit, a certain street immediately north of said lot 4, and those certain streets situated between and separating said lots 3 and 4, 3 and 7, 7 and 11, 11 and 12, 12 and 15, 13 and 14, 14 and 21, and that street lying immediately west of lot 5; and that the defendant company, through its officers, agents, and contractors, on the 10th day of August, 1885, and on divers other days between that day and the commencement of the suit, with force and arms entered upon said streets, and dug therein excavations and ditches, threw up embankments, made grades for a railroad, and placed cross-ties and iron thereon, and appropriated said places in said streets to its own use by taking possession of the same and constructing a railroad thereon, and continued to use the same up to the institution of the suit; thereby preventing plaintiff from using said streets or lots abutting thereon in so large and ample a manner as he might, and otherwise could, have done, and thereby materially lessening the market value of said closes. The total damage claimed was \$5,000. The company interposed the plea of the general issue, and on the trial plaintiff obtained judgment for \$1,070.

The first assignment of error argued is that "the court erred in overruling objection to the introduction in evidence of the plat or map of the land in controversy, on the ground that the same was not a certified transcript from any record, and that said plat or map had not been shown by the testimony to be correct."

Plaintiff offered in evidence a plat of the land in question, and it was ruled out by the court on the ground that it had not been shown to be correct. The book of records of town plats of Hernando county was then produced, and the circuit clerk testified that a certain page in the book referred to contained the record of the plat of L. B. Parsons' addition to the town of Brooksville. Plaintiff then offered the record of the plat in evidence, "to show that that tract of land had been divided into town lots, and official record made of the same." Objection was made to the introduction of the record, "because not a transcript; and, second, because it has not been shown to be a correct plat of the lands in question." The court ruled as follows: "That is a question for the jury to determine," and an exception was taken to this ruling, admitting the record of the plat in evidence. A copy of the recorded plat is in the transcript before us, and it appears from it that a portion of the E. $\frac{1}{2}$ of

the N. E. $\frac{1}{4}$ of section 27, township 22 S., range 19 E.,—one of the tracts described in the declaration,—was laid off into lots separated by streets, and there is also distinctly traced on the plat the line of the "Fla. Sou. R. R." and a "Y" across said land, and the lots laid out thereon. The suit, as will be seen from the declaration, is for damages for trespassing upon the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 26, township 22 S., range 19 E., and the lots and streets in Parsons' addition to Brooksville laid out on the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 27, township 22 S., range 19 E., and for constructing a railroad thereon. Such an injury is of a permanent nature, consisting in the construction of and putting in operation the railroad, and a recovery for such an injury will include all the damages to which the landowner is entitled from such source. *Railway Co. v. Lockwood* (decided at this term) 15 South. 327. The record of the plat objected to in this case was introduced in evidence on the trial in November, 1889, but there is nothing on the copy of the plat in the transcript to indicate when the original was recorded, nor is there any testimony before us to show this fact, further than the showing that it was of record in November, 1889. The location of the line of road and "Y" over the land and lots distinctly appears, as already stated, on the recorded plat, and we must conclude from this fact that the road was located over the land when the plat was made. The plaintiff was the owner of the land platted, and the record of the plat by him may be entirely sufficient to show a dedication of the streets thereon, and the location of the lots in respect thereto as a town plat. *Winter v. Payne* (decided at this term) 15 South. 211.

A material question, however, in this case is whether the plat was made and recorded before the road was constructed or afterwards, as the company was liable for the damage to the land in the condition it was in when the road was constructed. The evidence furnished by the plat introduced, and which must control us, is that when it was recorded the road extended over the land; and the witnesses for plaintiff, in estimating the amount of his damages, took into consideration the injury and damages to the lots. A plat or diagram of land shown to be a correct representation of land in reference to which witnesses testify is admissible for the auxiliary purpose of enabling them to more perfectly explain their testimony to the jury, but whether such plat or diagram has been shown to be correct is a question primarily for the trial court. *Adams v. State*, 28 Fla. 511, 10 South. 106; *Ortiz v. State*, 30 Fla. 256, 11 South. 611. The decision of the trial court admitting a plat or diagram in evidence for the auxiliary purpose of enabling witnesses to explain their testimony to the jury will not be reversed unless it is clearly shown that error was

thereby committed. In the present case the record of the plat was introduced by plaintiff, as the bill of exceptions states, for the purpose of showing that the tract of land had been divided into town lots, and an official record made of the plat. The damages recovered are an entire sum, including the injury to the land not platted, as well as that portion laid off into town lots. The court erred, in the first place, in holding that the question whether the plat was a correct representation of the land was one for the determination of the jury; and, in the next place, in allowing the plat to go to the jury to show that the land covered by it had been laid off and dedicated as town lots, without evidence that this had been done before the road was constructed. The testimony shows that the streets laid out on the plat had not been cut out up to a few days before the trial, and the ruling of the court in admitting the plat under the circumstances was erroneous, and we cannot say on the record that it was not prejudicial to the defendant.

The other points presented need not be considered. Judgment reversed, and new trial awarded.

(102 Ala. 679)

SMITH et al. v. BARKER.

(Supreme Court of Alabama. April 12, 1894.)

SALE—RETAINING TITLE—STOPPAGE IN TRANSITU.

1. Where goods are shipped to a buyer, evidence that they were sold "on commission only" does not show that the seller retained title.

2. A seller cannot stop goods in transit simply because the buyer absconded before they reached him, where the buyer's insolvency is not shown.

Appeal from city court of Decatur; W. H. Simpson, Judge.

Action by H. S. Smith & Co. against Joe Barker to try title to property levied on and sold under attachment in an action by said Barker against the Decatur Grocery Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

The writ of attachment was levied on several boxes of oranges on January 2, 1891. Upon the return of the writ, it being shown to the justice of the peace before whom the attachment was sued out that the property levied on was perishable, it was ordered by said justice of the peace that the same be sold, and the proceeds delivered to the court. After the sale of the property so levied upon as directed by the court, H. S. Smith & Co., on January 22, 1891, made an affidavit of claim to the property so levied upon. Upon the execution of the bond, an issue was made to try the right to the property so levied upon. The plaintiff moved the court to dismiss this claim interposed by H. S. Smith & Co. on the ground that the property claimed, as shown by the record and proceedings returned, was sold by order of the court before

the claim was interposed, and the proceeds of sale turned over to the court; and because there was no claim, as required by law, interposed to the property. The evidence for the plaintiff tended to show that the oranges levied upon arrived in Decatur on the night on January 1st, being brought as freight by the Louisville & Nashville Railroad Company, and were in one of the cars of said railroad company, at the depot in Decatur, at the time of the levy; that the persons composing the Decatur Grocery Company had absconded on or about December 25, 1890; and that their place of business had been, and before the time of the levy of the attachment was, closed. The testimony for the claimants tended to show that they were the original owners of the oranges levied upon in this suit; that they sold the oranges "to the defendants on commission only;" that they resided in Anthony, Fla., and they had shipped said oranges to the Decatur Grocery Company; that said oranges had never been delivered to the Decatur Grocery Company, to whom they had been consigned, the persons composing said company having absconded before the arrival of the oranges in Decatur. The court sustained the plaintiff's motion to dismiss the claim, and rendered judgment condemning the property levied upon to the satisfaction of the plaintiff's attachment. The claimants now bring this appeal, and assign these rulings of the lower court as error.

O. Kyle, for appellants. Wirt & Speake, for appellee.

HEAD, J. We are unable to see that the claimants have any just claim to the oranges levied on in this case. The bill of exceptions shows that they shipped the oranges from Anthony, Fla., to the Decatur Grocery Company, in Decatur, Ala., by rail, to whom they had sold them "on commission only." The goods were levied upon under attachment against the grocery company in favor of plaintiff, while they were in possession of the carrier, in Decatur, consigned to the grocery company. This made out a prima facie case of title in the grocery company, which it devolved on the claimants to overcome. They claim on two grounds: (1) That they never parted with the title; (2) the right of stoppage in transitu.

1. If claimants retained the title to the goods, it devolves upon them to show it with that degree of certainty which satisfies the mind. That they sold the goods to defendants "on commission only" is of such doubtful and uncertain import that we cannot say what it means. If the goods were merely shipped by claimants to the grocery company, to be by the latter sold for the former's use, on commission, it could have been easily shown. We must take it that there was a sale of the goods, passing the title.

2. The only fact on which the right of

stoppage in transitu is claimed is that "the individuals composing the firm of the Decatur Grocery Company had on or about the 25th day of December, 1890, absconded." The levy was made January 2, 1891. There is no proof of their insolvency. For aught that appears, they may have left abundant property to pay all their debts. Insolvency is the chief basis of the right of stoppage in transitu. *Loeb v. Peters*, 63 Ala. 243. The finding and judgment in favor of the plaintiff were right.

We must not be understood as deciding that a statutory claim suit, like the present, can be instituted and maintained after the goods levied on have been sold, as perishable, under order of the court. Decision of that question, being unnecessary in this case, is pretermitted. We intimate no opinion upon it. **Affirmed.**

(103 Ala. 78)

BOULDEN v. STATE.

(Supreme Court of Alabama. April 5, 1894.)

HOMICIDE—DYING DECLARATIONS—EVIDENCE—INSTRUCTIONS.

1. The mere fact that deceased did not die until two months after the statement sought to be introduced as a dying declaration is no reason for its exclusion.

2. Where dying declarations were reduced to writing at the time by the witness, testimony that he had given such writing to the grand jury, and had not seen it since, though he had searched diligently through his own papers, and, together with the clerk, through the grand jury papers, is insufficient to authorize the admission of oral evidence of the declarations.

3. A witness testifying to deceased's dying declarations may be asked if deceased's wife did not repeat to him such declarations before he went on the stand.

4. On a trial for murder, evidence as to who swore out the warrant for defendant's arrest is immaterial.

5. The state's theory being that defendant went to the scene of the killing to resist, with violence if necessary, a claim of deceased to lumber there, testimony that at the time of the difficulty defendant knew of no claim by any person to the lumber is admissible.

6. An instruction to convict if the jury believe from the evidence beyond a reasonable doubt that defendant is guilty, though they also believe it is possible that he is not guilty, is correct.

7. An instruction that a doubt is not sufficient to justify acquittal unless it be such as would cause a reasonable and prudent man to hesitate and pause in the graver transactions of life, is correct.

8. An instruction that if defendant provoked the difficulty, or entered willingly into the fight with deceased, he cannot set up self-defense, is correct.

9. To sustain the plea of self-defense the burden is on defendant to show that he had no reasonable avenue of escape.

10. An instruction defining malice, in its legal sense, as a wrongful act, done intentionally, without just cause or excuse, is correct.

11. It is proper to charge that, if defendant purposely killed deceased, after reflection, with a wickedness or depravity of heart, and the killing was determined on beforehand,—even a moment before the fatal blow,—he is guilty of murder in the first degree.

12. On indictment for murder, an instruction requiring an absolute acquittal, upon facts which

would justify an acquittal of murder only, is properly refused, as the indictment also involves a charge of manslaughter.

13. An instruction that a knife, without further description or evidence of its character, is not presumed to be a deadly weapon, is abstract, and properly refused, where there is evidence of the nature of the wounds inflicted with such knife, from which its character can be inferred.

Appeal from city court of Decatur; W. H. Simpson, Judge.

Todd Boulden was convicted of murder in the second degree, and appeals. **Reversed.**

Upon the trial of the case, as is shown by the bill of exceptions, the evidence for the state tended to show that prior to January 6, 1893, the deceased had leased a farm in Morgan county. That on the morning of January 6, 1893, he, in company with his brother, Jim Herndon, and three other persons, went in a wagon to a place on said farm, where the defendant was knocking plank off of a fence. That previous to that date the deceased and his brother had ordered the defendant to leave the farm, and had forbidden his taking the plank from the fence. That on arriving at the place where the defendant was knocking off the said plank the deceased and his brother got out of the wagon, his brother having an ax in his hand, which he laid down by the side of a pile of lumber. That, the two going within a few feet of the defendant, the brother of the deceased, Jim Herndon, said to the defendant, "Todd, what are you going to do with this plank?" to which the defendant replied, "I am going to move it." Jim Herndon said, "Don't you move this plank; it is ours;" whereupon the defendant replied, "Don't you move it either," and immediately struck at Jim Herndon with an ax, and cut him on the chin. That when the defendant went to strike Jim Herndon the second blow the deceased said to him, "Don't do that," and grabbed the defendant from behind; that the defendant dropped his ax, and then turned on deceased, and began cutting him. That Jim Herndon then ran up to where the deceased and the defendant were scuffling, and, grabbing the defendant in the back by his collar, pulled him loose, whereupon the defendant turned on Jim Herndon, and commenced to cut him. That the deceased then drew his pistol, and shot at the defendant twice. One Dymus Todd then ran up, and took the pistol from the deceased, stepped back, and shot at him twice. That said Dymus Todd then held, first the deceased, and then Jim Herndon, in order that the defendant might cut them. That the said Jim Herndon, getting away, walked off a short distance, and that, as the deceased tried to follow him, he walked under a barbed-wire fence, which caught him by the collar of the coat, and when so held the defendant ran up to him, and stabbed him in the back, the knife penetrating his lungs, and that it was from this blow that death ensued. The testimony for the defend-

ant was in conflict with that of the state as to which was in fault in bringing on the difficulty, and tended to show that, upon the deceased and his brother coming up to where the defendant was knocking plank off the fence, and the defendant saying that he was going to move the plank, the said Jim Herndon struck at him with his ax; that the defendant warded off the blow with his own ax, which struck Jim Herndon; that thereupon the deceased made for the defendant, drawing his pistol, and shot at him; that when the deceased shot him the defendant walked off, and the deceased, following him, struck him; and that, as the deceased turned, after having struck the defendant, the defendant cut him in the back.

The rulings of the court as to the introduction of the dying declarations, as testified to by the witness Banks, are sufficiently shown in the opinion. On the cross examination of the witness Banks he was asked if he had met the wife of the deceased in the courthouse building, and, after answering that he had, the defendant then asked him the following question: "If she had undertaken to repeat to him what her husband said in his dying declaration, which was written by the witness." The state objected to this question. The court sustained the objection, and the defendant duly excepted. On the cross-examination of one Ritch, a witness for the state, and after he had testified that he arrested the defendant and Dymus Todd, the defendant asked said witness, "Who swore out the warrant for the defendant and Dymus Todd?" The court sustained the state's objection to this question, and the defendant duly excepted. During the examination of the defendant as a witness in his own behalf, and after having given his version of the difficulty, he was then asked "If, at the time of the difficulty, he knew of any claim of any person to the lumber when he went to work that morning." The state objected to this question. The court sustained the objection, and the defendant duly excepted.

The court, at the request of the solicitor for the state, gave the following written charges to the jury: (1) "To prove beyond a reasonable doubt that the defendant is not guilty does not mean that the state must make the proof by an eyewitness, or to a positive, absolute, mathematical certainty. This latter measure of proof is not required in any case. If from all the evidence the jury believe it is possible, or that it may be, or perhaps, the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is that the jury should, from all the evidence, believe beyond a reasonable doubt that the defendant is guilty; and if you so believe, and you further believe, beyond all reasonable doubt, from the evidence, that the killing occurred in this county, and before the finding of this indictment, you must find the defendant guilty, al-

though you may also believe from the evidence that it may be that he is not guilty, or that it is possible that he is not guilty."

(2) "Gentlemen of the jury, I instruct you, as a matter of law, that in considering the case you are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely imaginary or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubts interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." (3) "If the defendant provoked, or brought on the difficulty, or entered willingly into the fight with deceased, then he cannot set up self-defense in this case." (4) "To sustain the plea of self-defense set up in this case the burden is on the defendant to prove to your satisfaction that he had no reasonable and safe avenue of escape from the danger which threatened him, and not on the state to prove it." (5) "I charge you, gentlemen of the jury, that malice, in its common acceptance, means ill will against a person, but in its legal sense means a wrongful act, done intentionally, without just cause or excuse." (6) "If you believe beyond a reasonable doubt, from all the evidence in this case, that defendant, in this county, before the finding of this indictment, purposely killed the deceased, by stabbing or cutting him with a knife, after reflection, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand,—even a moment before the fatal blow was made,—the defendant is guilty of murder in the first degree." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give to the jury, among others, the following written charges requested by him: (7) "If from all the evidence the jury cannot tell with reasonable certainty where the fault of the killing lies, it is their duty to acquit defendant; for this fact alone, if it be a fact, is what the law terms a reasonable doubt, and, if the jury has a reasonable doubt as to the defendant's guilt, then they should acquit the defendant." (20) "I charge you, gentlemen of the jury, that the knife, without further description, or evidence showing the size or the character of the knife, does not raise the presumption that it was a deadly weapon." (22) "I charge you, gentlemen of the jury, that although you may discredit the account given by the defendant as to the means by which the deceased came to his death, and although you may be satisfied that his statements in this respect are unreasonable, this

would not deprive the defendant of the benefit of the evidence in the case, whether introduced by the state for the purpose of criminalizing him or by himself as exculpatory evidence. It is upon the whole evidence the jury must make up their verdict."

S. T. Wert, A. M. Wade, and C. S. Price, for appellant. Wm. L. Martin, for the State.

HEAD, J. With the view of proving the dying declarations of deceased, the state asked its witness Banks, "What did the deceased say about whether or not he thought he would get well?" The defendant objected on the ground that the evidence showed that deceased did not die for nearly two months after the wound was received, and that it was too far from the time of his death to be received as a dying declaration. The objection was properly overruled. *Reynolds v. State*, 68 Ala. 502; 1 Greenl. Ev. § 158. It is true there was no evidence, so far as the bill of exceptions shows (and it purports to set out all the evidence), showing what relation the statement made by the deceased in reference to getting well bore to his declarations touching the facts of the homicide. Without such proof the declarations were inadmissible; but no question was raised by the defendant on this point. The dying declarations were reduced to writing at the time they were made. The court permitted oral evidence of them to go to the jury without the production of the writing, to which the defendant excepted. Witness Banks, who testified to the declarations, and that they had been reduced to writing, was asked by the court where said dying declaration was. He replied that he had turned it over to the grand jury of the city court at the June term, 1893, and had never seen it since; that he had made diligent search among all of his own papers, and had failed to find it; and that he, together with the solicitor and clerk, made diligent search through the grand jury papers, and failed to find it. Upon this predicate the court admitted the secondary evidence. We think the predicate was insufficient. It is of the highest importance, particularly in a cause involving such consequences as this, when important evidence exists in writing, that the writing itself be produced; and its production should be required, if by any means it is practicable. Every reasonable effort which it appears might have resulted in its production should be shown to have been made without avail before secondary evidence should be received. The reason of the rule is too obvious to require elaboration. The production of the writing in the present case, rather than proof of the dying declarations by the possibly uncertain and inaccurate memories of witnesses, may have been of the last importance to the prisoner. The witness makes the indefinite statement that he turned the paper over to the grand jury. Just how he did so is not

stated. The grand jury was composed of at least 15 men. It does not appear what member of that body received the paper, and of course he was not called to testify what he did with it, and no reason was shown why he was not. The next and only other evidence is the statement of the witness that he, with the solicitor and clerk, made diligent search "through the grand jury papers," and failed to find the paper. Where these papers were when examined, how they got there, in whose custody, how long they had been there, and how the witness knew they were grand jury papers, do not appear. There is not an intimation that the search was made in the place where the papers which went into the custody of the grand jury at the June term, 1893, were usually kept, and ought to have been found, even if that evidence had been sufficient. Indeed, it does not appear that the witness knew, or could know, except from hearsay, where those papers were usually kept; or that he was capable of identifying them as the papers of the grand jury of the June term, 1893. He was a magistrate, living in the country, and had nothing to do with the custody of the grand jury papers, and no connection with the clerk's office. It is manifest he knew nothing about them. The clerk, who is presumed to have been in the courthouse, was not examined on the subject. It would be idle to contend that such evidence as this shows the exercise of that degree of diligence sufficient to let in secondary evidence.

It is common, and we think allowable, practice to inquire of witnesses, on cross-examination, if they have talked with others in reference to the facts of the case; not as a means of impeaching the character of the witness, but of testing the accuracy or reliability of his recollection. If a witness' memory has been refreshed before going on the stand by having the facts rehearsed to him by others, we think the jury ought to know it, that they may consider it for what it appears to be worth in determining how far the recollection of the witness is reliable. Hence, if the wife of the deceased, who was in the courthouse, rehearsed to the witness Banks, before he went upon the stand, the alleged dying declarations of her husband, the defendant should have been permitted to prove the facts on cross-examination of Banks, as he proposed to do.

It was immaterial who swore out the warrant for the arrest of defendant and Dymus Todd.

It was a theory of the state, having some support in the tendencies of the evidence, that the defendant and others went to the place of the difficulty that morning to resist, with violence, if necessary, a claim of deceased and others to the lumber that was there, in pursuance of which the difficulty and homicide occurred. This being so, we think it was competent for the defendant to testify in his own behalf that at the time of

the difficulty he did not know of any claim of any person to the lumber.

We see no objection to the first, second, and third charges given for the state. The fourth charge given for the state correctly places the burden of proof touching the duty of retreat, and was properly given. The fifth charge correctly defines malice in its legal sense, and was properly given. Clark, Man. Cr. Law, p. 75, § 470, and cases cited; Roscoe, Cr. Ev. (7th Ed.) p. 21; Broom, Leg. Max. top of page 315. The sixth charge substantially hypothesizes the characteristics of murder in the first degree as defined by the statute. 2 Code, § 3725. It requires, in order to constitute that degree of murder, that the homicide be purposely committed, after reflection, with malice, and that it was determined on beforehand. These are the equivalent of the willfulness, deliberation, malice, and premeditation which the statute requires. Charges 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 21 requested by the defendant are so obviously erroneous or improper, upon principles so often declared by this court, that we deem it unnecessary to consider them in detail. Some of them require an acquittal entirely, upon facts which would justify an acquittal of murder only. The indictment involved the charge of manslaughter as well as murder. Charge 20 was abstract, and properly refused. This is not a case, as the charge supposes, without proof of the character of the knife. The jury were informed of the nature of the wounds inflicted upon the deceased with the knife, and they could infer its character from this evidence. Charge 22 is so drawn that it was, if given, liable to confuse and mislead the jury. It was properly refused. Charge 7 is more calculated to confuse than to instruct, and was properly refused.

The questions reserved touching the organization of the jury will not likely arise on another trial, and we do not consider them. Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

(102 Ala. 167)

JACKSON v. STATE.

(Supreme Court of Alabama. April 11, 1894.)

GRAND JURY—BURGLARY—INDICTMENT.

1. The grand jury may be organized at any time during the term.

2. A charge that the intent to steal must have existed "before and not after" accused entered the house is properly refused.

3. There can be no conviction on a count laying the ownership of the house in Mary M., when it appears that Mary M. was a married woman, living in the house with her husband, who was the head of the family, since on these facts he will be presumed the owner.

4. A count in an indictment for burglary laying the ownership of the house in "— Martin, whose Christian name was to the grand jury unknown," will, after plea of not guilty, support a conviction, though the grand jury by

reasonable diligence could have learned said Christian name. Wells v. State, 7 South. 272, 88 Ala. 239, followed.

Appeal from circuit court, Baldwin county; James T. Jones, Judge.

Oliver Jackson was convicted of burglary, and appeals. Reversed.

The indictment contained two counts. In the first the ownership of the dwelling house alleged to have been burglarized was laid in Mary J. Martin. The second count alleged the ownership of the dwelling house to be in "— Martin, whose Christian name was to the grand jury unknown." On the trial of the case, as is shown by the bill of exceptions, Mary J. Martin, a witness for the state, testified that on the night of October 4, 1892, she woke up, and found in her room a man. He came close to her bed, and whispered in her ear: "If you want to get even with any one for this"— That this sentence was interrupted by her calling for her son. That, after she called her son, the man threatened to blow her brains out, and walked from the room. That it was moonlight, and, the blinds of some of the windows being off, she saw the man well; and that, a few days afterwards, she recognized the defendant as the person who was in her room. That there was nothing missing from the house except a hat of her son, which was picked up at the gate the next morning. This witness further testified that she was the wife of Charles B. Martin, with whom she was living, and who was the head of the family. This witness also testified that she was examined before the grand jury that preferred the indictment against the defendant. The testimony of the other witnesses introduced for the state tended to corroborate that of Mary J. Martin. The defendant requested the court to give the following written charges, and separately excepted to the refusal to give each of them as asked: "(3) The court charges the jury that the intent to steal must from the evidence be proven to their satisfaction to have existed in the mind of the burglar before, and not after, he had entered the house. If the intent was formed after the house was entered, the jury must acquit. (4) The court charges the jury that if the evidence satisfied their minds beyond a reasonable doubt that Mary J. Martin, in whose name the house is alleged to have been broken, was a married woman, living with her husband at the time of the burglary, and that her husband was the head of the family, the defendant cannot be convicted under the first count of the indictment. (5) The court charges the jury that if they believe from the evidence that the house alleged to have been broken in the second count of the indictment was the property of — Martin, whose Christian name was to the grand jury unknown, and that said house did at the time belong to Charles B. Martin, the husband of Mary J. Martin, living with her at the time as her husband, and that Mary J. Martin was a witness before the grand jury

when the indictment was found, and that the grand jury by reasonable diligence could have ascertained the name of Charles B. Martin, and did not, there is a variance in the allegation of the indictment and the ownership of the house, and the jury must acquit on the second count."

John R. & Chas. W. Tompkins, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. It appears that the venire for the grand jurors for the spring term, 1893, of the circuit court of Baldwin county, was so issued that the persons drawn were commanded to be summoned to appear on the second Monday of the term, instead of the first; and they were summoned accordingly. The court regularly convened on the first Monday, and adjourned until the second, when the persons who had been drawn and summoned to serve as grand jurors appeared, and of or from them a grand jury was organized by the court. This body presented the indictment under which the defendant was tried, and it is now objected that the court had no authority to organize a grand jury on any other than the first day of the term, and that the indictment is consequently void. There is manifestly nothing in this objection. There is no provision of the statute requiring the grand jurors to be summoned to appear, or that the grand jury shall be organized, on the first day of the term. It may be done at any time during the term.

In order to constitute burglary, the intent to steal or commit a felony (to steal, in the present case, as that is the only intent charged in the indictment) must have existed at the time of the breaking and entering. If this intent was not formed in the mind of the offender until after the breaking and entering were complete, there was no burglary. The charge, however, by which the defendant attempted to have this principle presented to the jury was so drawn that the court could not do otherwise than refuse it. It instructs that the intent to steal must have existed "before, and not after," the defendant entered the house. This instruction was calculated to lead the jury to believe that although the intent to steal may have existed at the time of the breaking and entering, yet, if it did not exist after the house was entered, there would be no burglary. Nor is it essential to the crime of burglary that the intent spoken of shall exist before the breaking. It must be concurrent with the breaking and entering, and may be formed at the moment of time the breaking occurs.

The first count of the indictment lays the ownership of the house, the subject of the alleged burglary, in Mary J. Martin. The only evidence of its ownership was that Mary J. Martin was a married woman, living in the house with her husband, who was the head of the family. Under this evidence, the pre-

sumption of law is that the house belonged to the husband. The circuit court, therefore, erred in refusing to charge, as requested, that there could be no conviction under the first count.

The case of *Wells v. State*, 88 Ala. 239, 7 South. 272, determines that charge numbered 5, relating to the second count, was properly refused.

For the error mentioned, the judgment is reversed, and the cause remanded. Let the defendant remain in custody until discharged by due course of law.

(102 Ala. 570)

KNARD et al. v. HILL.

(Supreme Court of Alabama. April 11, 1894.)

PARTNERSHIP—EVIDENCE—REPUTATION—ESTOPPEL.

1. In an action for the negligent killing of a horse which was left by plaintiff in a livery stable, on an issue as to whether defendant K. was a partner of his codefendant in keeping the stable, there was evidence that K. furnished material from his store near by to apply on the horse's wounds; that he held a mortgage on all the livery stable stock, and once, in selling a horse, said it belonged to him and his codefendant; and that K. once told a collector with a claim against his codefendant that the property in the stable belonged to him (K.). It also appeared that K. owned the stable, renting it to the other defendant, and patronized it, and that where plaintiff lived, 18 miles from the stable, the defendants were reputed to be partners in keeping the stable. *Held*, that the partnership was not established.

2. Plaintiff having testified that he knew of no act, fact, or circumstance indicating that K. was interested in the stable, K. cannot be made liable as having held himself out as a partner.

Appeal from district court, Colbert county; W. P. Chitwood, Judge.

Action by Chillian Hill against John Knard and J. W. Bain. From a judgment for plaintiff, defendants appeal. Reversed.

This was an action on the case to recover damages for the killing of a horse, the property of the plaintiff, in a livery stable alleged to have been owned and kept by the defendants, through the negligence of a teamster in charge of a team alleged to have belonged to the defendants.

Kirk & Almon, for appellants. J. W. Cooper, for appellee.

HEAD, J. Case by appellee, Hill, against appellants, Knard and Bain, for negligently killing plaintiff's horse by running a hack and team against him. The main issue tried was the liability vel non of defendant Knard for the results of the negligence which the evidence tended to establish, causing the injury, the solution of which depended upon whether or not he (Knard) was interested with Bain in keeping and carrying on the livery stable wherein plaintiff's horse was being kept when he was killed. The bill of exceptions contains all the evidence. We have examined it critically, and are of the opinion that there is none tending to show that

Knard had any connection with, or interest in, the stable, which could impose any liability upon him for the negligence of Bain, or the servants employed in and about the stable, resulting in the injury to plaintiff's horse. The evidence upon this subject is as follows: Robert Ramsey testified for plaintiff that he went to the stable with others shortly after the injury occurred, and saw the horse with the wagon or hack pole run through his body. Efforts were being made for the relief of the animal, and he says that Knard was there, and "furnished water, towels, and some turpentine for the horse from his store. He told us to come to his saloon and get water, towels, and turpentine, if we wanted them, and anything we needed. He did furnish water, towels, and turpentine, and offered to do anything he could for the horse. He seemed to hate it very much." Witness never knew of any charge for the things. He also testified: "I usually put up at that stable when I came to town. It was always my understanding that it was Knard & Bain's stable, and we put up at it as such. It went by that name in my country. [Witness lived 18 miles from Tusculmba, where the injury occurred.] I considered it Knard & Bain's stable. My dealings there were with Bain. * * * I have seen Mr. Knard about the stable. Never saw him do any work about it. Never saw him exercise any acts of ownership over it at all. Something was said by Bain about a compromise. I afterwards saw him then and there go to and talk with Knard. Bain came back, and said he would not compromise. I can't say whether Knard was at stable more than once on the day the horse was killed. There were several men at the stable when I got there. All of them seemed willing to do what they could. None but Knard offered water, towels, and turpentine. When I stopped at the stable, Bain always took my horse, and I paid him for hitching in the stable. Knard never held himself out to me as a partner or interested in the stable. He never told me he was a partner or interested in the stable." N. S. Martin was next introduced by the plaintiff, and he testified that he had been about the stable, and did not know that it was ever known as the Knard & Bain stable. He had transactions with Bain, but none with Knard. Never knew or heard of Knard being a partner of Bain's in the stable. The plaintiff then introduced T. A. Hurst, who testified that about four years previously he bought a horse from Knard out of the stable, which horse Knard said was his and Bain's. Had seen Knard and Bain about the stable. Paid no attention to their business. Knew nothing about defendants' business. Does not know that they were partners. A. W. Ligon testified for plaintiff that he had lived in Tusculmba a great many years. In the latter part of 1887 had some notes against Bain for collection, and, looking around for a chance to make the money, spoke to Knard

about it, and Knard told him everything in the stable belonged to him. Did not say how he owned it, or what claim he had to it. He passed by the stable very frequently, sometimes two or three times a day. Never saw Knard transacting any business about the stable. Saw him about the stable the next winter. Never knew Knard was a partner. Never heard either of them say so. Knard never held himself out to him as a partner in the stable. Plaintiff testified for himself that he turned the horse over to Bain that morning to be hitched in the stable. "Knard was at the stable after the horse was hurt, and told us, anything we wanted, to send to the store for it. We got water, towels, and turpentine from him. He never charged me for it, that I know of. Don't know how Knard found out the horse was hurt. I think Mr. Bain told me about it. Don't think Knard went with me. Don't know where Bain went after telling me. Knard and Bain were at the stable. Did not see them talking while there." The witness used this language: "I know of no fact or circumstance showing that Knard and Bain were partners. I never heard the stable spoken of as Knard & Bain's stable in Knard's presence. It was known as Knard & Bain's stable. Knard never held himself out to me as being a partner or jointly interested with Bain in the stable. I don't know that Knard had any interest in the stable, nor in the team which ran away. Knard never made any proposition to me, nor I to him, about the horse or a compromise. I know nothing about Knard having anything to do with the stable. I usually hitched at that stable when I came to town, and paid for hitching. I had hitched there the week before. I have heard it called Knard & Bain's stable, but not in Knard's presence." This was all the plaintiff's evidence on this subject. Defendants introduced two witnesses who testified that they were well acquainted with the stable, and had had many transactions in connection with it. One was the blacksmith, who did all the horseshoeing for the stable; the other was a horse trader, living in the county, who patronized the stable largely, and had made many horse trades there. They both testified that it was Bain's stable. They had all their transactions there with him. That Knard had nothing to do with it. Never held himself out as having any interest in it. Bain paid all the bills that were paid for horseshoeing. They were all charged to him. Knard and Bain both testified emphatically and fully that Knard had no interest in or connection with the stable business whatever, except that he held a mortgage on Bain's property in the stable to secure a debt for some horses and vehicles he sold Bain when he (Bain) began the stable business. The mortgage was produced and put in evidence. That the stable belonged to Knard, and he rented it to Bain, at \$10 per month, and collected the rent. That he had no interest in the busi-

ness or the profits or losses arising therefrom. Knard frequently traded for and bought horses, and kept his horses, including his riding horse, at Bain's stable, and most always had a man to feed and look after his horse. Never paid Bain for keeping them. Always patronized Bain's stable. The testimony of both defendants, as we have said, is full and explicit to the above effect, and not varied or contradicted by anything brought out on cross-examination. What does the plaintiff seek to extract from this testimony as tending to show the existence of the alleged partnership? (1) Common reputation. (2) In 1887, Hurst bought a horse from Knard, which he said was his and Bain's. (3) Knard said to a collector of claims, who was on the lookout for property of Bain, that the property in the stable belonged to him. (4) Knard patronized the stable, and kept his horse there. (5) At the time plaintiff's horse was injured, Knard went with others to the stable, and showed solicitude and rendered aid for the relief of the suffering horse.

First. Common reputation cannot be considered to establish the fact of partnership. *Carter v. Douglass*, 2 Ala. 499; *Humes v. O'Bryen*, 74 Ala. 64; *Marble v. Lypes*, 82 Ala. 322, 2 South. 701; *Engine Co. v. Hall*, 86 Ala. 305, 5 South. 584. In order to bind one as a partner, in favor of a third person, when he was in fact not such, he must, by his conduct, have held himself out as a partner, and the plaintiff must have been misled, by such conduct, into his dealing with the supposed partnership. No extent of rumor or reputation which the supposed partner had not brought about by his own conduct can affect him; and this conduct must be proved by the party complaining, and that he was misled by it. The present plaintiff testifies, unequivocally, that he knew of no act, fact, or circumstance indicating to him that Knard was interested in the stable business. This eliminates the whole subject of Knard's liability by reason of having held himself out as a partner, and all the instructions the court gave the jury on that subject were mere abstractions and improper. Then, let us examine the other propositions, dissociated from this immaterial evidence of reputation, and see if there is any tending to establish the partnership as a fact; and in this connection it is proper to consider any other undisputed fact essential to complete the proposition. Then, second, Knard held a mortgage on all Bain's stock in the stable. He sold one of the horses in 1887 to Hurst, and said it was his and Bain's; wherefore the inference that he and Bain were partners in the livery business. Third. Knard held the mortgage aforesaid, and said to a collector in search of Bain's property that the property in the stable was his; wherefore the inference that he and Bain were partners in the livery business. Fourth. Knard was landlord of the stable rented to Bain, and patronized Bain's stable; where-

fore the inference that he and Bain were partners. Fifth. When plaintiff's horse was injured, Knard went, with others, to the stable and showed solicitude and rendered aid for the relief of the suffering horse; wherefore the inference that he and Bain were partners in the livery business. Other propositions are suggested in the brief, but they are more frivolous than the foregoing, if possible. It seems more than probable that this case went off, as it did, on the immaterial evidence of reputation. There was no evidence going to establish the alleged partnership, and the court should have so instructed the jury, as the defendants requested. With these views we do not deem it necessary to examine the many charges which were given for the plaintiff. Most of them are abstract, and some faulty for other reasons. We think the court will be sufficiently guided on another trial. Reversed and remanded.

(102 Ala. 594)

STATE ex rel. PERKINS v. MONTGOMERY LIGHT CO.

(Supreme Court of Alabama. April 11, 1894.)

CORPORATIONS—AMENDMENT OF CHARTER—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

1. The manufacture and sale of electricity by a corporation, organized under a special charter to furnish a city and its inhabitants with gas, as its sole business, is not an engaging in business not authorized by its charter, within the prohibition of Const. art. 14, § 5, when, before it commenced such manufacture, its charter was amended, under Act Dec. 12, 1888, so as to empower it to engage therein.

2. Act Dec. 12, 1888, authorizing corporations previously organized to amend their charters, is not unconstitutional because it fails to express the condition contained in Const. art. 14, § 3, providing that corporations with charters existing when the constitution was adopted shall not amend them, except on condition that they shall thereafter be subject to its provisions.

3. Act Dec. 12, 1888, is not, per se, a violation of the state and federal constitutions, forbidding the state to pass any law impairing the obligations of contracts, as the corporations and shareholders may, by acceptance of the provisions of the act, waive the protection of the constitution.

4. Where a corporation accepted the benefits of Act Dec. 12, 1888, and its stockholders acquiesced therein for over four years, their consent to such acceptance is presumed.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Quo warranto by the state of Alabama, on the relation of B. F. Perkins, against the Montgomery Light Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The information alleged that the relator, Perkins, was a resident citizen of Jefferson county, in the state of Alabama; that the Montgomery Gaslight Company was incorporated by a special act of the general assembly of Alabama, passed at its session of 1853-54; that, by the terms of the charter so granted, the place of business of said company was in the city of Montgomery, and the said company was authorized to furnish the

said city and its inhabitants with gas for illuminating purposes, and that it was only authorized to exist for that end and purpose; that for many years prior to 1889 the Montgomery Gaslight Company carried out the provisions of its charter, but that in 1889 the said corporation, acting by and through a majority of those in interest therein, obtained, upon a petition filed in the probate court of Montgomery county, an amendment to its charter, changing its name to Montgomery Light Company, and giving it authority to manufacture and furnish electricity to the city of Montgomery and its inhabitants for purposes of illumination, and authorizing it to increase its capital stock to \$200,000, and execute bonds to the amount of \$250,000, which were to be secured by mortgage on all of its property. The information further alleged that the probate court of Montgomery county was without any authority to make such amendment, but that it did undertake to do so, and that ever since that time the corporation has exercised the additional franchises and powers by operating an electric-light plant, and furnishing electricity to the city of Montgomery and its inhabitants, and increased its capital stock, issuing certificates therefor, and issued bonds to the amount of \$250,000, which were secured by mortgage on all of its property; and that the attempt to change its charter was without authority of law, and void. It was finally averred in said information that the said Montgomery Light Company had offended against the laws of its creation, in this: (a) In unlawfully increasing its capital stock. (b) In creating a bonded indebtedness of \$250,000, secured by a mortgage on all of its property. (c) In exercising a franchise not conferred by law, by operating an electric-light plant, and charging and taking toll for the same. A writ was issued upon this information, reciting the facts alleged in the information, and citing the Montgomery Light Company to appear before the court, and show cause, if it had any, why its charter should not be revoked, and its corporate existence annulled. In response to said writ the respondent moved to quash the same, on various grounds, chief among which were the following: (1) Because said B. F. Perkins, on whose information the writ was sued out, was not joined as plaintiff with the state. (2) Because it was not shown or averred in the information on which the writ issued, or in the recitals of the writ, that the said Perkins had any interest in the subject-matter of the proceedings. (3) That it was not averred that the alleged acts by which it amended its charter were not done pursuant to the provisions of the law authorizing it to make such amendment. (4) That neither the information nor the writ averred facts which showed that the probate court was acting without authority in granting the amendment to its charter. (5) That a copy of the act of the

legislature incorporating respondent was not attached to the information. (6) That it did not appear that the capital stock of the corporation was not increased in the mode and manner provided by law. (7) That it did not appear that the bonded indebtedness was not increased in the mode provided by law. (8) That it does not appear but that the respondent acted in good faith, and with the honest belief that it had the right to do the acts complained of. On the submission of the cause, judgment was rendered, dismissing the proceedings, as is shown by the following extract from the judgment entry: "It is ordered and adjudged by the court that the application filed in this case be, and is hereby, dismissed (1) because, the questions involved being the constitutionality of a statute, relator should show that he is a stockholder, or has some right affected by the statute; (2) the amendment complained of is auxiliary to the original purpose of the corporation."

Lea & Bell and Brooks & Brooks, for appellant. Tompkins & Troy, for appellee

HEAD, J. This is a proceeding in the nature of quo warranto, to vacate the charter of the respondent corporation, under Code 1886, § 3167 et seq. It has its basis mainly in subdivision 5 of section 3167, which authorizes judgment of forfeiture when a corporation "exercises a franchise or privilege not conferred on it by law." The statute prescribes two methods of procedure to enforce these forfeitures: One is that the judge of the circuit, wherein the corporation is located, whenever he has reason to believe any of the acts or omissions can be proved, and it is necessary for the public good, must direct the solicitor to bring the action. When so done the proceeding is alone in the behalf of the state, for the public good. The other is that the action may be brought on the information of any person giving security for the costs, to be approved by the clerk of the court, in which case the informant must be joined as plaintiff with the state. If the informant dies pending suit, another, giving security for costs, may be substituted in his place, but if no person is so substituted the action abates. The present proceeding is of the latter class, except that the requirement that the informant be joined as plaintiff with the state seems to have been overlooked, and was not conformed to; the action being instituted in the name of the state, alone, "on the relation of B. F. Perkins."

The respondent corporation was chartered by special act of assembly in the year 1853, by the name of the Montgomery Gaslight Company, with the city of Montgomery, Ala., as its place of business, and was empowered to furnish that city and its inhabitants gas for illuminating purposes, which was the sole object and end of the

incorporation. The business of the company was legitimately carried on, within corporate powers, until the year 1889, when the grievances complained of in the information began. On December 12, 1888, the general assembly of Alabama passed an act "To authorize corporations organized under the general incorporation laws of the state, or which have been chartered by an act of the general assembly prior to the enactment of the general incorporation laws of this state, of 1867, to alter and amend their charter;" and in this act it is provided that not less than three-fourths in number of the stockholders of any such corporation, holding not less than two-thirds in value of the stock thereof, may, in specified cases, file in the office of the judge of probate of the county in which the corporation has its principal place of business, a verified declaration, in writing, signed by them, setting forth (1) when said corporation was organized, its name, what changes, if any, are desired to be made in such name, and the amount of its capital stock which has been subscribed for and taken; (2) the names of the stockholders signing the same, and the amount of stock held by each; (3) the purposes of the corporation, and the nature of its business, as the same is set forth in the original declaration, and the alterations or amendments thereof desired; and (4) the amount of the capital stock, as shown by said original declaration, and the amount to which it is proposed to decrease such capital stock, if a decrease is proposed. There is a proviso limiting to some extent the powers to be derived by such alterations, not material to the present case. Acts 1888-89, p. 20. Proceeding strictly under and in accordance with this act, assuming its validity, the respondent, in 1889, in the probate court of Montgomery county, changed its name from the Montgomery Gaslight Company to the Montgomery Light Company, acquired the authority to manufacture electricity, and furnish the same to the city and its inhabitants, for purposes of illumination, had its capital stock increased to about \$200,000 "from amount fixed by its first-named charter," and acquired authority to execute bonds to the amount of \$250,000, and to mortgage all of its property to secure the payment thereof, since which the company has exercised the franchise of producing and furnishing electricity, as aforesaid, having established the necessary plant and appliances for that purpose. It has increased its capital stock to \$200,000, and issued certificates for the same; has issued its bonds in the sum of \$250,000, and its mortgage on all its property to secure them. The relief the informant seeks is based alone upon the proposition that the act above noticed is violative of section 5, art. 14, of the constitution, that "no corporation shall engage in any business other than that expressly authorized by its charter;" and, in connection therewith, section 3, art.

14, which forbids the general assembly to alter or amend the charter of any corporation existing at the adoption of the constitution, or to pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of the constitution; and especially as violative of those provisions of the federal and state constitutions which forbid the state to pass any law impairing the obligation of contracts. In argument of appellant's counsel, the attack is made solely from the last-named position, but we will notice the others as well.

We observe first, that section 5 of article 14 can exert no influence upon this controversy, for if we go to the verge of holding that, under that section, necessarily implied corporate power cannot exist, and that every corporate act must find its authorization in express terms in the charter, the acts now complained of are expressly authorized in respondent's charter, if the alterations and amendments above noticed can be otherwise upheld as valid.

Next, we find, in section 3 of article 14, express recognition of the right of the general assembly to alter or amend the charter of an existing corporation, or to pass any general or special law for its benefit, upon condition only that such corporation shall thereafter hold its charter subject to the provisions of the constitution. We take it that it would not be contended that the enactment, under these provisions, must express the condition above mentioned. A valid acceptance by the corporation of the benefits conferred by the enactment would imply acceptance upon the condition named in the constitution. Then, suppose all the stockholders of the respondent corporation had joined in the petition to the probate court for the enumerated powers, in pursuance of the act of 1888; could it be seriously questioned that the amendments of its charter and the enlargements of its powers were constitutionally accomplished, so far as the provision of the constitution under consideration is concerned? Certainly not; and, if not, then we demonstrate that the act of 1888 is not, per se, violative of the constitutional provision in question. It is, in that regard, a valid enactment, open to every existing corporation, in a lawful way, to avail itself of its provisions; and the only show of argument appellant can now make is that it does not affirmatively appear on the face of the probate court proceeding, that all the stockholders applied for, or consented to, the grant of the enlarged powers. What may have been done by the stockholder by positive act at the time, he may do by subsequent express ratification, or silent acquiescence; and in respect of acts which may be made lawful and efficacious by ratification, either express or by acquiescence, of another, it is the legal right of such other

so to ratify, which right no outsider can deprive him of. Then, in the present case, suppose it to be true, in point of fact, that every shareholder in the respondent company was, from the first, fully informed of the enlarged powers, was entirely satisfied with them, believed them to be beneficial to him, and day after day, through all these years, has acquiesced in and confirmed the same; is there any so bold to say that there has not been a lawful, constitutional acceptance by the corporation of the provisions of the act of 1888 on the condition named in the constitution? And it is too clear for controversy that, with the light this kind of proceeding, put on foot by a mere informer, is capable of shedding, we must presume such a ratification; for if we do not, and grant the prayer of the informant, we take the risk of infringing the legal right of the minority shareholders to adopt by ratification, express or silent, that which was done by the majority in their behalf. Indeed, it may well be inquired if a shareholder himself, having full knowledge of the facts, after four years' acquiescence in what has been done for him, standing by to affirm if the new venture proves successful, and disaffirm if unsuccessful, would be permitted now to come before the courts, even in a direct proceeding, to prohibit the usurpation of power by the company, or to vacate its ultra vires acts done in the exercise of the new venture. The authorities upon this question are abundant, and would seem to leave the course of such a complaining stockholder not free from difficulty. 3 Herm. Estop. § 1135, p. 1823; Cook, Stock, & Stockh. & Corp. Law, § 731; Taylor v. Railroad Co., 4 Woods, 575, 13 Fed. 152; Kelley v. Railroad Co. (Mass.) 6 N. E. 745; Cozart v. Railroad Co., 54 Ga. 383; Alexander v. Searcy (Ga.) 8 S. E. 630; Beach, Priv. Corp. 431; 2 Mor. Priv. Corp. 631; Railroad Co. v. Grayson, 88 Ala. 572, 7 South. 122.

What we have said applies with greater force, if possible, to that feature of appellant's contention resting upon the "contract" clauses of the federal and state constitutions. As we said in considering the other constitutional objections, it is a mistake to say that the act in question is unconstitutional and void, per se, because its terms appear to be such as, if enforced, might impair the obligation of the contract between the state and respondent's shareholders, for the reason, as we have said, that it is competent for the shareholders to waive the protection of the constitution, and by their assent to, or acceptance of, the provisions of the act, render it valid, though otherwise it would be invalid; and it is always open to inquiry, in a case like this, involving, so far as contractual obligations are concerned, merely the private rights of individuals, whether there has been such assent or acceptance. Cooley, Const. Lim. marg. p. 181; Mobile & O. R. Co. v. State, 29 Ala. 573, 536; 3 Am. & Eng.

Enc. Law, p. 744, note 1. And the assent of a corporation may be inferred from such acts or omissions as would raise a similar presumption in the case of natural persons. Id., and cases cited in note. These contract clauses are intended alone for the protection of the private rights of contracting parties. No principle or element of public state policy is intended to be conserved by them. A person, the terms of whose contract would be materially changed by the enforcement of a given legislative enactment, may conceive the change beneficial to him, and waive the unconstitutionality of the act; and in such case it would become no one—not even the state itself—to interfere, and allege it. The courts will not suffer such interference. There is, in essence, no contravention of the constitution, except upon complaint of the injured party. If he accepts it, it is a valid enactment. As we have already said, as the question now comes before us, we cannot do otherwise than presume that the shareholders have acquiesced in what was done by the majority, because they have the right to ratify it, and they are not complaining. We must not interfere with that right. This law of quo warranto, as applicable to abuse of corporate power and usurpation of corporate franchise, was never designed to enforce or protect the private contractual rights of persons, involving no public detriment. Such persons are supposed to be able to take care of themselves. Here is a case of a person coming into court, and bringing the state with him, if he will, and invoking the unconstitutionality of an act which has received the solemn approval of the legislative and executive departments of the state, and been put in operation by that branch of the judicial department appointed to enforce it, upon no other plea than that the private contracts of other persons, with which he has no concern whatever, may have been impaired by the act. To give sanction to the proceeding would be to pervert the law under which it is attempted to be maintained to ends never intended. Affirmed.

(102 Ala. 536)

HIGHTOWER v. CROW.

(Supreme Court of Alabama. April 11, 1894.)
RECORD ON APPEAL—CERTIORARI—NOTICE OF APPEAL.

1. The proceedings on motion for a rehearing below, after judgment, cannot be made part of the record on appeal from the judgment, by certiorari.

2. Code, § 3403, providing that notice of appeal from a justice must be served on appellee, is mandatory; and a judgment by default against the appellee will be reversed, unless the record affirmatively shows that such notice was given.

Appeal from circuit court, Lowndes county; John Moore, Judge.

Action of detinue by J. E. Hightower against J. C. Crow. From a judgment by de-

fault for defendant on appeal from a justice, plaintiff appeals. Reversed.

On an appeal to this court, prosecuted from a judgment by default rendered against the plaintiff in the circuit court, the appellee moved for a writ of certiorari to the clerk of the circuit court of Lowndes county, demanding him to transmit to this court a true transcript of the record and proceedings in the case of *Hightower v. Crow*. This motion was spread upon the motion docket April 3, 1893, and on April 6th the motion was granted. In response to this writ of certiorari the clerk of the circuit court certified to this court the proceedings had in the circuit court of Lowndes county upon an application for rehearing, which application was made by the plaintiff in the court below after judgment by default had been rendered by the trial court against the plaintiff. On May 22, 1893, the cause was submitted to the supreme court, together with a motion to strike from the record the return made by the clerk of the circuit court of Lowndes county to the writ of certiorari, and tax the appellee with the cost of such transcript. The grounds of this motion were (1) that the transcript which was certified is no part of the record in this cause; and (2) the said transcript is immaterial to any issue presented by the record in said cause. The assignments of error upon the record, as originally filed, were that the court below erred in rendering judgment against the plaintiff without any notice of an appeal to the circuit court having been given him, and that it is shown by the record and proceedings that the circuit court had no jurisdiction of the person of the defendant.

Tompkins & Troy, for appellant. Holloway & Holloway, for appellee.

BRICKELL, C. J. 1. The office of a certiorari issuing from this court, under the fifteenth rule of practice (Code, p. 802), is well defined by the rule. It is "to perfect or bring up a complete record" from the primary court of the cause pending in this court for review. The introduction here of the record of a separate, distinct suit or proceeding, though between the same parties, pending or determined in the primary court, is not within the scope or mandate of the writ. The writ, of itself, refers to the record which is to be perfected or completed; and, in return to it, no record materially variant from that which is referred to or described can be certified. 3 Bac. Abr. 181. During the pendency of an appeal, there may be in the primary court amendments of the record, and, if such amendments are properly made, they may be certified in return to the writ, because they are essential to the completeness of the record. With this exception, it has not been deemed permissible, through the agency of a certiorari, to introduce into the record matter which was not part of it when the judgment from which the appeal is taken was rendered.

Mining Co. v. Reynolds, 44 Ala. 252, and authorities cited. The transcript or record of the proceedings had before the judge of the circuit court in vacation, upon the petition of the appellant for a rehearing or new trial, under the statute (Code, §§ 2872-2880), proved no part of the record of the cause when the judgment from which the appeal is taken was rendered. The petition was, of itself, the institution of a new and separate suit, and from the final judgment which may be rendered therein an appeal will lie to this court. The introduction of the record or transcript of these proceedings in answer to the certiorari was unauthorized, and the motion of the appellant to strike it from the record must be sustained.

2. The appellant, in an action corresponding to the common-law action of detinue, recovered before a justice of the peace, from the appellee, a horse, of the assessed value of \$95. From the judgment of the justice the appellee appealed to the circuit court. At the return term of the appeal, there does not appear to have been any action taken in the circuit court. Nor does it appear that to that term there was a return of the original paper, and a statement of the proceedings before the justice. At the succeeding term, that which purports to be a judgment by default was rendered against the appellant. The statute is mandatory that, on an appeal from the judgment of a justice of the peace, notice that an appeal has been taken must issue to the appellee, and must be served on him, his agent or attorney, five days before the return term of the appeal. Code, § 3403; Acts 1890-91, p. 369. The notice is essential to the jurisdiction of the appellate court; and on error a judgment of non pros., or by default, rendered against the appellee, cannot be supported, unless it appears affirmatively, from the record, that the notice was given. *Bettis v. Nicholson*, 1 Stew. 349; *Wyatt v. Avery*, 14 Ala. 589; *Crownover v. Srygley*, 19 Ala. 251; *Kane v. Gammell*, 50 Ala. 492. The record does not show that notice of the appeal was given the appellant, nor an appearance by him in the circuit court; and, of consequence, the judgment is reversed. Reversed and remanded.

(102 Ala. 76)

JACKSON et al. v. STATE.

(Supreme Court of Alabama. April 11, 1894.)

CRIMINAL LAW—RECEIVING VERDICT—PLACE.

1. Under Code, § 749, requiring the circuit court to be held each year in the county courthouse, the verdict must be delivered at the courthouse, and if received by the judge at his hotel, on account of sickness, it is void.

2. Where the jury separates after rendering a verdict which is void because delivered to the judge outside of the courthouse, the accused, having been once in jeopardy, is entitled to be discharged.

Appeal from circuit court, Baldwin county; James T. Jones, Judge.

Oliver Jackson and another were convicted of assault with intent to murder, and appeal Reversed.

John R. & Chas. W. Tompkins, for appellants. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendants were tried and convicted for an assault with intent to murder, and sentenced to suffer imprisonment in the penitentiary. The material question is whether there was a legal verdict upon which the sentence of the law could be pronounced. The bill of exceptions states that, after the instructions to the jury were given, and the "jury was about to retire to consider their verdict, the judge, being unwell, instructed the bailiff in charge of the jury that if the jury desired to bring in a verdict before morning, they could come in his charge to the hotel, some three hundred yards distant." The verdict was received at the hotel, in the presence of the defendants, "and the jury then and there discharged." Section 749 of the Code provides that "the circuit courts in the several counties shall be held at the courthouses thereof, in each year as follows," etc. It is here declared that the courthouse is the place where the several courts shall be held. In the case of *Ex parte Branch*, 63 Ala. 383, construing the constitutional provision that "a court of chancery shall be held in each district at a place to be fixed by law, at least once in each year," it is said: "A term and a place of sitting have been so long by the general assembly appointed for every court of record, whether of superior or inferior jurisdiction, that involuntarily we regard them as elements of jurisdiction; and that rightful, judicial function, unless it is otherwise expressly provided, can be exercised only when the court is in actual session at the appointed time and place." When the law prescribes time and place, time and place are as essential elements of jurisdiction as subject-matter and parties. *Cullum v. Casey*, 1 Ala. 351; *Wrightman v. Karsner*, 20 Ala. 446; *Garlick v. Dunn*, 42 Ala. 404. The verdict of the jury was not received by the court, but by the judge, not sitting as the court. The jury was not discharged, in legal sense, but dissolved, and finally separated, without just cause or excuse, and without the rendition of any legal verdict. The prisoners had been placed in jeopardy. They cannot again be placed in jeopardy for the same offense. *McCauley v. State*, 26 Ala. 135; *Cobia v. State*, 16 Ala. 781; *Ned v. State*, 7 Port. (Ala.) 187; *Thomp. Trials*, § 2632. An order will be made by this court discharging the prisoners from further custody for the offense for which they were indicted and put upon trial. The jury should have been kept together until court convened in session. Reversed, and defendants discharged.

(102 Ala. 121)

MCNEILL v. STATE.

(Supreme Court of Alabama. April 11, 1894.)

HOMICIDE—DEGREE—ADULTERY OF WIFE—REMARKS OF COUNSEL.

1. If a man does not kill his wife, whom he has caught in the act of adultery, until there has been time for his passion to cool, or if he kills her immediately, but is not moved thereto by the heat of passion, but by prior malice, hatred, or by any other motive except such as is presently engendered by his rage caused by such provocation, he is guilty of murder.

2. If there was time for his passion to cool, such person is guilty of murder, though his rage actually continued, and caused him to strike the fatal blow.

3. On a prosecution for murder, remarks by the prosecuting attorney to the effect that defendant should be hung rather than sent to the penitentiary, as in the latter case he might be pardoned, are not objectionable.

4. A general charge by the court "ex mero motu" will be considered as an entirety, and in connection with the evidence, and if, so considered, it correctly states the law, it will not furnish ground for reversal, though a single clause, considered alone, is erroneous.

5. In a prosecution of a husband for killing his wife, an instruction that the jury may consider the want of virtue of deceased in determining whether defendant is guilty of murder is properly refused.

Appeal from city court of Mobile; O. J. Semmes, Judge.

William McNeill was convicted of murder in the first degree, and appeals. Affirmed.

The evidence for the state, as shown by the bill of exceptions, tended to show that on the morning of September 3, 1893, Catherine McNeill, the wife of defendant, was found dead in her bed in Mobile county, with a wound made by an axe on the right side of her head, just above the right ear, and that an axe was found on the bed near her body. The evidence further tended to show that the deceased went to bed about 11 o'clock on the night of the 2d of September, 1893; that there was sleeping in the same room with the deceased, but in a different bed, the niece and nephew of deceased, 14 and 12 years of age, respectively; that deceased took nothing to her room with her when she went to her room that night, except her baby and hat; that, some time before day, the niece awoke, and saw the defendant leaving the room hastily, and heard him run down the stairs leading from the room; that the niece immediately went back to sleep, and heard or saw nothing more until she was awakened in the morning. It was further shown by the evidence for the state that the deceased was washing for one Marvary, who had married defendant's sister, and that, on the evening before the killing, said Marvary and his wife came to the premises of deceased, and Marvary's wife asked deceased for one of Marvary's shirts, which had been left with her; that the deceased refused to give it to her, and a quarrel ensued, and, after the police were called, Marvary and his wife left the premises; that, after Marvary and his wife had gone some distance, they separated,

his wife going home, and he going back to the room of deceased, where he knocked several times, and, failing to get any response, he went away; that he met defendant a short distance from the house, and had a conversation with him about some accusations made by defendant as to Marvary's relations with defendant's wife; that Marvary denied these accusations, and, after cursing defendant, went on home, arriving about 12 o'clock, and spent the rest of the night at his home. It was also in evidence that defendant had told the chief of police, and had stated on his preliminary trial, "that he was at home on the evening on which the quarrel above referred to between Marvary and his wife took place; that he started for Spring Hill shortly after Marvary and wife left the place. He proceeded a short distance, when he became suspicious, and returned to the place where his wife was; that, finding the door locked, he suspected that some one was in his wife's room, and went out on a shed adjoining the gallery, and from that position discovered Marvary and his (defendant's) wife in the act of adultery; that he went to his wife's room door, and waited until Marvary came out, when he accosted him; that, after Marvary went off, he (defendant) went into his wife's room, and accused her of infidelity; that he was attacked by his wife with an axe, which had been previously concealed behind the bed; * * * that he took the axe from his wife, and in a moment of passion struck her once on the head, and she fell on the bed; that he then fled, and remained in hiding a few days, and then surrendered himself at the county jail." There was also introduced by the state two witnesses, whose testimony tended to show that they passed up the steps leading to the room occupied by deceased, and along the door of the room, the night she was killed, at different times between the hours of 1 and 4 o'clock, and they did not see any one at the door. The evidence on the part of the defendant was substantially the same as what he told the chief of police, which is copied above. The defendant also introduced a number of witnesses, who testified that the general reputation of the defendant for peace and quiet was good. The court, as a part of the general charge to the jury, instructed them in writing as follows: "As mitigation in this case, the defendant claims that the defendant had discovered his wife in the act of adultery at or shortly before the time of the killing. The law is that if a man discovers his wife in the act of adultery, and his passion was greatly aroused, and through this passion he strike and kill his wife, it would not be murder, but manslaughter. *The law does not say, that under all circumstances, a man is not guilty of murder if he kill his wife, even if in the act of adultery at the time of the killing. The test is does the slayer slay by reason of passion aroused or induced by revenge or malice? If a wife has lost her virtue, and continues*

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to defile her marriage bed, and the husband knows this, and after so knowing, and after reflection, while the mind is coolly operating, kills her to avenge his wounded honor, and not by reason of passion, it would be murder, not manslaughter. Therefore, in the case at bar, gentlemen of the jury, if you should find from the evidence that the defendant caught her in the act, and, through the influence of passion, shortly thereafter killed her, this would be manslaughter; but if you should find that the defendant caught his wife in the act of adultery, and before the killing there was sufficient cooling time, and a man kills his wife through hatred and revenge, this would be murder, and not manslaughter."

The defendant separately excepted to the giving of each portion of the general charge italicized at the time each such portion was given; and also separately excepted to the court's refusal to give the following written charges requested by him: "(1) The court charges the jury that if from the evidence they cannot tell who provoked the difficulty, that it is their duty to give the defendant the benefit of the doubt, no matter how slight its weight. (2) The court charges the jury that they may take into consideration, if proved, the want of virtue of the deceased, in determining whether the defendant is guilty of murder in either degree. (3) If the jury believe from the evidence that there was a motive which prompted the defendant to kill his wife, it is their duty to ascertain what that motive was, and if the evidence tends to show that the motive that prompted the killing was the infidelity or adultery of the wife on the night of the killing, and that the killing was the result of passion, they ought not to find the defendant guilty of any offense beyond manslaughter in the first degree. (4) If the jury believe from the evidence that there was a motive which prompted the defendant to kill his wife, it is their duty to ascertain what that motive was, and if the evidence tends to show that the motive which prompted the killing was passion, engendered by the infidelity or adultery of his wife, they ought not to find the defendant guilty of any offense beyond manslaughter in the first degree." The bill of exceptions contains the following recital: "The solicitor for the state said to the jury in his argument: 'I submit you ought not to sentence this man to imprisonment, because there might be a pardon granted through the influence of his friends exerted in his behalf; that a petition might be circulated, and the signatures of many good and influential citizens obtained, who sign without looking at the petition, or who are too tender-hearted to refuse to sign; even you, gentlemen of the jury, may be importuned to sign such a petition. You should sentence him to be hung, and run no such risk.'" To this argument by the solicitor the defendant objected. The court overruled the objection, and defendant duly excepted.

Saml. B. Browne and Henry Tonsmeire, for appellant. Wm. L. Martin, Atty. Gen., for the State.

MCLELLAN, J. The general charge of a trial court, given ex mero motu, with reference to any point, is to be considered as an entirety, and in connection with the evidence; and it "should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of the context; and if any part, when so considered, limited, or expended, asserts the law correctly, it will not furnish ground for reversal, however faulty the clause might be, if its meaning were not controlled by prior or subsequent passages." *Railroad Co. v. Stewart*, 91 Ala. 421, 427, 8 South. 708; *Williams v. State*, 83 Ala. 68, 3 South. 743; *O'Donnell v. Rodiger*, 76 Ala. 222; *Railroad Co. v. Orr*, 94 Ala. 602, 10 South. 167. Considered in this way, and probably even without reference to the principle just stated, that part of the court's general charge to which exceptions were reserved asserts no more than this: That if a man find his wife in the act of adultery, and, provoked by the wrong done him, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter only; but that, on the other hand, if he does not strike and kill until after there has been time for his passion to cool and for reason to reassert itself, or if he strikes and kills immediately, but is not moved thereto by the heat of passion, but by prior malice, hatred, a desire to avenge the wrong done him, or by any other motive, or upon any design whatever except such as is presently engendered by the paroxysm of rage into which he is thrown by this extreme provocation, he is guilty of murder. And this, beyond all doubt, is the law. 2 Bish. Cr. Law, § 708; Whart. Hom. §§ 407-412; 9 Am. & Eng. Enc. Law, p. 578 et seq.

Charge 1 requested by the defendant is bad in that it assumes there was a difficulty at the time of the mortal blow between defendant and deceased, when the evidence for the state tends to show that the deceased was stricken while she slept.

Charge 2 requested for defendant is palpably vicious in that its direct tendency was to have the jury find the defendant guilty of murder or not, as they should find the deceased to have been a virtuous or lewd woman.

Charges 3 and 4 were properly refused to defendant for that they premit all inquiry as to whether there had been time for defendant's passion to cool after he caught his wife in the act of adultery, if indeed he did see her in the act of adultery, and prior to inflicting the mortal blow upon her. If there had been such time, it is wholly immaterial whether the passion aroused by the act of adultery had cooled or not, for, though

the paroxysm of anger and rage in fact continued and moved the defendant to the fatal blow after the lapse of sufficient cooling time, yet would he still be guilty of murder. These instructions, moreover, are, to say the least, confused, self-contradictory, and misleading, in that they assume there may be a motive for an act which is superinduced by and done in the heat of passion. The absence of motive is essential to the ascription of the act to unreasoning fury, and, where there is motive, the killing is murder, and not manslaughter.

The court committed no error in its action with reference to that part of the solicitor's argument to which objection was made. No fact was stated by him, but, to the contrary, all he said was but the expression of his opinion or anticipation as to what would be the result of committing the defendant to the penitentiary for life instead of inflicting the death penalty,—an argument for the death penalty proceeding on considerations the reasonableness of which was as much open to the jury as to counsel, and nothing said was beyond the limitations put upon the remarks of counsel to the jury by repeated decisions of this court. *Cross v. State*, 68 Ala. 476; *Railroad Co. v. Bayless*, 75 Ala. 466; *Wolfe v. Minnis*, 74 Ala. 336; *Noble v. Mitchell* (Ala.) 14 South. 581; *Railroad Co. v. Harris* (Ala.) 13 South. 377. The judgment of the city court must be affirmed; and, the time originally fixed for the execution of the sentence of death imposed thereby having passed, it is here ordered and adjudged that the sheriff of Mobile county will, on Friday, the 18th day of May, 1894, proceed to execute said sentence in the manner prescribed by law. Affirmed.

(162 Ala. 615)

PARRISH v. STEADHAM.

(Supreme Court of Alabama. April 12, 1894.)
STATUTE OF FRAUDS—SALE OF LAND—ACTION FOR PRICE—ESCROW.

1. Under Code Ala. § 1732, subd. 5, which excepts from the statute of frauds parol contracts for the sale of land where "the purchase money, or a part thereof, is paid, and the purchaser put in possession of the land," an action will lie for the balance of the price, though the purchaser never executed any written agreement to purchase.

2. Where the delivery of a deed to a buyer's agent is absolute, the buyer cannot make it an escrow by requesting the agent to hold it until the price is paid.

Appeal from circuit court, Franklin county; H. C. Speake, Judge.

Action by Mrs. W. A. Steadham against Alfred Parrish. From a judgment for plaintiff, defendant appeals. Affirmed.

For prior report, see 9 South. 353, 93 Ala. 465.

The complaint contained the common counts, and a special count on a contract for the sale of a tract of land by the plaintiff to the defendant, alleging that she executed a

deed to him, that she had paid a part of the purchase money, had promised to pay the balance, and was placed in possession of the land. The defendant made a motion to dismiss the attachment upon several grounds, which were, in substance: (1) That the demand of the plaintiff for which the attachment was sued out was an equitable, and not a legal, demand, and that an attachment at law could not be sued out therefor; and (2) that no such contract had been entered into by the defendant as was binding upon him under the statute of frauds. This motion to dissolve the attachment was submitted on an agreed statement of facts, which was substantially as follows: On February 6, 1890, the defendant offered to buy from the plaintiff a certain tract of land for \$2,400. The plaintiff accepted this offer, and the defendant paid her \$10 in cash, and agreed, orally, to pay her by the 15th of March following the balance, to wit, \$2,390; that thereupon the plaintiff executed and delivered the following written instrument: "Russellville, Ala., Feb. 6, A. D. 1890. For and in consideration of ten dollars to me in hand paid, and a further sum of two thousand three hundred and ninety dollars to be paid to me on or before the 15th day of next March, I hereby sell and transfer to Alfred Parrish, of Philadelphia, Pa., all my right, title, and interest in the eighty acres of land on the hill south of Fossick's quarry in Franklin county, Ala., and adjoining the lands of the Mabel Mining Co. My said rights specially include the mineral rights of ingress and egress. I also agree to sign a more formal deed than this, upon the payment of the consideration money in full, or the half thereof. Witness my hand and seal, the day and date above written. [Signed] Willie A. Steadham." The defendant received this written instrument, and it was in his possession at the time of the trial. On the same day of the purchase, the defendant took possession of said lands, and did a good deal of work thereon, by digging for iron ore. On the day after the purchase, February 7, 1890, the defendant wrote to his attorney the facts of the purchase of the tract of land, directing him to prepare a proper deed, and have the plaintiff to execute the same. In obedience to this letter, the defendant's attorney prepared a deed, which was duly executed by the plaintiff, and given to the attorney, who afterwards delivered it to the defendant. Upon the examination of this deed the defendant discovered that there was a conveyance of greater mineral rights than he purchased from the plaintiff, and therefore requested his attorney to redraught a deed, and have it again executed by the plaintiff. This was done, and the second deed delivered to the defendant, who asked his attorney to hold it for a few days, until he received the money which he was to pay to the plaintiff. With the exception of the \$10 paid in cash, no part of the purchase money has been

paid by the defendant. The motion to dissolve was sustained, and upon issue joined upon the pleas interposed by the defendant, alleging substantially the same defense as that contained in the motion for the dissolution of the attachment, evidence was introduced tending to show the same facts as those above stated. At the request of the plaintiff, the court gave the general affirmative charge in her behalf, and to the giving of this charge the defendant duly excepted. The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe all the evidence in this case, they should find a verdict for the defendant under the first count of the complaint, which claims \$2,390 due by account. (2) If the jury believe all the evidence in this case, they should find in favor of the defendant on the count of the complaint which seeks to recover on an account stated. (3) If the jury believe all the evidence in this case, they should find for the defendant on the last or special count of said complaint, for the sale and conveyance of the lands mentioned in said count. (4) If the jury believe all the evidence in this case, they should return a verdict for the defendant."

Roulhac & Nathan, for appellant. Key & Hester, for appellee.

HEAD, J. We are unable to see how the appellant proposes to take this case without the influence of the decision of this court, made when it was here at a former term. 93 Ala. 465, 9 South. 358. As then presented, it was simply a case of a sale by Steadham to Parrish of 80 acres of land at an agreed price, a part of which was paid in cash, the balance agreed to be paid at a specified time in the future, and actual possession of the land sold delivered to the purchaser, who actually enjoyed the possession and use thereof. The purchaser had not bound himself by any instrument in writing to pay the future maturing debt. The statute of frauds was fully met by part payment of the purchase money and delivery of possession, and we held, in effect, that an action could be maintained by the vendor to recover the unpaid purchase money, although the contract, on his part, binding him to execute a deed, still remained unexecuted. As the case is now presented, it is fortified by the further agreed fact that the plaintiff (vendor), before suit brought, executed and delivered, unconditionally, to defendant's duly-authorized agent, a deed conveying the land to defendant. It makes no difference that by the terms of the original contract the purchaser was not entitled to a deed until he paid one half the purchase money. It was competent for the parties to waive or modify that provision, and this was done when the defendant's attorney, at his request, procured the

plaintiff to execute and deliver the deed to him. Nor is the plaintiff to be affected by the fact that the defendant, when his attorney handed him the deed, immediately returned it to the attorney, with the request that he hold it in escrow until he (defendant) should pay plaintiff the purchase money. The delivery of the deed by plaintiff to the attorney was absolute and unconditional. It was effectual as a conveyance to defendant of the legal title from that moment, and nothing the defendant and the attorney could do between themselves, without the knowledge or assent of plaintiff, could affect him. We have no doubt whatever of the plaintiff's right to recover upon the common counts, on an account and account stated, as well as upon the special count, and that the rulings of the circuit court were free from error. Affirmed.

(102 Ala. 631)

HUDSON v. WOOD.

(Supreme Court of Alabama. April 12, 1894.)

PRACTICE—PLEADING OUT OF TIME—MOTION TO STRIKE.

Acts 1890-91, p. 605, creating the district court of Lauderdale county, adopted the practice of the circuit court, and page 351, regulating the circuit court practice, provided that the defendant should demur or plead to the complaint within 30 days after service, or be in default, and judgment rendered against him. It was further provided that such judgment may be set aside and demurrers or pleas filed on such terms as the court may deem just, but not unless an affidavit is made that there is a lawful defense to the action. Defendant, more than 30 days after service, but before entry of default, filed pleas. Plaintiff moved to strike the pleas from the file, and for judgment. Defendant refused to make affidavit of meritorious defense. *Held*, that the court's action in granting the motion would not be reviewed on appeal.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Action by Sallie E. Wood against W. A. Hudson on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was commenced on April 21, 1891. The summons commanded the defendant "to appear at the next term of the district court to be held for said county, at the place for holding the same, then and there to answer the complaint of Mrs. Sallie E. Wood." This summons was executed on the defendant April 28, 1891. On June 1, 1891, which was the first day of the June term of said court, the defendant entered appearance by his attorney, Mr. Parkins, on the docket of said court, pleas were filed, and a trial by jury was demanded at the time of filing the pleas. On July 10, 1891, the plaintiff's attorney moved the court to strike defendant's pleas from the file, because they were not filed within 30 days from the service of the summons and complaint upon the defendant. In response to said motion, the court said that Mr. Parkins was marked as attorney for defendant, and he would hear

him before deciding the question, and that he would not strike the pleas from the file if an affidavit was made, either by the defendant or his attorney, that there was a meritorious defense to the action. On the following day, the plaintiff renewed his motion, which was resisted by the defendant, who demanded to be allowed to try the case on his pleas, filed June 1, 1891. Thereupon the court asked the attorney for the defendant to state in open court that his defense was a meritorious one. This the defendant's attorney declined to do, saying that his pleas were on file, and that they attested the legal sufficiency of his defense. After hearing the argument, the court ordered the pleas stricken from the file, and thereupon rendered judgment *nisi* dict against the defendant, which judgment is here assigned as error.

Nathan Parkins, for appellant. Emmett O'Neal and Pickett & Crow, for appellee.

HEAD, J. The practice and proceedings in the district court of Lauderdale county are regulated by special law. See act creating that court, adopting the practice of the circuit court (Acts 1890-91, p. 605), and act regulating circuit court practice (Id. p. 351). By the latter, it is provided that the defendant shall be required to appear and demur or plead to the complaint within 30 days after the service of the summons and complaint upon him, whether such service be made in term time or vacation; and any defendant, failing for more than 30 days after service has been perfected upon him to appear and demur or plead, shall be "held to be in default, and at any time thereafter judgment by default, on motion of the plaintiff, may be rendered against him." It is provided that the court may, for good cause shown, allow the judgment by default to be set aside, and demurrers or pleas to be filed, on such terms as the court may think just, but not unless affidavit is made by the defendant, his agent or attorney, that, in the belief of affiant, the defendant has a lawful defense to such suit. The general practice in the state is that when the term of the court is one week, the defendant must plead or demur within the first two days of the return term, and, when more than one week, within the first three days (Code, § 2732); and by the ninth, tenth, and eleventh rules of circuit court practice (Id. p. 807) defaults may be entered on the docket, in vacation, which shall relate to the preceding term, and advantage thereof may be claimed at the next term; and, after default so entered, the party claiming the benefit thereof shall not be bound to receive any plea or pleading of the party so in default. On timely application, on affidavit showing merit and a sufficient matter of excuse, a default may be set aside on such terms as the court may impose. Under this general practice, it was held by this court in *Woosley v. Railroad Co.*, 28 Ala. 536, that, construing

the several provisions of the statute and rules together, the defendant had a right to plead at any time before the default is entered. That decision, we think, is undoubtedly correct. It was reaffirmed in *Rhodes v. McFarland*, 43 Ala. 95, and *Wagnon v. Turner*, 73 Ala. 197. The provision that, after the default is entered, the party claiming the benefit of it shall not be bound to receive any plea of the party so in default, clearly implies that such plea shall be received at any time before the default is entered. The special law by which this case is governed supersedes the general practice so far as it would apply to Lauderdale district court. By it the failure to demur or plead within 30 days after service operates *proprio vigore* to establish the defendant's default, without action on the part of the plaintiff claiming the benefit thereof; and thereafter the plaintiff is, by the terms of the act, entitled to a judgment by default on his motion. The default so created operates an admission of the cause of action, which the defendant has no right to qualify or withdraw by filing pleas putting in issue the allegations upon which the cause of action rests, or otherwise defending against the plaintiff's right to a judgment, unless upon leave of the court first had and obtained; the power to grant which leave is inherent in the court, by virtue of its general control over its practice and proceedings. If a defendant, so in default, without leave puts a plea upon the file, the court, in its discretion, may strike it therefrom. It is confided to the court, in all such cases, to see that justice is done, and its discretion will be exercised to that end. We held in *Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. 333, construing a similar act, that it was within the discretion of the trial judge to allow or refuse to allow a plea to be filed after the 30 days, and that his discretion cannot be reviewed or controlled on appeal. The same rule applies to the court's action striking or refusing to strike from the file a plea filed without authority. We would remark, however, that in the present case this discretion seems to have been most wisely exercised by the trial judge. After the motion to strike, the defendant was given time to file affidavits of merit. This he failed to do. The court then took a step further, and offered to permit the pleas to remain, if defendant's counsel would state, in his place, that the defense was a meritorious one, which the counsel declined to do, saying that his pleas were on file, and that they attested the legal sufficiency of his defense. It would be a very unwholesome rule that would deny to the court the right to strike out the pleas in such a case. In *Glass Co. v. Paultk*, 83 Ala. 405, 3 South. 800, and *Land Co. v. Morgan*, 88 Ala. 434, 7 South. 249, we ruled that the objection that a judgment was by default instead of *nil dicat* relates to a mere matter of form, and is without merit, especially when made by the defendant. It may be different

when the plaintiff complains. 83 Ala. 405, 3 South. 800, *supra*. The judgment of the district court is affirmed.

(46 La. Ann. 1168)

DEAN et al. v. BECK. (No. 11,395.)

(Supreme Court of Louisiana. May 21, 1894.)

LANDLORD AND TENANT — DISSOLUTION OF LEASE — LACHES.

Where, pending a lease, work has to be done, which should have been done prior to the lease, in order to place the building leased in the condition in which it should have been to fulfill the lessor's warranty that it was fit and appropriate for the known use to which it was to be applied, the lessee has the legal right to a dissolution of the lease. The extent of the work to be done, and the extent of the inconvenience to be suffered by the lessee, do not control the rights of the lessee as to a dissolution. The warranty is indivisible.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Dean & Cazenavette against Theodore A. Beck for dissolution of a lease. Judgment for plaintiffs, and defendant appeals. Affirmed on condition.

Denegre & Denegre for appellant. Horace E. Upton and Lloy R. Posey, for appellees.

NICHOLLS, C. J. On the 3d of November, 1890, the defendant leased to the plaintiffs, for a period of 11 months commencing on the 1st of November, 1890, certain property in the city of New Orleans, for the sum of \$2,200, payable in monthly installments of \$200 each, represented by promissory notes of the lessees indorsed by Paul Conrad. The lessees took possession of the building, but, after occupying it for a short time, left the same, and instituted the present suit for a dissolution of the lease, and claiming \$800 as actual, and \$10,000 as exemplary and punitive, damages against the defendant. Defendant resists the demand, and, admitting the plaintiffs had paid the first month's rent, reconvenes, praying for a judgment for \$2,000 as still due under said lease and on said notes against the plaintiffs and Paul Conrad, who, on their prayer, was made a party to the suit. The case was tried by a jury, which returned a verdict in favor of the plaintiffs for the sum of \$100, and also in their favor on the defendant's reconventional demand. Defendant appealed.

Plaintiffs allege that about the 1st of November, 1890, they formed a copartnership with the object and purpose of carrying on the business of warehousemen; that they required for said business a suitable building; that they found what they considered,—not having before engaged in that business,—a suitable location for conducting it at Nos. 59 and 61 Decatur, the property of the defendant; that they called on him, and were by him informed that the house and premises were particularly fitted, eminently proper, and thoroughly safe for said business;

that the building was so strongly constructed that it could bear all the weight of all the goods of any character whatever that could be stored there; that under such a statement, and owing to the safe appearance of the house, it being lately built, they rented the same, and commenced business, after fitting up the establishment with furniture, tools, an elevator, etc., at considerable cost. They aver that the building and premises were wholly unfit and dangerous for the purpose and business for which they were rented to them by the defendant; that he well knew that it was unsafe, unsound, and unfit, both in foundation and superstructure, for the business, and he falsely and purposely misrepresented the facts, misleading them into the belief that the premises were in every respect adapted and perfect for the said business of a warehouse for sugar and molasses; that thus, by fraud and bad faith on the part of the defendant, they were prevailed upon to enter into said contract of lease; that they began business under the most favorable auspices, and with brightest prospect of success; that, after they had received 900 sacks of rice, 119 hogsheads of sugar, 1,450 barrels of sugar, and 1,150 barrels of molasses, weighing altogether about 1,518,250 pounds, over one-half of which was stored on the basement floor, they were suddenly forced to stop receiving and storing goods, because the building proved unable to support the said weight, and began to sink and give way, and it became at once apparent that it was unfit and useless for a warehouse; that in the mean time they were obliged to refuse offers from various parties to store sugar and molasses, more than sufficient to fill the premises, because of the defective and dangerous condition of the building; that it got out of level, and its foundations gave way, owing to the defective condition and construction of the same, and they were obliged to discontinue their business altogether; that, notwithstanding effort on their part, they were unable to find any other building convenient and suitable for their business, and through the malicious and false representations of the defendant they were deprived of the means of conducting a business which would have been very lucrative, and would have yielded them during the term of the lease (including the term for which renewal had been stipulated therein) at least \$10,000 net; that they notified defendant without delay that they considered the lease null and void by reason of said defects and unfitness, and that they would vacate the premises, and hold him for damages; that they had complied with all their obligations under the lease, and had paid the first month's rent, which they were entitled to recover; that by reason of the sinking of the building they were compelled to notify all the owners or their agents of the goods stored with them to remove the same, and they had refused to pay the storage due

at the time on the same, which amount, as well as the labor thereon, they were entitled also to recover. Answering the charges made in the petition, defendant, after denying generally all plaintiffs' allegations, says that the premises rented were not improper, unfit, unsafe, or unsound; that they were examined by the plaintiffs before the lease was entered into, and, if any damage or inconvenience was caused plaintiffs, it was because of their own reckless, negligent, and improper use of the premises; that through some unforeseen event some of the posts holding up a part of the building sank a few inches, but the flooring did not fall in or give way; that, immediately upon being notified of the fact, he had the proper repairs made, with as little inconvenience as possible to the plaintiffs, and all were done and completed inside of eight days; that he offered to allow a rebate in the rent for the time and space occupied while the repairs were going on, but the plaintiffs refused to consider the question, and claimed excessive damages.

The questions we have to decide are, first, whether the plaintiffs, having leased the premises described in the petition, and taken possession of the same, were justified in subsequently vacating the building under the circumstances disclosed in the record, and repudiating the contract, and claiming damages from defendant, or whether the latter be entitled to rent, and, if so, to how much rent. The plaintiffs maintain (and the testimony of Dean and Ker sustain the contention) that prior to leasing the property several interviews took place between the parties, at which the lessor was advised of the business upon which plaintiffs were about to enter, the use of the building which they sought to lease, and the character of the building needed for that purpose; that the defendant represented to them that his building would meet the necessity of the case, and was what they needed; that they entered into the contract of lease relying upon the correctness of these representations, which subsequent events showed to be untrue. The defendant denies that any such representations were made, but his own testimony is not as positive, as emphatic, and direct as it should have been. The reference made by him, prior to the lease, of the storing capacity of the Kelly building, which he evidently admitted very reluctantly on cross-examination, indicates that the subject-matter of the capacity and strength of his own building was under discussion, and this reference was made clearly in incidental support of the merits of his own building. Defendant's answer contains a declaration that he rented the "warehouse" to the plaintiffs, and this allegation sustains plaintiffs in their position as to the knowledge by the defendant of the contemplated use of the building, and its lease for a warehouse. Plaintiffs took possession of the premises about the 10th of November, and immedi-

ately commenced business as warehousemen for sugar, molasses, and rice. The building was at no time completely filled. The precise distribution of what they did have on hand on the 10th of December is shown neither by plaintiffs nor defendant. Sugar and molasses are said to have been stored in some places two tiers high, and in others three, but the exact place where this was is not disclosed. The building is a long one, with nine supporting posts distributed lengthwise through the center, and resting on brick foundations of uniform size and character. On the morning of the 10th of December the three back posts were observed to have settled considerably, bringing down correspondingly the flooring with them, and the portion of the roof over them. Plaintiffs at once notified the defendant of the situation. Workmen were immediately sent to the building, under the direction of an architect, who prized up and took out the flooring near the three posts, as well as the posts themselves. The foundations on which the three posts rested were taken out, and made deeper and broader; a portion of the wall, which had "bulged" somewhat from the sinking of the posts, was straightened; the posts were replaced, and the roof raised to its original position. Only eight or nine days were consumed in this work, but plaintiffs had made up their minds to throw up the lease, and vacate the premises. Owners of the property on storage were called on to withdraw the same, and, as soon as this was done, plaintiffs left the premises, after notifying the defendant, and tendering him the keys of the establishment. Defendant refusing to receive the keys, they were left at a corner store, subject to his orders. We may here say that after some delay defendant took the keys, and in July occupied a portion of the building for his own purposes. We may also say here that in the mean time the defendant unsuccessfully attempted to lease the building for the account of the plaintiffs.

Considerable testimony was taken in the lower court as to the weight a building should be able to bear per square foot in order to be held and considered a building proper and suitable for warehouse purposes, and as to whether the particular house leased to plaintiffs came up to the required standard. As might be expected, there was a difference of opinion on that subject. The jury adopted the views of the plaintiffs' witnesses on both points, and we cannot say they erred. It is very certain that defendant, when he sent his workmen to the building after the sinking spoken of, caused the foundations on which the posts rested to be made considerably deeper and broader, thereby recognizing the necessity for a change. This change was not confined to the particular post under which it is claimed a soft spot, up to that time unknown (occasioned by the existence there at a former time of a well), was discovered, but extended to all three of the posts at the back

end of the building. There was some claim that plaintiffs had overloaded the building, but the answer ascribes the sinking not to this, but to an "unforeseen event," which defendant's testimony points out as the "soft spot" just mentioned. Even if the building were overloaded beyond the actual bearing capacity, there is nothing to show that it would have been overloaded had that capacity been up to standard requirements. Defendant claims that the work called for by the sinking of the post was in the nature of "repairs," and not "reconstruction;" that plaintiffs were put to no serious inconvenience, as they were not forced to leave the house; that the repairs worked an interruption (such as it was) of plaintiffs' business for only eight or nine days; that the building, except at the particular place where the sinking took place, was staunch and strong, and that the partial trouble gave no right to a dissolution of the lease, but at best to a reduction of rent. He relies particularly on article 2700 of the Revised Civil Code. The work done in this case was work which was necessary to have been done prior to the lease in order to have placed the building in the condition in which it should have been to fulfill defendant's warranty that it was fit and appropriate for the known use to which it was to be applied. This warranty is indivisible. *Caffin v. Redon*, 6 La. Ann. 488. The work itself was a "betterment," not mere "repairs," and could only be done during the lease, subject to plaintiffs' legal rights in the premises. The rules referred to by the defendant are not applicable under the conditions of this case. Defendant contends that plaintiffs inspected the building themselves prior to contracting, and recognized in the act of lease that it was in good condition. The building was a new one. The condition referred to was the outward apparent condition. The foundation under the posts which gave way or sunk were hidden from view. It is claimed that the real motive of the plaintiffs in asking a dissolution of the lease is to be found in the failure of their business venture, independently of the building. That may be, but, if the circumstances of the case justified an abandonment of the premises, their motives in exercising the legal right do not affect the situation. We think the jury erred in condemning the defendant to pay plaintiffs \$100. If plaintiffs have suffered any damage in this matter, the proximate cause thereof is not due to the defendant. For the reasons herein assigned, it is ordered, adjudged, and decreed that so much of the verdict of the jury as condemns the defendant to pay the plaintiffs \$100, and the judgment of the court below, based on said portion of the verdict, be, and the same is hereby annulled, avoided, and reversed. The verdict and judgment otherwise are hereby affirmed; defendant to pay the costs of the lower court, plaintiffs and appellees to pay costs of appeal.

(46 La. Ann. 307)

STATE v. COURCIER. (No. 11,399.)
(Supreme Court of Louisiana. May 14, 1894.)

CRIMINAL LAW—APPEAL—RESTRICTED ISSUE.

On appeal from a judgment of the recorder's court of the city of New Orleans finding a person guilty of having violated an ordinance of that city, and imposing upon the party charged, as provided for in the ordinance, a fine of \$25, or, in default of payment, imprisonment for 30 days, the case is not before the supreme court generally, but only upon the restricted issue of the constitutionality and legality of the fine and penalty imposed by the municipality. Therefore it cannot, when that remedy is resorted to, examine into and pass upon the question as to whether the person who presided at the trial and rendered and signed the judgment was legally authorized so to do. For the same reason it cannot grant relief when the complaint made by the accused is that, under the charge as made and the evidence as received, the judge has sentenced him, not under an illegal ordinance, but without the authority really of any ordinance at all, and therefore without warrant of law.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; Thomas R. Adams, Judge.

Dasyva Courcier was convicted of cashing a ticket of an illegal lottery company, and appeals. Affirmed.

Lionel Adams, for appellant. M. J. Cunningham, Atty. Gen. (C. H. & C. C. Luzenberg, of counsel), for the State.

NICHOLLS, C. J. The defendant, charged with having violated an ordinance of the city of New Orleans, was tried in the first recorder's court of that city, was found guilty, and sentenced to pay a fine of \$25, or, in default of payment of said fine, to imprisonment in the parish prison for the term of 30 days. The trial was conducted before, and the judgment rendered and signed by, Samuel Levy, signing himself "Acting Judge of the First Recorder's Court of New Orleans." The defendant has appealed.

The affidavit on which he was arrested charges: "That on the 16th day of October, 1893, at about — o'clock — m., on Baronne street, between Gravier and Union streets, in this district and city, one to be pointed out did then and there violate Ordinance No. 92, C. S., relative to illegal lottery tickets, by cashing or paying a prize supposed to be drawn by a ticket of an illegal lottery company; wherefore deponent charges the accused with violating ordinance No. 92, C. S., and prays that he be arrested and dealt with according to law." The affidavit was taken before T. R. Adams, signing as "Assistant Recorder." Before trial, defendant pleaded: (1) "That Samuel Levy, a resident of the fifth district of the city of New Orleans, is not competent to sit and act as a recorder pro tem. in and for the first recorder's court for the city of New Orleans." (2) "Because the affidavit sets out no offense known to the law." The court overruled these pleas and defendant excepted to the ruling.

Ordinance No. 92, referred to, is as follows: "(1) That it shall be unlawful for any person or persons to sell, barter, exchange, or otherwise dispose of any lottery ticket or token, policy, combination, device or certificate or fractional part thereof in any lottery drawn or to be drawn in or out of the city of New Orleans unless the same be duly authorized by the laws of the state of Louisiana. (2) That any person or persons violating the provisions of this ordinance shall upon conviction before the recorder within whose jurisdiction the offense was committed, be condemned by said recorder to pay a fine of twenty-five dollars for each offense and in default of payment to imprisonment of not less than twenty nor more than thirty days." In the judgment appealed from it is declared that, "considering the evidence adduced, and the provisions of Ordinance No. 92, C. S., the court adjudges the said Dasyva Courcier to be guilty of having, on the 16th of October, 1893, on Baronne street, between Gravier and Union streets, violated Ordinance No. 92, relative to illegal lottery tickets, by cashing or paying a prize supposed to be drawn by a ticket of an illegal lottery company."

Defendant urges upon us that we should reverse the judgment for the reason that Samuel Levy, who presided at the trial, was not competent to sit and act as a recorder pro tem. in and for the first recorder's court for the city of New Orleans, he being a resident of the fifth district of the city of New Orleans. Assuming this exception to be well founded in law and in fact, we would not be authorized, in this proceeding, to so declare. This case is before us on appeal, not generally, but on the special restricted issue of the constitutionality and legality of the fine, forfeiture, or penalty of a municipal corporation. We cannot extend our inquiries beyond that issue. This court reversed the judgment of the district court in two criminal cases (State v. Phillips, 27 La. Ann. 663, and State v. Fritz, Id. 689) upon an assignment of error involving the competency of the person who presided as judge on the trial of those cases; but the supreme court had full and complete appellate jurisdiction over them for all purposes.

Defendant next contends that the judgment should be reversed for the reason that the affidavit on which he was tried sets out no offense known to the law, but that, if the ordinance was intended to, and did, as a matter of law, by implication prohibit the act complained of against the defendant, in that respect the ordinance was null and void, for the reason that the purpose of the common council was not disclosed by the prohibitions of the ordinance, and that the object of the ordinance was not set forth either in the title or in the enacting clause, and that, therefore, defendant was deprived of his constitutional right to be informed of the nature and cause of the accusation

against him. This same objection was interposed in the recorder's court, after the case was tried, but before judgment was rendered therein. In the brief for the prosecution the title of the ordinance is said to be "An ordinance for the purpose of carrying out the provisions contained in paragraph 12 of section 8 of the present city charter," though the copy in the record is headed, "Unlawful Sales of Lottery Tickets." Whether it be one or the other, we think the objection which defendant contingently raises as to the title not well founded. We know of no law extending the provisions of article 29 of the constitution so as to make them cover municipal ordinances. We do not think that the question which the defendant seeks to have this court pass upon can, as presented to it in this case, be adjudicated upon. The affidavit charges the defendant with having violated Ordinance No. 92, C. S., and accompanies or bases the charge upon specifications set out. The sufficiency of this affidavit is not before us. As matters stand, the complaint of the defendant is, not that the ordinance itself is illegal or unconstitutional, but that the recorder has made the ordinance apply to a case outside of the terms thereof, and not covered by it. In other words, that under the charge as made, and under the evidence as received, the judge sentenced him, not under an illegal ordinance, but without the authority really of any ordinance of the city at all, and therefore without warrant of law. If this be true, defendant was not without remedy; but the remedy was not by appeal (in the respects we have just been alluding to), as has been attempted here. There being no question before us within our appellate jurisdiction, the appeal is dismissed.

(46 La. Ann. 1407)

STATE v. COURCIER. (No. 11,400.)

(Supreme Court of Louisiana. May 14, 1894.)

CRIMINAL LAW—APPEAL—RESTRICTED ISSUE.

This case is controlled by the decision in *State v. Courcier* (No. 11,399) 15 South. 360.

Appeal from first recorder's court of New Orleans; Thomas R. Adams, Judge.

Dasylya Courcier was convicted of cashing a ticket of an illegal lottery company, and appeals. Affirmed.

Lionel Adams, for appellant. M. J. Cunningham, Atty. Gen. (C. H. & C. G. Luzenberg, of counsel), for appellee.

NICHOLLS, C. J. This case comes before us under the same conditions, and presents the same questions, as those which we have just disposed of in the case of *State v. Courcier* (No. 11,399) 15 South. 360. For the reasons assigned in that case the appeal taken herein is hereby dismissed.

(46 La. Ann. 550)

STATE v. ALEXANDER. (No. 11,442.)

(Supreme Court of Louisiana. May 7, 1894.)

CRIMINAL LAW—FORFEITURE OF APPEARANCE BOND—NOTICE ON PRINCIPAL—APPEAL—DISMISSAL.

1. The appellant was security on an appearance bond. It was forfeited. Notice of judgment, to him, was duly given. Failure to make legal service of notice of judgment of the forfeiture of the bond, on his principal, gives the security no grounds of defense, the parties being bound in solido.

2. The appellant urged that he had right to a devolutive appeal, and a delay of 12 months within which to apply for the appeal. Forfeiture of bonds under the statute of March 11, 1837, has always been regarded as of the character of criminal proceedings. Without that interpretation, this court would be without jurisdiction, for the amount involved in this case is less than \$2,000. Appeals from sentences and judgments, including judgments forfeiting bonds, pronounced in the criminal district court of New Orleans, must be taken in conformity with the statute controlling appeals in criminal cases.

3. The court notices, *ex proprio motu*, that it is without jurisdiction.

4. Nullities may be pleaded by rule, even after appeal. If there are nullities in the proceedings, giving legal rights to the defendant (in regard to them, the court expresses no opinion), they are reserved.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; J. H. Ferguson, Judge.

Sonny Alexander was indicted for inflicting a wound less than mayhem, and Nichols Gasper became surety on his appearance bond. On default, judgment was entered against Nichols Gasper, who appeals. Dismissed.

J. Zach. Spearing, Joseph D. Kiernan, and Bernard Titcher, for appellant. E. A. O'Sullivan, City Atty., for the State.

BREAUX, J. The accused was indicted for inflicting a wound less than mayhem. He executed a bond for his appearance. On the 17th day of January, 1893, the defendant's case was called for trial, and he failed to answer, whereupon, in accordance with the provisions of section 1032 of the Revised Statutes, judgment, on motion of the district attorney, was entered in favor of the state of Louisiana against the accused, as principal, and against the surety on his bond, in solido. Sonny Alexander, the principal, being absent on the 17th day of January, 1893, on that day notice of judgment was served, by leaving it with the security on his bond. The same day, notice of judgment was served upon Nichols Gasper personally. He (Gasper) did not cause it to be set aside for any of the reasons, or by the means, specified in the act. On the 15th day of January, 1894, the security applied for an appeal, which was granted on that day. One year, less a few days, having elapsed from the date of the judgment to the date the appeal was granted, the question as to whether the appeal was seasonably taken suggests itself. No motion is interposed to dismiss

the appeal. It is argued in the brief for appellee that the time for appeal had elapsed.

Notice of Judgment.

The appellant urges that the service of notice of judgment on the principal was a radical nullity. Objection is also made to the service of notice of judgment on the surety. Regarding the principal, however null that service may have been, it does not enable the security to escape from responsibility on the judgment rendered against principal and surety in solido, and duly served personally upon the latter. He has no interest, after judgment, in the cause of the principal on the bond. We do not feel authorized to hold that a notice of judgment, illegal as to the principal, relieves his surety. An absconding principal, upon whom the ordinary service cannot be made, is without right to thus present grounds of defense to the security on the bond.

A Proceeding Criminal in Character.

The appellant seeks to avail himself of the delays in civil proceedings, in which a devolutive appeal may be taken within one year from the date of the judgment. The question of the criminal character vel non of the proceedings in which recognizance and bail bonds are forfeited is not of first impression in the courts of this state. The act of March 11, 1837 (now section 1032 of the Revised Statutes), authorizing the summary forfeiture of bonds, received judicial interpretation a short time after its adoption. It has always been regarded as a criminal proceeding. It is one of the means adopted to insure the prosecution and punishment of criminals. *State v. Cassidy*, 7 La. Ann. 276; *State v. Williams*, 37 La. Ann. 200.

Time Within Which Appeal shall be Taken.

The last utterance bearing directly upon the point at issue was in *State v. Burns*, 38 La. Ann. 363. The appeal was from East Baton Rouge, and came under the operation of Act 30 of 1878, requiring that motion for appeals in criminal cases be filed in the courts, other than those of the first judicial district, during the term at which the sentence shall have been imposed. In that case the sureties on the appearance bond furnished by one of the defendants had appealed from the judgment forfeiting the bond. The court reiterated that which had repeatedly been said,—that the proceeding to forfeit is criminal in its character,—and held that in criminal cases the appeal must be taken during the term, and not subsequent to the term; thus applying the statute providing for appeals in criminal cases to the cases in which bonds for the appearance of the accused are perfected. There cannot, in reason, be an interpretation different, in so far as relates to forfeitures of bonds in the criminal district court (formerly the first judicial district court), i. e. if in the other district courts it

is held that the proceeding to forfeit is, in its nature, criminal, and therefore the appeal must be taken as required by the statute for appeals in criminal cases, in the criminal district court, in so far as it applies to that court, the same rule must apply. The law is clearly announced: "Within the courts of the first judicial district (now the criminal district court) within ten days after the sentence shall have been rendered." (The parentheses are ours.) The question involves the propositions: (1) The forfeiture is part of the proceeding of the criminal case, and is governed by the statute applying to such proceeding. (2) The statute provides that the appeal shall be taken within 10 days, and makes no provision for an appeal after that time. In the criminal district court, no appeal taken from sentence and judgment after 10 days have elapsed would lie. The rule applies to the case at bar, involving forfeiture of an appearance bond. *State v. Touns*, 44 La. Ann. 896, 11 South. 524.

A Question of Jurisdiction.

We were at first of the impression that without a formal appearance, and demand for the dismissal of the appeal on the ground that the time had elapsed, the argument to that end in the brief could not avail the appellant. We have yielded that impression, after having examined the decisions bearing on the subject. The jurisdiction of the appellate court, in cases of a criminal character, "attaches only by a judicial order divesting, where its condition is complied with, the jurisdiction of the inferior court, and *cannot be given by consent*." (Italics ours.) *Gibson v. Selby*, 2 La. Ann. 630. Jurisdiction was declined in *Bank v. Barrow*, 24 La. Ann. 276, "as consent cannot give jurisdiction." *Ex proprio motu*, the appeal was dismissed, for want of an order of appeal, in *Batchelor v. His Creditors*, 20 La. Ann. 193. In the case at bar there is an order of appeal entered in the face of the statute, which reads: "That no appeal shall be granted in such cases after the time herein specified shall have elapsed." Section 3, Act 30 of 1878. This court dismissed the appeals in the cited cases, that are entirely civil in their character, and in which the question of jurisdiction is not as prominent and important as in cases of the character of the one at bar. If a devolutive appeal lies in the case at bar, such appeals being confined to civil cases; this court is absolutely without jurisdiction, in view of the amount involved. This court has repeatedly held that it has jurisdiction in such cases because they are, in character, criminal. Without the criminal features, they are not appealable. *State v. Williams*, 37 La. Ann. 200; *State v. Harrison*, 38 La. Ann. 299; *State v. Burns*, Id. 363; *State v. Balize*, Id. 543; *State v. Hendrix*, 40 La. Ann. 719, 5 South. 24; *State v. Cornig*, 42 La. Ann. 416, 7 South. 698; *State v. Touns*, 44 La. Ann. 897, 11 South. 524.

If any effect were given to the order of appeal, it would have to be given to it as a devolutive appeal. The devolutive appeal is a civil remedy. The court would be without jurisdiction to entertain such an appeal in a civil case on appeal involving less than the amount within its jurisdiction. It can only entertain the appeal from a judgment forfeiting a bond when taken in conformity with the law controlling appeals in criminal cases. This law not having been complied with, the court must notice, *ex proprio motu*, that it is without jurisdiction.

Proceeding by Rule.

In carrying out the object of a bail bond which brings offenders against the laws for trial and punishment, and which is not taken with a view solely of enriching the treasury, this court held, after judgment had been entered on the bail bond against the sureties, and from which they had appealed, that the defendant having appeared, and having submitted to the sentence of the court, at a succeeding term, the sureties had a right to a rule (their appeal still pending) presenting grounds to be discharged from the judgment against them on the bail bond. *State v. Hamill*, 6 La. Ann. 257. The right to proceed by rule has been recognized even after an appeal has been taken. We express no opinion in regard to any defense, if any appellant has, by rule. In the appeal taken by the surety from the judgment rendered upon his bond, nothing can be examined, unless it is properly lodged in this court's jurisdiction. Whatever rights the appellant may have to proceed by rule are reserved. The appeal is dismissed, at appellant's costs.

(46 La. Ann. 1132)

CALVERT v. BOULLEMENT. (No. 11,359.)¹
(Supreme Court of Louisiana. Feb. 12, 1894.)
LEGACY TO MINOR—WITHHOLDING TILL MAJORITY—VALIDITY.

1. The legacies to minors to be held and administered for their benefit by the executrix of the deceased, and not paid to them until their majority and emancipation, are valid. *Succession of Macias*, 31 La. Ann. 127; *Strauss' Succession*, 38 La. Ann. 59.

2. Such a disposition imposes the trust upon the executrix to hold and administer the legacies as directed by the will, and that trust continues, notwithstanding the discharge of the executor granted on her petition.

3. This trust continuing, there is no basis for this court to direct the payment of the legacies to the dative tutrix of the minors.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Mary H. Calvert, tutrix, against Nettie B. Boullement. Judgment for plaintiff, and defendant appeals. Reversed.

J. Zach Spearing, for appellant. A. G. Brice and Frank E. Rainold, for appellee.

¹ Rehearing refused May 28, 1894.

MILLER, J. The plaintiff, the tutrix of the minor, Annie Gertrude Calvert, seeks to recover from defendant, the universal legatee of Sumter C. Boullement, the amount of the special legacy to the minor contained in the will of the deceased. The will originally gave to the minor, without condition or qualification, the amount of the legacy, and on the same terms contained legacies to two minors, the nephews of the deceased. By a codicil the testator directed that these legacies to the minors should not be paid till their majority or emancipation, and in the event of the death, before or after that of the testator, of one or two of the legatees, the legacies to them should accrue to the survivor. The codicil further directed the legacies were to be administered by the executrix for the benefit of the minors until their majority or emancipation. The executrix was the wife, as well as the universal legatee, of the deceased. She qualified as executrix, caused an inventory to be taken, filed an account exhibiting disbursements embracing payments of all legacies except those to the minors, these last, the account stating, not being payable till the majority or emancipation of the minors. The account was homologated, and the universal legatee put in possession, and discharged as testamentary executrix. Thereafter this suit was brought by the tutrix of the minor, Annie Gertrude Calvert, for the payment of the legacy to the minor. The plaintiff substantially contends that, by the discharge of the executrix procured by her, she ceased to be an officer of the court, or, if deemed a quasi tutrix, she vacated her office, and cannot retain the legacy which the will directs she should hold and administer as executrix.

Dispositions similar to that contained in this will with reference to the retention and administration during minority of legacies to minors have been upheld by this court. *Macias' Case*, 31 La. Ann. 131; *Strauss' Case*, 38 La. Ann. 59. We do not understand that those decisions are called in question. It is the discharge of the executrix which is conceived by plaintiff to afford the basis for her demand. Viewed as a valid disposition, the part of this will under consideration imposed a trust or duty upon the executrix to be performed for the benefit of these minors. Qualifying under the will was acceptance of that trust, and bound the executrix to its performance. Civ. Code art. 1658. Under the change in our law by statute, executors, it is enacted, shall continue in office until the succession is finally wound up. Id. art. 1673, adopting the statute; Rev. St. § 8. See also *Bird v. Succession of Jones*, 5 La. Ann. 645. In our opinion, the executrix was not relieved by her discharge from the trust of holding and administering the legacy for the benefit of the minor as directed by the will. Nor is it appreciated that the executrix had any purpose to escape from her duty in this respect in applying for her dis-

charge as executrix. We hold that, quoad these minors and the legacies in their favor, the trust and duty imposed on the executrix was unaffected by the discharge granted on her application. In this view, the executrix being still subject to this trust, and bound to execute it, there is no basis for plaintiff's demand, which rests on the theory that her discharge as executrix rendered her incompetent to hold and administer the legacy as directed by the will. The decisions in the *Macias* and *Strauss* Cases give recognition to a quasi tutorship for the execution of dispositions like this under consideration for minors. In this case, we think, the executors of defendant continues in respect to the legacies to the minors.

The court reaches its conclusion the more readily in view of the great solicitude exhibited by the testator on this point, i. e. that no payment of the legacy should be made until the majority or emancipation of the minor, and, until then, should be held and administered by the executrix. This nonpayment until majority or emancipation, and this control and administration by his executrix, who was also the wife and universal legatee, was the dominant idea in the testator's mind. To effect that purpose the testator added the codicil. In the codicil in the most explicit terms he declares and repeats that no payment of the legacies is to be made until the majority or emancipation of the minors. He makes it more explicit in changed language: "It being my wish and intention that no portion of these legacies shall be due and payable to" the legatees "until they are of age or duly emancipated." His closing expression is that his executrix, previously directed to hold the legacies, shall administer the legacies for the benefit of the minors until their majority or emancipation. The cardinal rule in giving effect to last wills is to adhere to the intention of the testator. The substantial execution of that intention is, we think, secured by this decision. To order the payment of these legacies to the dative tutrix, an official not within the contemplation of the testator, and that, too, when the legatees are still minors not emancipated, would, in our opinion, be to defeat, and not execute, the intention of the testator. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that the plaintiff's petition be dismissed, at her costs.

(46 La. Ann. 1101)

BARON et al. v. BAUM et al. (No. 11,476.)
(Supreme Court of Louisiana. March 12, 1894.)

DECREE OF DISTRIBUTION—COLLATERAL ATTACK.

In a succession, when the judgment of the court recognizes a party as sole heir, and in pursuance of this judgment and under order of the court the administrator pays the balance of the succession after paying debts to said heir,

heirs subsequently opposing cannot compel him to account to them, and answer personally for said sum, in default of filing said account.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; George W. Buckner, Judge.

Suit by Louis Baron and others against Jacob Baum and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Cross & Cross, for appellants. Kernan & Laycock, for appellees.

McENERY, J. This suit is the logical sequence of the case reported in 44 La. Ann. 295, 10 South. 766. The pleadings and the facts are stated therein. That suit was for the purpose of compelling a succession administrator, who had been discharged, to file an account to the plaintiffs, claiming to be the legal heirs of the deceased. The administration of the succession had been closed, and the account homologated. Under the order of the court the residue of the succession had been delivered by the administrator to Mrs. Amelia Gillingham as the sole heir of the deceased. The contest is between the brother and sister of the deceased and Mrs. Gillingham, who claims to be his legitimate daughter. Mrs. Gillingham was not made a party to the first suit. Therefore the decree was that "the judgment appealed from be amended so as to read as a mere judgment of dismissal as in case of nonsuit, reserving to plaintiffs the right to renew the action on proper averments against the proper parties." In pursuance of this decree the present suit was instituted, making Mrs. Gillingham a party. The prayer of the petition is that the judgment homologating the account be declared a nullity, and that the discharged administrator file an account to petitioners; and, in default thereof, they ask for judgment against him for \$5,457, the amount of the property on the inventory which went into his hands. Mrs. Gillingham is dead, and her representative was made a party defendant. This controversy involves the issue of heirship. On this point the evidence in the record is meager. It does not satisfy us that Mrs. Amelia Gillingham was an adulterous bastard, as urged by the plaintiffs. She had applied for the administration of the succession, and this was opposed by Louis Baron, one of the plaintiffs, on the ground that she was not the legitimate daughter of the deceased, on account of her mother being unmarried at the time of her conception. Mrs. Gillingham was appointed administratrix on the issues thus presented, but she failed to qualify. The defendant Baum was appointed administrator. There is no note of evidence in the application of Mrs. Gillingham, and the plaintiffs claim that the decree appointing her administratrix is null for that reason. If an appeal had been taken from that judgment, and lodged here, on account of the absence of the note of evidence from the rec-

¹ Rehearing refused May 29, 1894.

ord, the decree would undoubtedly be annulled, and the case remanded. But there is no evidence that no note of evidence was not taken, but the testimony of the clerk is that he could not find it among the succession papers. He was not the clerk of court when the decree was rendered, and says that he only looked for the note of evidence in one single bundle of papers, indorsed "Succession of Pierre Baron." We presume the decree was rendered in accordance with the allegation in Mrs. Gillingham's petition, supported by evidence. The decree closes as follows: "It is further ordered, adjudged, and decreed that she be recognized as sole heir of the deceased." It was under this decree that the administrator paid over to her the balance of the succession after paying debts. The absent heirs were represented by an attorney appointed for that purpose. The evidence does not show that there was any fraud or collusion between the administrator and Mrs. Gillingham. The decree had full force and effect until set aside. As long as it was in existence it was to be respected as a valid judgment, protecting the administrator in the distribution of the funds of the succession. Judgment affirmed

(46 La. Ann. 1099)

WARNER et al. v. REDDY. (No. 11,475.)¹
(Supreme Court of Louisiana. March 12, 1894.)

DEED EVIDENCING SALE—WHEAT CONSTITUTES.

An act under private signature which recites that, for and in consideration of a person named paying a certain mortgage note on one-half interest in the Moss-Side plantation, the heirs of the deceased owner do transfer all of their rights, titles, and privileges in said property belonging to their ancestor, renouncing all their interest in his favor, is a conveyance of the property evidencing a sale in the sense of the Code.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; George W. Buckner, Judge.

Action by Mrs. K. B. Warner and another against Charles J. Reddy, executor. Judgment for defendant, and plaintiffs appeal. Affirmed.

Cross & Cross, for appellants. Kernan & Laycock and Read & Goodale, for appellee.

WATKINS, J. This is a petitory action for the recovery from the executor of E. A. Yorke, deceased, of one-half interest in the Moss-Side plantation, to which other collateral interests are joined. Plaintiffs' claim is, that on the 19th of August, 1869, H. P. Beckwith executed a deed of conveyance to E. A. Yorke and J. D. Hamilton, jointly, of one-half interest in said plantation, and on July 15, 1874, he executed a like conveyance to the same parties, jointly, of the remaining one-half interest in the property; that on

January 22, 1884, John D. Hamilton conveyed his half interest to Mrs. Elizabeth F. Yorke, wife of E. A. Yorke, mother of Mrs. Warner, and grandmother of Miss Hamilton, the plaintiffs in this suit; that consequently, upon the happening of Mrs. Yorke's death, her estate was owner of one-half the property in her own paraphernal right by conveyance from Hamilton, and one-half of the other one-half as community interest, by virtue of her husband's acquisition thereof during the marriage; that, as she left three heirs at her demise, the two plaintiffs inherited and are the owners of two-thirds of three-fourths—equal to one-half—interest in the plantation. Defendant relies upon a subsequent transaction which occurred, shortly after the death of Mrs. Yorke, between her three heirs and her surviving husband, insisting that the effect of same was to convey a title to Edward A. Yorke, and that this conveyance defeats plaintiffs' title. On the issues thus joined there was judgment rejecting plaintiffs' demands, and they have appealed.

Fully recognizing the transaction referred to as an impediment in their way, plaintiffs assumed the burden of removing it from consideration as a title, and in their petition took the initiative thus: "That, on the settlement of her affairs, the said heirs made a family compact with the surviving spouse, E. A. Yorke, a copy of which is hereto annexed, the true intent of which was that the said Yorke was to pay the community debts and enjoy the usufruct of the whole property, both community and separate estate, of the deceased, Mrs. Elizabeth Yorke, he agreeing to make a will leaving the whole estate to the heirs. That, under this agreement, the said Edward A. Yorke went into possession of said property, and about the time executed his olographic will, annexed thereto, which was in compliance with said family compact. That said E. A. Yorke, using and abusing the confidence reposed thus in him by petitioners, who are nonresidents, adopted a scheme to use said instrument as an actual sale of said property, and for this purpose appeared before a notary public in the city of New Orleans, with certain other persons to petitioners unknown, who personated petitioners, and signed an acknowledgment of said agreement, hereto annexed, the tendency and effect of which was to recognize said agreement as a valid, subsisting transfer of property, and thus deceive the public, petitioners never signing or knowing of said acknowledgment until after the death of said Yorke. Now, they aver that said agreement does not in any manner purport to be a sale, nor is it, in any legal sense, an act of sale, there being no price and no definite description of the property sold." (Italics ours.) In the foregoing elaborate statement we have a clear and definite expose of plaintiffs' case. It is a noteworthy fact that plaintiffs do not deny or disavow this act, but distinctly af-

¹ Rehearing refused May 25, 1894.

firm its genuineness. They aver that Edward A. Yorke went into possession under it, but charge him with adopting a scheme to use the same as an actual sale of said property by fraudulently procuring its acknowledgment, the tendency of which was to recognize it as a valid, subsisting transfer of property, whereas it does not in any manner purport to be a sale, nor, in any legal sense, is it an act of sale. The following is the text of the instrument, viz.: "We, the undersigned children and lawful heirs of Mrs. E. F. Brandenburg, deceased, wife of Edward A. Yorke, to wit, Ella Brandenburg, authorized by her husband, John D. Hamilton, Kate B. Brandenburg, authorized by her husband, Jos. R. Warner, and Charles D. Brandenburg, for and in consideration of the said Edward A. Yorke paying in full, with interest, a certain mortgage note held by John D. Hamilton on Mrs. E. A. Yorke's half interest in Moss-Side plantation, parish of East Baton Rouge, do hereby transfer all our rights, titles, and privileges in said plantation belonging to our late deceased mother, wife of Edw. A. Yorke, to said Edw. A. Yorke, and by these presents put him in full possession of said property, renouncing all our interests in his favor, the said Edw. A. Yorke guarantying to protect and assume all mortgages and debts against said plantation." Conceding the full force and weight of plaintiffs' charges against the conduct and acts of E. A. Yorke, in our opinion they do not go to the extent or have the effect claimed for them. The authentication of the instrument, though fraudulently obtained, only enabled Yorke to procure its registry. It did not affect the title. On its face the instrument purports a conveyance, and the judge a quo properly gave it effect. Judgment affirmed.

(46 La. Ann. 1104)

BLOCK et al. v. JEFFERIES et al.¹ (ROWAN et al., Interveners. No. 11,468).

(Supreme Court of Louisiana. March 12, 1894.)

RESPITE BY CREDITORS — EFFECT — PRIVILEGE CLAIMS — EFFECT ON CREDITOR NOT JOINING — APPOINTMENT OF SYNDIC.

1. The respite is a judicial contract between the debtors and creditors and among the creditors; therefore neither debtor nor creditor can take advantage of the other, and the creditors must remain on an equal and fair footing.

2. If the debtor does any fraudulent act to give an undue preference, ipso facto he becomes an insolvent, and the respite proceedings are converted into a cession.

3. Privilege claims are not affected by the respite, and by consenting to the same privilege creditors do not waive their liens and privileges.

4. Creditors in a respite cannot sue to have property returned to the debtor's estate for their individual benefit. Any action in this direction by an individual creditor will inure to the benefit of all the creditors.

5. If no opposition is made to a respite in 10 days, it cannot be set aside. The alternative

is to convert the proceedings into a cession of the debtor's property.

6. When the respite debtor has absconded, and abandoned the property on his schedule, the courts have power to issue the requisite conservative writs to protect the property, and to appoint a syndic, until a meeting of creditors can be convened.

7. A written notice to the creditor in respite proceedings is essential, but where the debtor informs the creditor of his intention to ask a respite, and the creditor answers that he does not wish to participate in the proceedings for fear of losing some advantage, but will not take steps against the debtor, if the creditors agree to give time, the creditor cannot, after the respite is granted, because of want of notice, seize the property placed on the schedule. To all intents and purposes he consented to the respite.

(Syllabus by the Court.)

Appeal from district court, parish of Madison; Field F. Montgomery, Judge.

Action by Blasco Block & Co. and others against W. T. Jefferies, Utz & Boney, and others, in which J. P. Rowan and the Sharffe-Bernheimer Grocery Company and others intervened. Judgment for defendants Utz & Boney and for Chaffe, Powell & West, liquidators. Plaintiffs and interveners appeal. Reversed.

Wade R. Young, for appellants. J. G. Hawkes and W. M. Murphy, for appellees Utz & Boney. A. L. Slack and H. P. Wells, for appellees Chaffe, Powell & West, liquidators.

McENERY, J. This suit is a sequel of the suit of Tobacco Co. v. Jefferies, 45 La. Ann. 622, 12 South. 743. The plaintiffs, making all the creditors parties as plaintiffs or defendants, instituted the present action to annul the respite granted to the debtor Jefferies. Some of the parties plaintiffs were plaintiffs in suit of Tobacco Co. v. Jefferies, reported 45 La. Ann. 622, 12 South. 743. As to these creditors who were plaintiffs in that suit, the matters disposed of in the same are res judicata. As the same facts are alleged to avoid the payments made to the defendant creditor by Jefferies, the respite debtor, we need only to refer to that suit to render herein the same decree as in that suit against the additional complaining creditors.

The amount of cotton shipped to Chaffe, Powell & West was in the ordinary course of business,—the business which the creditors, parties to the respite, permitted the debtor to carry on and conduct in order, within the delays granted, to pay his indebtedness. The creditors Utz & Boney were privileged creditors, and by consenting to the respite did not waive their privileges, or postpone the payment of the special privilege they had on the effects surrendered. Rev. Civ. Code, art. 3095. In *Bennett v. Creditors*, 13 South. 402, 45 La. Ann. 1019, a similar question was presented. In that case, on rehearing, we said: "The proceeds of the sale of this cotton could not be ratably, as contended for by opponents, applied to the payment of all the debts. By granting the respite the creditors do not

¹ Rehearing refused May 25, 1894.

relinquish the privilege and pledge they may have on particular property of Mrs. Bennett at any time after the respite was granted. In fact she was bound, under agreement, to turn the cotton or its proceeds over to the furnisher of supplies. The furnisher of supplies had a right to the proceeds of the sale sufficient to pay his privileged debt. The surplus only could be ratably applied to the payment of the other creditors. Opponents were in no way injured by the disposition of the cotton." In the instant case the respite debtor was a merchant. He had rented property from Utz & Boney to carry on his business. The rent was payable by the month, and the rent had been regularly paid. The lease had some time to run, and the rent was paid monthly, as before the respite. When these privilege creditors unnecessarily consented to the respite, there was no judicial contract springing from the same that they could postpone the collection of the rent yet to become due. The places leased were necessary for the debtor to carry on his mercantile pursuits, and by consenting to the respite, and to the carrying on of these pursuits, the creditors necessarily consented to the continuance of the lease and the payment of its price. This suit, in addition to the averments made in the Tobacco Company suit, asks that a certain judgment obtained by Chaffe, Powell & West against the respite debtor be annulled, and the property seized under it be applied to the payment of the debts due the complaining creditors; thus ignoring the claims of other creditors. So far as the suit is instituted for the purpose of annulling the order granting the respite, the plaintiffs are estopped by article 3092 of the Revised Civil Code, which says that the opposition to the homologation of the order must be made within 10 days, in writing, dating from that on which the proces verbal of the deliberations of the creditors was returned to the clerk's office. After this delay has expired, the creditors are forbidden to interfere with the order, or to urge any fact which would have been effectual in setting aside the order if presented in time. It has been frequently stated by this court that the respite is a judicial contract between the debtor and the creditors, and among the creditors. Therefore no creditor can make any agreement or contract with the debtor by which he can secure an undue advantage over the others, and the debtor must so conduct his affairs as to preserve equality among the creditors. Any act of his in violation of the contract resulting from the respite is a fraud, and ipso facto turns the respite into insolvent proceedings, a cession of goods for the benefit of all the creditors, as though it had been offered in the first instance. It is to be assimilated to a case in which the respite is refused by the creditors. Rev. Civ. Code, art. 3098. The contract, by this fraud, is ended, and the respite stands as though it had been offered to the creditors and refused.

That this course, in such a contingency, is the proper one to pursue, is clearly outlined in the case of Tobacco Co. v. Jefferies, 45 La. Ann. 622, 12 South. 743.

It does not appear from the proces verbal that Chaffe, Powell & West were summoned to attend the meeting of creditors by letter, in accordance with law. They say under oath that they were never notified. But the record shows that they were aware of the contemplated proceedings for a respite, and in a letter to Jefferies the debtor declined to participate in the meeting for fear of losing certain privileges which they held on the property of the debtor's wife in Mississippi; but they informed the debtor that, if the other creditors granted time to him, they would acquiesce, and also delay the enforcement of their claims. The property in Mississippi paid some \$6,000 on Chaffe, Powell & West's debt, and for the balance—say \$5,000—they sued their debtor, obtained judgment without opposition on his part, and seized the property surrendered, which was enjoined by the creditors. The testimony in the record shows that this judgment was obtained through the connivance of Jefferies, and with his consent, evidently for the purpose of giving Chaffe, Powell & West an advantage over other creditors. Under these circumstances, to all intents and purposes, Chaffe, Powell & West were parties to the respite. It would be inequitable and unjust, and would in fact practically annul the benefit of a respite, to permit a creditor to arrange with his debtor for nonparticipation, and possibly, through his efforts, to escape summons, in the respite proceedings, and then obtain a judgment by consent of the debtor, and execute it against the property surrendered. The evidence justifies us in believing that such was the case here.

The complaining creditors pray that the proceeds of the sale of the property be applied to the payment of their several and individual debts. From what has been said above it is evident that the prayer cannot be granted. No creditor can seek an advantage not common to all. Through the efforts of individual creditors, whatever property of the insolvent debtor is recovered and restored to his estate, must inure to the benefit of all the creditors. *Gumble v. Andrus*, 13 South. 633, 45 La. Ann. 1081; *McGraw v. Andrus*, 13 South. 630, 45 La. Ann. 1073; *Andrus v. Creditors*, 13 South. 635, 45 La. Ann. 1067; *Anderson v. Duson*, 35 La. Ann. 915; *Hayden v. Yale*, 12 South. 633, 45 La. Ann. 362.

The evidence shows that the debtor has violated his contract of respite, and ipso facto committed an act of insolvency, and, as such insolvent, he no longer has the right to administer his property, and it must pass to his creditors. In addition he has absconded, and abandoned his property. The plaintiffs contend, under these circumstances they are unable to force the debtor into in-

solvency. The fraudulent acts themselves ipso facto forced him into insolvency, and it is only requisite for the court to appoint a syndic to administer the property. Rev. St. § 1810. The court has power to issue all conservatory writs to protect the estate. State v. Judge, 42 La. Ann. 71, 7 South. 69. The amounts due for clerk hire are established, and they should be paid as general privilege debts.

Complaint is made by plaintiffs of costs paid by the sheriff, and the illegal disposition of a 12-months bond by seizure and sale. These matters can be adjusted in the settlement of the insolvent's estate. The facts before us are not sufficient to warrant a decree respecting them.

The injunction restraining the execution of the judgment of Chaffe, Powell & West against the property of Jefferies has served its purpose, and there is no reason for a formal decree in reference thereto. The proceeds of the sale of the property not legally disposed of will be turned into the insolvent's estate. We see no reason why we should disturb the judgment of Chaffe, Powell & West against Jefferies. We will only correct it so far as it affects the rights of the creditors of the insolvent in the seizure made of his property surrendered on his schedule. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the seizure made under the judgment of Chaffe, Powell & West be set aside, and the property restored to the estate of the insolvent debtor. It is further ordered that this case be remanded, and proceedings therein continue as if the cession had been offered in the first instance by the defendant Jefferies. It is further ordered that payments be made and proceedings conducted as herein stated, the insolvent's estate to pay all costs.

(46 La. Ann. 551)

TRAIN et al. v. CRONAN et al. (No. 11-362.)

(Supreme Court of Louisiana. March 26, 1894.)

TITLE BY PRESCRIPTION — CLAIM UNDER DEFECTIVE INSTRUMENT.

1. The rule is that, when the opinion of the possessor who holds an object under a title of sale has a just ground, though in fact there is no sale, the opinion is equal to title.

2. A title defective in form cannot be the basis of prescription. By this is meant a title on the face of which some defect appears, and not one that may be found defective by circumstances, or evidence dehors the instrument.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Mrs. Johanna Train and Mrs. Nestor Faivre against Mrs. Catherine Cronan and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

P. M. Milner, for appellants. Henry P. Dart, for appellees.

WATKINS, J. This is a petitory action, instituted by the widow and surviving heir of George W. Train, deceased, for the recovery of two lots of ground situated in the sixth district of the city of New Orleans, charging an illegal and simulated sale thereof in August, 1875, under a certain void and illegal judgment and sale, through the instrumentality of which they were dispossessed in the year 1878. The statement of plaintiffs' case, as it appears in their counsel's brief, is as follows, viz.: "The petition avers that plaintiffs, Mrs. Johanna Train and Mrs. Nestor Faivre, the former the widow of George W. Train, and the latter the only surviving child of said Train, are the owners of the property described therein; that George W. Train died the 19th of March, 1871; that at the time of his decease he was the lawful owner and possessor of the property aforesaid, which plaintiffs have inherited; that said property was acquired by said Train by authentic act of purchase 12th June, 1866; that the plaintiffs have been illegally dispossessed of same by virtue of an alleged judgment, execution, and sale in suit No. 1,625 of the sixth district court, entitled 'Garrish v Geo. W. Train,' that in said suit, pending an appeal to the supreme court, Geo. W. Train, departed this life; that nevertheless a judgment eo nomine against defendant was rendered, without making his heirs parties; that his legal representatives were never made parties in the lower court; that the return on a *fi. fa.* to make damages shows that defendant, Geo. W. Train, was dead; that nevertheless the property was sold August 14, 1875; that petitioners remained in possession until some time in 1878; that these proceedings, judgment, execution, and sale are absolute nullities. Petitioners aver that defendants Mrs. Cronan and husband, are in possession of said property. They charge simulation and bad faith in the successive conveyances, and pray for judgment decreeing the aforesaid judgment, execution, and sale and sheriff's deed absolute nullities, and the conveyances under which defendants claim null and void. They pray that they do recover the property and the revenues of which they have been illegally deprived." The defendants tendered various technical pleas, such as misjoinder of defendants, *res adjudicata*, estoppel, no cause of action, and the prescription of 10 years; all of which were overruled, except the last, and judgment rendered in favor of the defendant Cronan. It is from this judgment the plaintiffs have appealed. In this court the defendant and appellee filed an answer to the appeal, and requests an affirmation of the same; and, in the alternative that this court should not favorably consider her plea of prescription, she prays that her other demands and exceptions be sustained, and that thereupon judgment be affirmed. To this answer

¹ Rehearing refused May 14, 1894.

the appellants object and protest on the ground that it seeks an amendment of the judgment, and that it comes too late, same not being notified to them. The order of appeal made this case returnable on the first Monday in November, 1893, but it was not fixed for trial until the 3d of January, 1894, at which time it was not reached, and was therefore continued. It was again set down for trial on the 14th of March, 1894, when it was argued and submitted. Consequently the appellee's answer was in ample time, having been filed on the 29th of December, 1893. Appellants were not entitled to any notice of the filing of the appellee's answer, and a simple inspection of the record would have furnished them all the information that was necessary. Appellee's brief was filed in this court on the date the cause was first fixed for trial. The objection is untenable.

Taking up the defendant's plea of 10 years' prescription, on which the lower judge founded his judgment, we find the facts to be as follows, viz.: Mrs. Catherine Cronan, defendant, acquired the property in dispute on the 30th day of April, 1892, by purchase from Charles L. Worth and Ernestine Piper, by a notarial act of sale in due form, which contains the recital that Mrs. Piper acquired title by purchase from Henry L. Davis, by notarial act, under date July 18, 1878, duly registered in the book of Conveyances. Reference to the act of that date shows that Henry L. Davis sold same property to Mrs. Piper for a valuable consideration, and with full warranty, the act reciting that the property conveyed was the same that the vendor acquired by purchase at sheriff's sale made in the suit of Joseph Garrish v. G. W. Train, No. 1,625 on the docket of the sixth district court of the parish of Orleans, on the 14th of August, 1875; the sheriff's deed bearing date February 9, 1878, and likewise duly recorded. The proces verbal of the sheriff's sale was not put in evidence, but a conveyance certificate was introduced, and it shows the fact of the sheriff's adjudication as recited in Davis' deed, and gives full particulars of date and description. The defendant states as a witness that she purchased the property as stated in her title, and paid the purchase price; that before purchasing she had a lawyer to examine the titles to the property, and he pronounced them good, and on the faith of his report she made the purchase; that soon after her purchase she went into actual possession of the property, and commenced the erection of a house, when this suit was brought; that at the time of the purchase she was not aware that there was any complaint about the titles to the property. The defendant's title is traced back to the sheriff's sale made under executory proceedings in 1878, under which G. W. Train was divested of possession and Henry F. Davis, adjudicatee, was placed in possession under an order of court, and in which the plaintiffs evidently acquiesced. Referring to

the record of the suit of Joseph Garrish v. G. W. Train in this court, which is brought up in the original, we find that the order of seizure and sale bears date October 18, 1870, and was predicated upon an act of special mortgage of date April 20, 1867, just one year subsequent to his purchase of the property from Pliny Earl Davis, the title on which the present suit is founded. The defendant appealed suspensively from the order, and the appeal was presented and decided on an assignment of errors, and the decree of this court confirmed the order, and awarded 10 per cent. damages. We find nothing in the record to show that the defendant was dead at the time judgment was rendered, on the 20th of April, 1874, and the extracts in evidence from the sixth district court show that the purchaser was put in possession of the property in pursuance of an order of court. We think there can be no question of the defendant's title being perfected by the prescription of 10 years under a title translatif of property, under the principles announced by this court in *Pattison v. Maloney*, 38 La. Ann. 885. Judgment affirmed.

(46 La. Ann. 1118)

AMERICAN HOMESTEAD CO. v. LINIGAN. (No. 11,192.)¹

(Supreme Court of Louisiana. December 4, 1893.)

BUILDING AND LOAN ASSOCIATION—MORTGAGE BY MEMBER—VALIDITY—USURY—JOINDER OF ISSUE—EFFECT.

1. In the absence of fraud or demonstrable error, a party recognizing the existence of a corporation by subscribing for its stock cannot defend an action on his subscription by impeaching the existence and capacity of the corporation.

2. The defendant, having taken a loan as a stockholder, cannot sustain the plea of the want of capacity of plaintiff to sue for the recovery of the amount loaned.

3. After issue joined, the filing of an exception of no cause of action will not be heard to defeat the admission of the answer.

4. The exception must be decided with reference to the issues at the time it was filed.

5. The answer and the testimony that had been admitted without objection at the time the exception was filed showed an issue of indebtedness, and precluded the possibility of returning to the allegations, alone, of the petition, to determine whether they were sufficient to maintain the suit.

On the Merits.

6. The defendant has a right to the amount paid by her to the association, and to her annual dividends to the date of default, and they are credited on her indebtedness. The attempt to forfeit these amounts fails.

7. The association provided that every member should pay weekly installments on each of his shares; that, as often as the funds of the association should warrant it, the same should be put up to competition among the members, and the member offering the highest premium should be entitled to them, and should secure the payment by satisfactory security, and pledge of shares, and should pay, from the time of purchase, interest at the rate of 6 per cent. per

¹ Rehearing refused May 30, 1894.

annum on the loan and premiums capitalized, as a redemption fee; that, whenever any stock which had been pledged should become equal in value to the indebtedness for which the same was pledged, the stock should cancel the indebtedness, and it (the indebtedness) should be considered satisfied, and be discharged. The defendant purchased shares according to the articles of the association, received the amount of these shares, deducting the premium or discount, and gave security to secure both the loan and the discount. *Held*, that the note and mortgage given as security are valid, and the sums secured are not usurious.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by the American Homestead Company against Mrs. Mary Ellen Linigan. Judgment for plaintiff for part of its claim, and it appeals. Affirmed.

E. D. Le Breton and Henry Chiapella, for appellant. Dinkelspiel & Hart, for appellee.

BREAUX, J. In June, 1883, the American Homestead Company was organized. The charter sets forth that the association shall have authority to loan money on security, and to sue and be sued; that the shares shall be paid in weekly installments. It was agreed that each stockholder not in arrears should be entitled to receive a loan of \$200 for each share of stock held by him, less premiums, when the funds in the treasury justified. The interest on the loan was fixed at the rate of 6 per cent. per annum, in weekly installments. Fines were provided for non-payment, and forfeiture of stock. The stock pledged, whenever it should become equal in value to the indebtedness for which pledged, should be canceled. It was stipulated, under the terms of the charter, to divide annually the net earned profits, pro rata, among the shares of stock not in default. By act dated December 26, 1887, plaintiff made a loan to the defendant stockholder of \$5,200, including therein the premium bid for the loan, for which she signed her note, authorized by her husband, to the order of plaintiff, on its face payable six years after date, subject to the terms and conditions of the association; bearing 6 per cent. per annum from date, and secured, as to its payment, by a special mortgage and vendor's lien. This sale was preceded about six months previous by a sale from the defendant to the plaintiff for the sum of \$3,744. The property being incumbered with mortgages accounts for the delay which elapsed between the two sales. The object of these two sales was to secure a loan, and the difference in price between the sales by the defendant to the plaintiff, and by the plaintiff of the same property to the defendant, was the amount of the premium or bonus for the loan. The conditions were, if the maker of the note (the defendant) paid the interest on the note weekly, and the installments on her stock punctually, the amount was to remain subject to a settlement and payment at the ter-

mination of the affairs of the association, but in case the purchaser failed to pay as agreed the note became due. The plaintiff sues to recover the note and interest, also taxes, insurance premiums paid for her on the property mortgaged, attorney's fee, and costs, and claims a mortgage and vendor's lien on the property conveyed by it to the defendant. The defendant has not paid interest and other charges, as alleged. The defendant interposed an exception, and therein alleged that the plaintiff is not a legal corporation, and that it is absolutely without capacity to prosecute this suit in its corporate name. The defendant also excepted on the ground, "If the plaintiff can sue at all, that the suit was not authorized by a resolution of the board of directors." These exceptions were overruled. In her answer the defendant denies plaintiff's allegations; says that plaintiff had no right to forfeit her stock, and that the value should be credited to the note upon which suit is brought; that she was charged interest on the amount of the note of \$5,200, when she should have been charged with interest only on the actual amount received by her, and that the interest actually charged should be credited to the amount actually due by her. She charges usury. She admits the payment of the taxes and insurance by plaintiff, as alleged, and her liability therefor. She prays that plaintiff's demand be rejected, with costs; if any judgment be rendered against her, that it should be for the amount received by her on December 26, 1887, with 6 per cent. interest on that amount only, and that she should be credited with interest illegally paid, with the value of the stock pledged, and that the 5 per cent. attorney's fees be limited to the amount actually due. After the answer had been filed, and part of the evidence heard, the defendant interposed the exception of no cause of action. The district court pronounced judgment in favor of the plaintiff for the sum of \$3,744, with 6 per cent. interest from August 26, 1887, subject to a credit of \$1,571.96, the amount the court decided due to her by the plaintiff on 26 shares of her capital stock on March 29, 1892, and subject to a secured credit of \$143 interest paid on the \$3,744, part of which the court held extinguished the interest due on the last-mentioned amount on February 12, 1888, and the remainder was credited and applied as partial payments on the interest due on this date. Interest and taxes paid were allowed, and 5 per cent. attorney's fee on the \$3,744, with conventional mortgage and lien on the property ordered to be sold. From this judgment the plaintiff appeals.

Illegality of the Corporation, and the Want of Authority to Sue in the Name of the American Homestead Company.

This company was organized under section 683 of the Revised Statutes of 1870, in which there is no reference specially made to build-

ing associations. The defendant alleges and argues that it was not the object, in adopting the statute, to authorize the forming of such companies. Her counsel correctly concedes that if she has been benefited she cannot plead the want of capacity in plaintiff to make the loan and contract, as was entered into in this case. They argue, however, that the act of incorporation being an absolute nullity, because unauthorized by law, the persons thus organized have a right to sue only in their individual names for whatever might be due, and not as a corporate body. We are referred to article 446 of the Revised Civil Code as the only article under which plaintiff can proceed. The defendant, in her dealings with plaintiff, does not charge fraud or error. She treated with it, in all respects, as being a legal corporation. She became one of its stockholders, and sought thereby the benefit it offered to incorporators. Her taxes were paid by it, premiums of insurance, and an amount borrowed, and she fully recognized the legal existence of the corporation. She participated in the annual dividends. She cannot be heard to impeach the existence and capacity of the corporation of which she was a member. The illegality on which the appellee relies might, perhaps, have been sufficient cause for defense on the part of third persons injuriously affected by such transactions; but she is estopped from denying the existence of a corporation from which she, as a stockholder, and on account of her shares, has received benefits. The subscriber is under obligation to perform the promise distinctly made, and pay all that is legally exigible. Having voluntarily acted as a corporator, and exercised privileges which belong to that capacity, there is reason estopping her from denying the validity of the charter. The question was decided in *Casey v. Galli*, 94 U. S. 680. The court said: "Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence, or the legal validity, of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they had made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." In *Eaton v. Aspinwall*, 19 N. Y. 119: "A defect in the proceedings to organize a corporation is no defense to a stockholder sued to enforce his personal liability, who has participated in the acts of user as a corporation de facto, and appeared as a shareholder upon the books when the debt for which he is sued was contracted." See, also, *Rice, Ev.*

(1st Ed.) p. 891. In *Insurance Co. v. Hunt*, 11 La. Ann. 623, a similar principle was laid down, and the court sustained a suit for the restitution of money paid to the defendant, who denied the existence of the company. In *Hotel Co. v. West*, 13 La. Ann. 545, the stockholder was not permitted to set up, by way of defense, any illegality in the charter, or any informality in the organization. It is true that the case of *Bank v. Converse*, 29 La. Ann. 370, is not absolutely in line with these and other state and United States decisions upon the subject. Article 446 of the Civil Code is given, in this case, the effect of a prohibitory law. The authority to stand in judgment is one of the rights to which the defendant consented in becoming a stockholder. She is as much precluded from denying these rights as she is from denying the validity of the charter. The clause of the act of incorporation granting the authority is not in contravention of laws made for the preservation of public order or good morals. It is not of such a prohibitory character as that it may not be waived, and bind the party waiving. The principle that "corporations unauthorized by law, or by an act of the legislature, enjoy no public character, and cannot appear in a court of justice," is binding and must be given full effect as against third persons, as expressed in the *Converse Decision*, 29 La. Ann. 370. But this requirement ceases when parties choose to so contract as to absolutely bind themselves, and receive actual benefits, from which they cannot be released without its being contrary "to the plainest principles of reason and good faith." In the cited case a secretary and the sureties on his bond were sued. The relations of a stockholder are nearer to the company, in so far as relates to the responsibility for the charter, and other acts of organization. In this may be found sufficient difference in the two cases to maintain the former in its entirety. Be this as it may, the difference of our views from those expressed in the *Converse Case* is not in any event great. In so far as relates to stockholders, however, the authority of that decision must yield to the number of decisions of the state and United States courts.

Authority of the Board of Directors to Sue.

The defendant further excepts on the ground that, if the plaintiff can sue, the institution of this suit was not authorized by a resolution of the board of directors. The resolution adopted is plain, and directs the company to foreclose the mortgage against the defendant.

No Cause of Action.

The amount is alleged as being due by the wife. The note and mortgage were signed by her, as maker and mortgagor. They are due by her. The petition substantially sets forth the claim. The defendant admitted, in

effect, that whatever amount might be due was due by her. The exception filed after the answer had been filed could not destroy the effect of the joinder of issue, and of the admission of the answer.

The Points Controverted on the Merits.

The first question for our consideration relates to the forfeiture, *vel non*, of defendants' stock. In reaching a conclusion, we have written a brief statement of the plan and nature of building associations, as we understand the scheme. They are founded on the theory that it is possible for a given number of persons to pool their savings each month until the total amounts to a sum sufficient to make it an object to divide it among the contributors; that, if each monthly collection be invested, the revenue, *pro tanto*, will be increased, and the time within which to accumulate the amount of savings contemplated shortened. The idea being to enable persons to own their homes, the money is invested primarily among those members who choose to take loans for that purpose. The borrower, in paying interest on this loan, pays a part to himself. He increases the savings that are partly his. He thereby anticipates payments, and at once gets a house, to be paid for in a number of years. For the reason that there are a number of applicants for these loans, they are offered to the highest bidder. The bid is the discount,—the premium; that is the difference between the par value of the shares and the sum loaned to the borrower. In forming these organizations, there is generally an agreement that, if a member borrows, he will be entitled to receive, by way of loan or advancement, an amount equal to the par value of the shares he holds, less the premium; also, one regarding the forfeiture of stock, and the privilege of withdrawing from the association without being subject to a forfeiture of the money paid. This last privilege, manifestly, is most valuable, and one that the defendant has. Regarding the forfeiture of the sum paid by the defendant, the counsel for plaintiff, in the last brief, direct attention to the fact that plaintiff based no demand in the prayer of the petition for the stock itself, and that it is not seeking to obtain a decree recognizing the validity of a forfeiture, and that the question of forfeiture is not before the court. The answer specially controverts plaintiff's right to forfeit her stock, upon different, well-stated grounds. Plaintiff's allegation that the stock had been forfeited provoked the issue, although not followed by a prayer for a recognition of the validity of the forfeiture. The question of forfeiture is now inseparable from the issues, as presented for solution. Counsel for the plaintiff, in their brief, state that, should the question of forfeiture be considered as in the case, they have no hesitancy in declaring most positively that in this particular instance, in view of the facts which were

only developed during the trial of the case, they disclaim any intention of obtaining the enforcement of the forfeiture, and aver that defendant "should receive full credit for the sum of \$1,571.96, which is the aggregate of all paid installments and declared dividends." Questions of plaintiff's waiver of the forfeiture after attempt had been made to forfeit the stock; of the impossibility of entering forfeiture of stock, as attempted, it being stock deposited in pledge; of deficiency of rules in matter of the enforcement of forfeitures,—are disposed of by the admission of plaintiff, as made through counsel, as above stated; and the consent to give credit for installments and dividends declared is binding upon it.

The Usury Alleged.

The fact that a member of a building association, in taking a loan for the amount of his stock, agrees to pay a premium, does not render the contract usurious. The transaction is a loan not entirely free from a partnership venture. The papers, on their face, show a loan of a specific amount. The par value was advanced to the stockholder, less the premium. There is, however, an appearance of partnership in the transaction, in that the funds are invested in a joint enterprise of members, who will, after deducting all expenses, share the net earnings of the society. We have *Endlich* (page 335) as authority for the statement that in England the later cases admit no question as to the nature of the transaction, but take it for granted that it is a partnership transaction, and proceed upon this as a legal postulate,—that, as a *bona fide* partnership, it is not usurious; that it is a dealing with the partnership funds in which a member has an interest in common with his fellow members; that the said defendant was interested in the funds when the money was advanced to her, and when it was repaid. The decisions of the courts of this country are not uniform upon the subject. In Massachusetts and New Hampshire the partnership theory obtains. The transaction is not a mere loan. The monthly payments, it was held in the former state, are for the privilege of becoming an owner of a certain number of shares, and of eventually taking the dividends to which, by the articles of agreement, he would, upon the winding up of the affairs, be entitled. All the associates had the same right. Each one would determine for himself what was the value of the prospective benefit to be enjoyed, and would make his offer for the money to be loaned, according to his estimates of the worth of the shares which he was allowed to take. Since the borrower is to have his full proportion of the benefit of all the gain, he cannot assert that the lender has reserved to himself a usurious rate of interest. *Merrill v. McIntire*, 13 Gray, 157. The transaction cannot be held usurious, because it is a dealing be-

tween them, as partners, in relation to partnership funds, in which they had a common interest. *Delano v. Wild*, 6 Allen, 1. This case is cited with approval in the case of *Association v. Stephens*, 26 N. J. Eq. 351. By the court in that case: "The association, in this case [*Delano v. Wild*], was unincorporated; but the principle declared, if sound, must govern the rights of the members of an incorporated association." See, also, *Association v. Martin*, 13 N. J. Eq. 428; *Association v. Marsh*, 29 N. J. Law, 225. In *New Hampshire*, in another case of an unincorporated company, the court followed the Massachusetts decisions. *Shannon v. Dunn*, 43 N. H. 194. In Georgia, in *Pattison v. Association*, 63 Ga. 373, the doctrine of the court is closely akin to those cases before cited by us. In Indiana, the premium was said not to be interest on money, but a contract price for the privilege of borrowing. *McLaughlin v. Association*, 62 Ind. 264; *Shaffrey v. Association*, 64 Ind. 800. In *Reeve v. Association*, 56 Ark. 335, 19 S. W. 917, the syllabus reads: "In a loan made by a building association to a shareholder, in the usual form, there can be no usury, because the rate of interest payable by him is contingent on the length of time required to pay out his share." In Connecticut, Iowa, Ohio, and Pennsylvania the courts entertain a contrary view, and hold that the conditions of such loans can be enforced only when authorized by statutes.

The society, in this case, having been engaged prior to the adoption of the statute authorizing such association, viz. prior to the adoption of Act 115 of 1888, it remains for us to consider the status of an unincorporated association. They are said, in certain jurisdictions, to be partnerships only, and that their acts are to be judged by the law applying to persons. "In applying this law the courts will allow themselves to be guided by the rules which were adopted by the members in forming the association, of whose binding efficacy, they, in joining it, have either formally recognized and subscribed to, or precluded themselves from denying, by their participation in the society's business and profits under these rules. They are analogous to articles of copartnership entered into between the different members; and the reciprocal rights and duties arising under them, so far as they are countenanced by law, are protected and enforced by the courts, as in the case of voluntary benevolent associations, to which they bear a close resemblance." *End. Bldg. Ass'ns*, § 517. If the conclusion be reached that the contract was not so essentially that of partnership as to relieve it from the taint of usury, the rules, principles, and policy of the law must be applied, in determining the legality of any article, and not special statutes, for there were none, at the time, regulating building associations. The provision of the law relative to notes being that the owner of any

promissory note shall have the right to collect the whole amount, notwithstanding it may include a greater rate of interest than 8 per cent. per annum, its principle is not only not violated, but complied with, in capitalizing the premium with the amount of the loan. In recognizing the effect of that article of the Civil Code upon the contract, there is nothing of harshness, for the demand of the premium is not extravagant,—in view, especially, of the delays that have elapsed. There was no oppression, or advantage taken of necessities. When the suit was instituted, more than four years had elapsed from the date of the loan. There was, from the first, an element of uncertainty in the contract, excluding questions of an exclusive loan and usury. "When the promise to pay a sum of money above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." *Spain v. Hamilton's Adm'r*, 1 Wall. 604; *Tyler, Usury*, p. 98; *Lloyd v. Scott*, 4 Pet. 205. In the case of the *Succession of Latchford*, 42 La. Ann. 539, 7 South. 628, we maintained the validity of the premium. As in the case at bar, there was consideration other than the mere loan of money.

Entertaining these views, it follows that interest is due on the note declared upon, from its date. The prohibition of the statute of 1860 relates only to interest after maturity. Interest is due at the rate of 8 per cent. on the amounts of premiums of insurance and taxes paid. This rate of interest is especially provided for in the by-laws of the plaintiff association.

It is therefore ordered and decreed that the judgment appealed from be amended and increased, and that plaintiff have judgment against defendant for the sum of \$5,200, with 8 per cent. interest thereon from the 26th day of August, 1887, until paid, subject to a credit of \$1,571.96 from March 29, 1892, and subject to a further credit of \$144; that the interest on the amount of taxes and insurance of defendant, paid by plaintiff, shall be 8 per cent. per annum from the date of the respective payments, and the fee of attorney is 5 per cent. upon the principal of the note due by defendant. As thus amended the judgment is affirmed, at appellee's costs.

(46 La. Ann. 1158)

CITIZENS' BANK OF LOUISIANA v. IRVINE. (No. 11,461.)¹

(Supreme Court of Louisiana. March 26, 1894.)

BANK-STOCK SUBSCRIPTION — ENFORCEMENT AGAINST LAND SECURITY — RIGHTS OF PURCHASER.

1. Where the owner of property seized and sold by the Citizens' Bank in enforcement of calls for contribution on stock indebtedness (secured by a stock mortgage on the land) is not the owner of the shares of stock, but a third possessor, not personally bound, his consent to

¹ Rehearing refused.

have executory proceedings directed against himself as actual possessor of the land, instead of against the original subscriber and his heirs, and his becoming the adjudicatee of the property, which was sold entirely for cash, did not make him a stockholder in the bank, and liable for future contributions. The sale of the stock under proceedings directed against himself was that of the property of a third person without process of law, and an absolute nullity. The ownership of the stock remained after the adjudication where it was before,—in the heirs of the original subscriber. *Pepper v. Dunlap*, 9 Rob. (La.) 283; *Hall v. Nevill*, 3 La. Ann. 326.

2. In selling the land entirely for cash on the defaulted calls for contribution the bank exhausted its mortgage claims on the property (there being no loan mortgage), and the purchaser, in paying the purchase price, held the property free from mortgage.

(Syllabus by the Court.)

Appeal from district court, parish of West Feliciana; F. D. Brame, Judge.

Action by the Citizens' Bank of Louisiana against John F. Irvine. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel McC. Lawrason, Thomas J. Semmes, and Henry Denis, for appellant. W. W. Leake, for appellee.

NICHOLLS, C. J. On the 27th February, 1838, Robert McCausland mortgaged certain property in the parish of West Feliciana to secure 200 shares of the capital stock of the Citizens' Bank of Louisiana, to which he had subscribed. He died in 1851, and his wife in 1853. McCausland had living in 1879 two children and several grandchildren, minors. At a probate sale made in the succession of McCausland in 1852, C. B. Chinn purchased the plantation. The other property (excepting the Citizens' Bank stock) was partitioned in kind. The defendant, Irvine, bought the plantation at a sale made in the matter of the succession of Chinn on the 19th September, 1872. Neither McCausland nor his heirs were called upon to pay contributions upon the stock until 1878, when the bank proceeded by seizure and sale to sell the shares of stock (then reduced to 186 shares under the operation of the statute of April, 1853) belonging to McCausland, and the land mortgaged to secure the same. McCausland's heirs were not cited nor notified in said proceedings, which were directed against John F. Irvine, the present defendant, as being at that time the actual possessor of the property. At the sale Irvine became, on 15th November, 1879, the purchaser for the price of \$835. In the present suit the bank—alleging that Irvine became, on the date mentioned, the owner, by purchase at the sheriff's sale made in the matter of the Citizens' Bank of Louisiana v. Robert McCausland and John F. Irvine, of 186 shares of mortgage stock of said bank, the property of Robert McCausland (defendant in said suit), seized and sold therein; that the Citizens' Bank had called for the following contributions, to wit, two dollars per share, payable on the 1st day of December of each of the years 1881 to 1891, inclusive—has sued the defendant, as the

owner of said stock, for the sum of \$4,400 and interest, as an amount due by Irvine for such contributions. Plaintiff also prays for the recognition of the special mortgage securing the said shares of stock, and for the seizure and sale thereof to pay said contributions, reserving all its rights against defendant on the balance and sums which will hereafter fall due on said shares of stock.

Defendant pleaded the general issue, and specially denied that he was a stockholder, or that he ever assumed the liabilities of a stockholder, of the Citizens' Bank. He averred that the pretended seizure and sale of 186 shares of mortgage stock of the bank belonging to McCausland, and the adjudication to him of said stock, was an absolute nullity, and said pretended sale should be annulled for the reason that Robert McCausland and wife died many years prior to said pretended seizure and sale in 1879, leaving children and grandchildren in Louisiana and in Texas, and these heirs were never made parties, nor was any notice served on them; that the sheriff never saw, and never had actual possession of, the certificates of stock belonging to McCausland; that possession of said stock was never given to defendant, nor was he ever notified of any transfer on the books of plaintiff. He avers that on the day of the sale (November 15, 1879), and prior thereto, it was distinctly agreed and understood between defendant and the attorneys of the bank in the suit of the Citizens' Bank of Louisiana v. Robert McCausland and John F. Irvine (actual possessor of the land) that defendant was not to assume any of the responsibilities of a stockholder of said bank, and in bidding in said stock he was in error, and deceived by the representations and assurances of the attorneys representing the bank in said case. Defendant also pleaded the prescription of 3, 5, and 10 years. Judgment was rendered in the district court in favor of the defendant. Plaintiff appealed, and specially pleads in this court the prescription of 3, 5, and 10 years to defendant's demand to set aside the sale.

At the time of the sale, in November, 1879, in the proceedings of the Citizens' Bank v. Robert McCausland and John F. Irvine, the latter was the owner of, and in possession of, the real estate which had been mortgaged by McCausland to the bank, under and through the probate sales which had been made, as stated, first in the succession of McCausland, and later in the succession of Chinn. The stock had not been sold at either of these sales, and quoad that stock Irvine stood only as the owner of and in possession of the property which had been mortgaged to secure it. He had assumed and was under no personal liability in regard to that stock when he bought the property from the succession of Chinn. On the 15th November, 1879, the date of the sale made by the bank under the executory proceedings referred to,

the ownership of the shares of stock and that of the real estate was in different hands. The heirs of McCausland still remained the owners of the stock, but the real estate had, by the probate sale mentioned, become the property of, and was in the possession of, Irvine. Under the special legislation relative to the Citizens' Bank the property which had been sold was, for the purpose of the enforcement of the rights of the bank, to be dealt with as if still held by McCausland, and proceedings under executory process were to be carried on on that theory, regardless of the intermediate sales. This method of proceeding had been granted by way of benefit or privilege to the bank, but in the particular case the privilege would have been an actual burden, as McCausland had died, and to have made his heirs parties would have entailed both expense and delay. In view of the fact that the land had been sold in the McCausland succession, and the heirs had ceased actually to have any interest in it, or to be concerned in after-proceedings respecting it, the bank, with the consent of Irvine (the then owner and possessor of the real estate), directed the executory proceedings which it instituted against Irvine; and contradictorily with him as the only defendant a sale took place, at which Irvine became, as we have seen, the purchaser for the price of \$850 cash. Irvine gave a qualified consent to this proceeding, evidenced by the following indorsement upon the petition in the case: "Service of the within petition and order accepted, notice and citation waived, and I agree and consent that executory process issue without further forms, processes, or delays, and that the property mortgaged may be seized and sold on November 20, 1879. [Signed] J. F. Irvine." At this sale, not only was the real estate mortgaged sold, but with it was also sold 186 shares of the capital stock of the bank. The terms of sale were cash, and the value of the entire property offered for sale was fixed by the appraisers at \$1,250. The amount of the stock subscription of the McCauslands, as reduced, was \$18,600. The particular proceeding directed against Irvine was in enforcement of past-due calls on that subscription, amounting to \$558, with interest. We are of the opinion that Irvine's obligation, as resulting from his purchase of the land, was limited to the purchase price. There was, as against the land, only one single claim, that securing by mortgage the stock subscription. It is true that simultaneously with the granting of the stock mortgage there was granted a loan mortgage of even date to secure amounts which it was assumed might possibly be borrowed by McCausland, but this mortgage was one of the class permitted to be given by article 3293 of the Revised Civil Code to secure an obligation not yet risen in existence, but which, as declared by article 3293, is realized only in so far as the obligation for which it prospectively provides shall after-

wards actually arise. It was a mere contingent mortgage, which never came actually into life, for the reason that McCausland never obtained any money on the strength of his stock, and the land was sold without the privilege of borrowing having ever been utilized. There is no question in this case of a sale by the bank under a senior mortgage, and its effect upon a junior mortgage is in its own favor. The decision quoted from—Haynes v. Harbour, 14 La. Ann. 237—therefore has no bearing. The case at bar was simply that of a mortgage creditor proceeding upon his claim by executory process against the mortgaged property, asking that it be sold entirely for cash, and so selling it. There can be no question in law as to the effect of such a sale upon the property and upon the purchaser. The creditor, by his course, exhausted his rights against the property, and the purchaser, by paying the purchase price, complied fully with all his legal obligations flowing from his purchase. If the creditor was entitled to demand that the property should be sold for cash to meet the past-due calls, and on credit to meet such additional future calls as might be due to the bank on the stock indebtedness and mortgage, and subject to the original stock mortgage to secure such calls, he should have claimed and obtained a recognition of that right, and the property should have been advertised to be sold, and sold on those terms; but it did nothing of the kind. The reason why this was not done is very clear, for, with such a heavy liability resting on the property and the purchaser, no purchaser other than the bank itself could have been found. The only alternative left to the bank was either to purchase itself, and then sell on private terms, free from all claims, or to find in advance a purchaser at a suitable price, and then sell the property at judicial sale in manner and on terms as was actually done in this case.

We have so far been intentionally entirely separating Irvine's rights and obligations as a purchaser of the land from those which resulted or could result from the sale of the stock. We now pass to that matter. It will be seen at once that Irvine occupied a very different position towards the stock at the time the executory proceedings were taken out from what he did towards the land, and the position of the McCauslands was also entirely different as to the two. The McCauslands had the ownership of the stock, and a legal interest in judicial proceedings in regard thereto, and no legal interest in the land and the judicial proceedings in respect to it. Irvine, on the contrary, had the ownership of the land, and an interest in the proceedings relative thereto, and none whatever in regard to the stock. The bank was authorized to deal, and was safe in dealing, in regard to the land, with Irvine, who was its actual owner and possessor; but the bank and Irvine had no right whatever to deal

with each other in respect to the sale of the stock. Irvine, as to that stock, was completely a third party and a stranger. Proceedings carried on contradictorily with Irvine, leading up to a sale, were absolute nullities. The adjudication conferred no title. The sale was that of a third person, without due process of law, and the stock remains today, as it was before, the property of the McCausland heirs. It will not do to say that the McCauslands will never claim the stock, that it is worthless, that it no longer represents a right, but exclusively evidences a liability. We have legally to deal with the stock as that of third persons, which has been attempted to be sold in judicial proceedings to which they were not parties. Plaintiff claims that Irvine adheres to the sale of the land as made under executory proceedings, and repudiates the sale of the stock. It must be borne in mind that at the time of these proceedings Irvine was actually the owner of the land, and he is its owner now. The effect of the sale made under the executory proceedings as to Irvine was not, as between the bank and himself, to give him a new title. It simply operated to clear off an existing incumbrance upon the property. The proceeding as to its effect was rather an extinction of a mortgage by payment than a purchase. The sale of the land was legal; the sale of the stock illegal. Irvine had the right to claim the benefit of one and to reject the liabilities springing from the other. *Pepper v. Dunlap*, 9 Rob. (La.) 283; *Hall v. Nevill*, 3 La. Ann. 326. We do not think the plea of prescription filed by the plaintiff well founded. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

MILLER, J., recused.

On Application for Rehearing.

(May 29, 1894.)

In the brief of counsel on application for rehearing it is said: "Counsel for the Citizens' Bank do not question the conclusion of the court that the sale of the stock of the bank attached to the McCausland plantation is void, but they respectfully suggest that the sale of the plantation under the proceedings taken by the bank in 1879 is also void. The court rests the nullity of the sale on the consent of the bank. * * * We respectfully suggest that the board of directors of the Citizens' Bank never expressly or impliedly consented to a sale of the plantation separate from the stock, and therefore both the sale of the stock and the sale of the plantation are void." "A decree that Irvine is not liable for contributions on the stock because the sale of the stock was a nullity would meet the case presented by the pleadings. Whether Irvine acquired a title to the

plantation, free from the stock mortgage, is a question not raised by the pleadings. The court has, however, passed upon that question in its opinion. We respectfully suggest that the exigencies of the case are met by deciding that Irvine is not personally liable for stock subscriptions, and when the bank shall hereafter proceed to enforce the stock mortgage against the plantation, the effect of the judicial sale made in 1879 can be more satisfactorily determined, and hence the court should reserve so important a question for final determination, when that question becomes the vital point in the case, and is thoroughly discussed by counsel." The prayer of plaintiff's petition in the case is as follows: "Petitioner prays that John F. Irvine may be cited to answer hereto; that, after due proceedings, judgment may be rendered in its favor against said defendant for the amount of said contributions, to wit, four thousand four hundred dollars, with interest, as aforesaid, with recognition of petitioner's mortgage on the property herein described to secure said stock and the contributions aforesaid; and that said tracts of land may be sold to satisfy, as far as they will, the judgment herein by preference,—petitioner reserving all the rights against defendant for the balance and sums which will hereafter become due on said shares of stock." It will be seen that the plaintiff claimed not only a personal judgment against Irvine, as being personally liable for the contributions of the stock, but a judgment recognizing, contradictorily with him as a stockholder and as a purchaser of the land under and through its proceedings against him in 1879, a stock mortgage on that property. The court below and this court had to pass upon and dispose of the whole of the prayer, not only as to Irvine's personal liability, but also as to this claimed stock mortgage on the land. In disposing of each of the two claims, reasons had to be assigned. When the court rejected plaintiff's prayer for a recognition of the stock mortgage on the land owned by the defendant, it did not, as counsel say, pass upon a question not raised by the pleadings. In dealing with that question we had to consider the claim in the light in which, and under the circumstances in which, it was presented to the court. Under what circumstances was the mortgage claimed? Was it under and through proceedings against the McCausland heirs, or against Irvine as strictly a third possessor of the land, holding no privity with the asserted mortgagor? By no means. The claim was advanced directly against Irvine himself as a stockholder, and as having as such personally assumed the reversion of the stock mortgage. The whole theory of plaintiff's case is that Irvine is the owner of the land, not under the two succession sales, but under the sale made in the executory proceedings of the plaintiff in 1879. We reasoned as to the existence of a stock mortgage from that standpoint,—the

standpoint presented by the plaintiff itself,—and from it held it to be impossible for plaintiff to have sold the land in the manner and on the terms it did and to still retain a mortgage on the land. Plaintiff, in its pleadings and its prayer, maintained that it could do so. It did not ask the nullity of the sale. So far from asking the nullity of the sale of the plantation by it to Irvine, its whole demand and prayer was based upon the existence and the legality of that sale. We could not have decreed the nullity under any prayer of the plaintiff, nor could we do so under defendant's pleadings and prayer. Defendant was already the owner of the property, though under a different title, derived through the succession sales mentioned. There was no necessity for him to ask for a decree setting aside the sale by the bank to him. It would not have been to his interest to do so, and, should the plaintiff bring the action against him which the brief hints at, he will no doubt vigorously oppose the action. The decree of nullity of the sale of the plantation which counsel suggest as that which should have been rendered would have been, not a decree under the pleadings, but entirely outside of them, and directly against those of the plaintiff itself. We did not intend to express an opinion, and expressed no opinion, as to what the rights of parties would have been had an action of a different character from that actually brought been instituted, nor what would be those rights in case of a future action of a different character. Those matters are for future adjustment. We intended to deal, and dealt, only with the issues presented in this particular case under its pleadings and prayer. Those we had to dispose of, as we have said, in their entirety. What we decided in this case are those issues, none other. Nothing that we have said could or should be construed to go beyond this. Rehearing refused.

(46 La. Ann. 555)

CITY OF NEW ORLEANS v. HOME INS. CO. (No. 11,379.)¹

(Supreme Court of Louisiana. March 26, 1894.)

TAXATION — ENFORCEMENT BY CITY — ASSETS OF CORPORATION — DESTRUCTION AFTER ASSESSMENT.

1. The defendant made a return showing money at interest, its credits, and its bills receivable, which was received as correct by the assessors.

2. In answer to the plaintiff's rule, and in defense, the defendant alleges that losses by fire were suffered, to a large amount, shortly after its return had been made to the assessors.

3. The evidence is that none of the money at interest, credits, and bills receivable assessed remain.

4. The requisite demand prior to seizure of other property than that assessed has been made.

5. The plaintiff has exhausted its remedy by rule to compel the delivery of the property

assessed. The right to seize other property than that assessed becomes the issue.

6. It is reserved to the plaintiff, subject to such legal rights as the defendant may plead. (Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the City of New Orleans against the Home Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. A. O'Sullivan, City Atty., and George W. Flynn, Asst. City Atty., for appellant. Farrar, Jonas & Kruttschnitt, for appellee.

BREAUX, J. The plaintiff, by rule, seeks to compel the defendant to deliver personal property for the taxes of 1892, in order to sell it at public auction to satisfy the taxes, penalties, and costs. The property is described as money at interest, credits, and bills receivable amounting to \$210,100, and money in possession, \$11,200. The taxes claimed by the city are \$4,470.26, plus interest. The assessment was proved as alleged by the plaintiff. The defendant, through its president, deposes that its return dated January 27, 1892, to the board of assessors, which served as a basis of the assessment, was correct, at the date it was made; that the company suffered severe losses, between the 18th of January and the 3d of April of that year. The net amount of stock losses was \$158,000. The items of the different losses are given in a statement filed in evidence. The witness referred to the fires that occurred on Canal street, and those among the cotton presses, as having caused the loss. He also stated that the losses were paid out of the property assessed, and that none of the cash or the bills receivable taxed remained in March, 1893, at the time the rule was filed. The judge of the district court, upon these facts, found that the defendant company had on hand none of the money at interest, and cash assessed. The rule was dismissed.

The plaintiff, a municipal corporation, can proceed by rule to compel the taxpayer to deliver to the tax-collecting officer the personal property assessed, to the end of realizing at public sale the amount of the taxes, costs, and penalties. The plaintiff's remedy, in this respect, is similar to that of the state.

On the merits the argument on the part of the plaintiff is that the net loss is less than the amount assessed, and that, as there is a remainder of the property, the rule should be made absolute as to this remainder. The amounts themselves sustain that contention, for the property assessed was valued at \$221,300, while the extent of the losses, in the figures given, is \$158,000, caused by fires. There is other testimony on the subject that does not limit the losses to the last figures. There has been a constant depreciation in values, and in consequence, it is stated the

¹ Rehearing denied May 24, 1894.

surplus is no longer what it was. These statements are not unreconcilable with the statement that the amount of loss from certain fires was \$158,000. To that amount, these figures are corroborative. The absolute, uncontradicted testimony is that, in consequence of the company's losses, none of the cash or bills receivable taxed remained in the possession of the company. With the evidence before us we do not feel authorized to conclude that there remains any of the property assessed, the delivery of which can be compelled. It would not be reasonable to order a company to deliver property the president—the only witness—deposes it has not in its possession. The plaintiff has exhausted whatever remedy it had by rule. Whatever may be the cause of the disappearance of the values assessed, the fact remains that they are no longer in possession. Nor can the responsibility of the parties for their disappearance be tested on the rule at bar. It is the duty of the tax-collecting authority to enforce payment by seizure, when possible, of the property assessed. It is authorized to rule the tax debtor into court, to compel him to deliver the property, that it may be seized. It (the property assessed) "has been concealed, parted with or disposed of" by the tax debtor, so that its seizure has been rendered impossible, by the debtor's acts. Seizure of other property becomes possible. The property in the case at bar has been disposed of, whether illegally or no is a question that cannot be determined in the trial of this rule. The remedy is pointed out by the statutes. Until applied in the manner pointed out, the courts are not called upon to determine whether the disposition made of the property renders it impossible to collect the tax.

The defendant has presented us an additional ground of defense,—that the power of the city treasurer was divested and taken away from him by section 7 of Act No. 135 of 1888, which provides that at the end of each year the council shall farm out and adjudicate the contract to the lowest bidder; that the section is mandatory; and that only the one to whom the collection of the taxes has been farmed out has any power or authority to collect the taxes. The rule is presented by the city attorney, who alleges that the defendant is indebted to the city for taxes. The treasurer is also a party to the rule. It was not sued out exclusively in the name of the city, but the city is sufficiently a party to sustain the demand for delivery of the property assessed in order that taxes due it may be collected. The heading of the rule is, "The City of New Orleans." Counsel for the city allege in its behalf for the recovery of the amount it claims. It is the city proceeding by rule to compel payment to the proper officer. The municipality has the authority to enforce the payment of taxes, and has, to that end, all the remedies given to the state for the collection of her taxes. If

no farmer of the tax has been selected, or if that official is recreant to his trust, or if, for any other reason, he does not choose to act, the municipal government is not divested of all authority of enforcing the payment of taxes due.

The right of the city to proceed, after an ineffectual attempt has been made to have the property assessed delivered to be sold for the payment of taxes, is reserved, in the judgment appealed from, i. e. the right to seize other property than the property assessed, without prejudice to such legal defenses as the defendant may have to offer. It is therefore ordered, adjudged, and decreed that the judgment of the court a qua is affirmed.

(46 La. Ann. 1120)

FERNANDEZ v. CITY OF NEW ORLEANS
et al. (No. 11,393.)¹

(Supreme Court of Louisiana. April 9, 1894.)
CLAIM AGAINST CITY—DEFICIENCY IN TREASURY—
PRESCRIPTION.

1. Plaintiff, holder of evidence of indebtedness, sues for judgment against the defendant. There are no funds in the treasury for the years the debts are due. The ordinance under which the defendant became indebted provides that the claims shall be warrantable and payable whenever there shall be money in the treasury to the credit of the appropriate fund. It is the law of the contract binding the original claimants and their transferees.

2. The creditor has a right to a warrant on the treasurer, payable out of the appropriate fund.

3. Prescription. That plea does not attach to a right for which judgment cannot be obtained.

4. There is a suspension of prescription on those rights for which plaintiff has no cause of action.

5. The principle "contra non valentem" applies.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by L. F. Fernandez against the city of New Orleans and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles Lonque, for appellant. E. A. O'Sullivan, City Atty., for appellees.

BREAUX, J. Plaintiff sued to recover \$6,420.14 from the defendant, with legal interest from judicial demand. The court a qua entered a decree recognizing the plaintiff as the owner of the claims held by him. The defendant does not ask for a reversal of the judgment, but prays that it be affirmed. There is therefore no issue before us in so far as relates to the recognition of the plaintiff as owner, by transfer from the original claimants, of claims against the city of New Orleans for the years 1881, 1882, 1884, and 1886. In all other respects, plaintiff's demand was dismissed as in case of nonsuit, without prejudice to the city's rights to plead

¹ Rehearing refused May 24, 1894.

prescription against the claims, or to urge any other defense hereafter, except that of want of ownership or title to the claims sued on.

The record discloses that there are no funds in the treasury, for the years before stated, upon which warrants can be drawn in satisfaction of plaintiff's claim. The ordinance under which these claims became an indebtedness of the defendant contains the condition that they shall be warrantable and payable whenever there shall be any money in the city treasury to the credit of the appropriate fund. It is the law of the contract, binding the original claimants and their transferee. The equities between the debtor and the present holder are not closed, for the reason that the claims are not negotiable, and the transferee has only such rights as the original claimants had.

In *Neugass v. City of New Orleans*, 42 La. Ann. 109, 7 South. 565, this court held that "all that the creditor could claim would be a warrant on the treasurer, to be paid out of the appropriate fund in the city coffers, in the order stated in the ordinance." An absolute judgment against the city for the amounts was never contemplated. The relief sought cannot be granted. The law in the cited case applies to the case at bar.

With reference to interest, it has been repeatedly decided that claims against the city of New Orleans do not bear interest until there is money in the treasury, and the city refuses to pay.

Fernandez v. City of New Orleans, 42 La. Ann. 1, 7 South. 57, with reference to the prescription pleaded. The claims are not subject to prescription that the judgment applied for can interrupt. The payment being suspended, and made conditional to there being funds in the treasury, the plea is ineffective until a right of action arises.

The questions decided in this case were considered at some length in the case of *Johnson v. City of New Orleans* (decided this day) 15 South. 100. The case at bar being similar, the same judgment must be pronounced. In so far as relates to prescription, the judgment appealed from is amended. It is ordered, adjudged, and decreed that the judgment appealed from be amended by rejecting the plea of prescription, and in all other respects it is affirmed, at appellees' costs.

(46 La. Ann. 1074)

SUCCESSION OF THOMSON. (No. 11,363.)¹ (Supreme Court of Louisiana. April 23, 1894.)

SUBSCRIBER FOR BANK STOCK—PERSONAL LIABILITY—MORTGAGE TO SECURE SUBSCRIPTION—PURCHASE OF PROPERTY BY BANK.

1. The subscribers to the stock of the Citizens' Bank of Louisiana, in subscribing, not only subjected their property to mortgage, but incurred personal responsibility to the amount of the stock.

2. Proceedings against stockholders in enforcement of calls for contributions by means of executory process are in affirmance of the contract of subscription, and not proceedings of forfeiture, and they are governed by different rules as to their effects.

3. Any balance left unpaid on defaulted calls after sale of the stock, and of the property mortgaged to secure it, made in executory proceedings, remains due by the subscriber, and an action lies to collect it.

4. The purchaser of the stock, and property mortgaged to secure it, sold at a judicial sale made in enforcement of defaulted calls, is not responsible for the balance of the defaulted calls left unpaid after sale of the stock and property mortgaged.

5. The bank, in purchasing the stock, and property mortgaged to secure the same, occupies no worse position than any other purchaser as to the unpaid balance on defaulted calls.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

In the matter of the succession of Adam Thomson. Opposition by the Citizens' Bank to the account of the testamentary executrix. From a judgment adverse to said bank, it appeals. Reversed.

Henry Denis, for appellant Citizens' Bank. Joseph C. Gilmore, for appellee. Walter B. Sommerville and Carleton Hunt (representing heirs of Gay), for appellees.

NICHOLLS, C. J. This is an appeal from the judgment of the civil district court for the parish of Orleans dismissing an opposition filed by the Citizens' Bank to the account of the testamentary executrix of Adam Thomson, and homologating said account, and authorizing and directing the distribution of the funds of the succession in accordance therewith. The petition of opposition avers that Thomson was at his death, and had been for many years before, a stockholder of the bank, holding and owning 854 shares of the capital stock, of \$100 each; that the bank had made calls for contribution of \$1,708 upon his shares each year, from 1881 to 1890, inclusive, which he neglected and refused to pay, said calls or contributions bearing by law interest at the rate of 8 per cent. per annum from the 1st of December of each and every year; that the aggregate of said contributions amounted to the sum of \$17,080; that Thomson was entitled to a credit on June 13, 1891, of \$8,040, the same being the proceeds of sale by executory process of the property mortgaged to secure the stock; that Thomson's succession is still indebted to the bank in the sum of \$9,040, with 8 per cent. per annum interest from the 1st of December of each year from 1881, upon the said annual calls or contributions of \$1,708. The bank prayed for judgment accordingly, and that its claim be placed upon the account, with interest, reserving the right of the bank to any future claims that it may have for the balance which will hereafter be due to the contributions on the 854 shares of stock. The executrix excepted to the demand and opposi-

¹ Rehearing refused May 25, 1894.

tion, on grounds not necessary to be specially enumerated, as they were not renewed in the answer afterwards filed. The exceptions were permitted to be filed and argued as such, but on the trial of the merits of the opposition. The grounds of defense of the executrix are, substantially: "(1) That the subscribers to the capital of the bank have contracted no personal obligation to pay the amount subscribed for, and they have only bound their property by mortgage; (2) that the ruling of the supreme court in the case of *Association v. Lord*, 35 La. Ann. 425, applies to this case, and shows that the subscribers of the Citizens' Bank are equally exonerated; (3) that the bank has no right to compromise with some of its mortgage stockholders, and not with others; (4) that the right of the bank to claim the contributions already due by a stockholder is lost when it has caused the shares of such stockholder to be seized and sold, and has bought them in. On the trial of the opposition, the bank waived the reservation it had made in its petition of opposition to the right to demand future contributions from the succession, admitting "that it made no claim for any contributions that have been raised or would be raised after the stock of Adam Thomson had been seized and caused to be sold by the sheriff at the instance of the bank in its suit." The district court rendered judgment dismissing the opposition of the bank, at its costs, and approving and homologating the account filed, and ordering the funds to be distributed accordingly. The bank appeals.

Plaintiffs' contention that in subscribing to the Citizens' Bank stock the subscribers merely subjected their property to mortgage, and incurred no personal liability, is not well founded. In *Cucullu v. Insurance Co.*, 2 Rob. (La.) 577, this court said: "A person who, with others, signs an agreement or promise to take stock in an incorporated company, thereby promises to pay the corporation the sum necessary to cover every share set opposite his name, and an action will lie to recover it. This point has been repeatedly decided, both in England and the United States, and rests upon the plainest principles of law and justice. * * * It is not to be permitted to any number of individuals to get up incorporated companies for insurance, banking, or other operations, and, after enabling them to get into debt, to throw the loss upon the creditors, by refusing to pay their stock, or forfeit it, or dissolve the corporation, and releasing themselves by nonuser." Cook says (section 71): "A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect," and he adds (section 72): "This rule prevails in regard to subscriptions taken before the incorporation as well as after incorporation." Cook, *Stock, Stockh. & Corp. Law*. There is no question in this case of any implied promise. The promise is absolute and express, and the

right of action to collect by personal action unquestionable. We see nothing to take this particular subscription out of the general rule, and the evidence in the record establishes that Adam Thomson, when he purchased the shares of stock referred to herein, and the property mortgaged to secure the same, assumed all the obligations of a shareholder in the bank. His personal obligation, as resulting from his purchases from the Bishops, is equally clear.

We do not understand the executrix to question the amount of the calls, the necessity for the same, or the regularity of the proceedings taken to enforce them. On the contrary, she sets up those proceedings, and the sale made under them, as a defense, claiming that by reason thereof the succession of Thomson has been released from all liability. She invokes in favor of this position the doctrine laid down in Cook (sections 127 and 128) that "forfeiture of stock relieves the shareholder whose shares are forfeited from liability to company creditors," claiming that the seizure and sale of the stock, and the property mortgaged to secure it, in the enforcement of the demand for calls, operated a forfeiture of the stock, and that the corporation, by becoming the purchaser of the stock and the property mortgaged, had assumed, and rendered itself liable for, all the obligations resulting from the subscription, thereby relieving the succession of Thomson.

In referring to the various remedies of which a corporation can avail itself against its nonpaying stockholder, Cook (section 121) says: "When a subscriber fails or refuses to pay for the shares of stock for which he has subscribed, the corporation has generally several methods of enforcing the contract. First, there is the common-law action to collect the subscription as a debt. This remedy always exists, except in a few states, where it is available only when the subscription itself, or the charter, creates a liability to pay. Second, the corporation may sue on the subscription, obtain judgment, and then proceed to sell the stock under an execution levied to collect the judgment. Third, the corporation may bring an action at law for breach of contract, the measure of damages being the difference between the value of the stock at the price which the subscriber was to pay and the market value at the date of the refusal to pay. A fourth and very important remedy is that of forfeiture. It is effected in one of two ways. The forfeiture may be a strict foreclosure of the stockholder's stock,—that is, by the taking of his stock by the corporation itself,—or it may be by a public sale of the stock for nonpayment of the subscription." After a discussion of these various remedies and their effect, the author proceeds to say: "There is a class of cases where it is held that a forfeiture of shares of stock is like the foreclosure of a mortgage, and that, just as

a mortgagee may have judgment against the mortgagor for a deficiency, so may a corporation have its action of assumpsit against a subscriber whose stock, having been forfeited, has failed to sell for enough to pay his entire indebtedness to the corporation on the subscription. This rule is held to apply equally to original subscribers or their transferees, and any stockholder is liable under this rule for the balance due upon assessments, after deducting the amount realized at the forfeiture sale." We are of the opinion that, the Citizens' Bank having made legal calls upon the succession of Thomson which were not responded to, the judicial proceedings taken by the bank were by way of direct enforcement of the contract, and not by way of forfeiture, and therefore the rule relative to forfeitures is not applicable to this case.

We are next to inquire what was the effect from other standpoints upon the rights and obligations of parties of the adjudication made to the bank. The matured unpaid calls due by the succession at the time of the adjudication amounted to \$17,080. The stock, with the property mortgaged, sold together for \$8,040, so that, after exhaustion of the mortgaged property, there remained a deficit upon the defaulted calls of \$9,040. Would a third party, purchasing the stock and property at this sale, have been responsible by reason of thus becoming owner of the stock for this deficiency upon the calls? We think not. In cases of transfer by conventional sale, Cook declares the transferor is liable for calls payable before the transfer is made, and in some cases for calls made before, but payable after, the transfer, and he cites in support of this position, among others, a Louisiana case,—that of Railroad Co. v. McKeen, 14 La. Ann. 724. See Cook, Stock, Stockh. & Corp. Law, §§ 255, 258, and notes. To the same effect, in section 418, he says: "The transferor is bound to pay all calls made before the transferee purchases." The purchaser at a judicial sale occupies no worse position, and, in our opinion, matters are not varied by the corporation itself becoming the purchaser. The situation is that to which reference is made in the citation from Cook (section 126). The adjudication left the stockholder responsible for the balance upon the matured assessments or calls, after deducting the amount realized from the sale. The bank claims nothing more than this.

The decisions in the matter of the Consolidated Association of the Planters of Louisiana rested upon the special facts connected with the affairs of that association. As it is entirely separate and distinct from the Citizens' Bank, the plea of *res judicata* has no force.

The executrix urges that it would be against good conscience to permit the bank to recover in this case, as, though it has made numerous compromises of indebtedness with other stockholders, it has declined to compromise with the succession she represents.

She not only made no defense against the propriety and the legality of the calls when made, and the proceedings in their enforcement, but she sets up in this suit, as we have said, the proceedings heretofore taken as having relieved the succession from all liability. Questions as to the calls are not properly before us. All that we are called on to say is whether, defaulted calls having been enforced, resulting in a purchase by the corporation of the stock and mortgaged property, but leaving a balance due upon the stock, the succession is legally responsible for that balance. If it is, the bank has a right to a judgment in the premises. Whether the compromise referred to has or has not resulted, or will result, in unjust discrimination among stockholders is a matter which we would be unable to dispose of from the record, even if the issue were properly before us. A thorough knowledge of the entire situation of the bank and the accounts of all the stockholders would be necessary to reach correct conclusions. It is quite possible that the most liberal concessions made to other parties have resulted in larger actual pro rata payments from them on their stock than have been or ever will be made by the succession of Thomson. If the succession should suffer injury, the remedy is not that sought to be applied here. Referring to enforced payments upon stock, Cook (section 211) says: "Corporate creditors compelling stockholders to pay their subscriptions are under no obligations to see that the payments made by the subscribers are proportionately equal. A court of chancery will compel subscribers to pay in full the amount of their unpaid subscription, if the corporate indebtedness make it necessary, leaving them to seek contribution from other shareholders. The rule, moreover, is well settled that a shareholder who has been compelled to pay more than his proportion of the debts may maintain his action against his co-stockholders for contribution." In *Haynes v. Kent*, 8 La. Ann. 132, which was an action to enforce calls made against a stockholder, this court said: "The defendant stands as any other partner in a joint stock company, and is bound to pay, when regularly called upon, the share of the capital which he agreed to pay. He is in no sense a joint debtor of the corporation. His obligation, on the contrary, is several, and entirely unconnected with those of the other stockholders. He owes the amount of his subscription, whether they pay or not, and nothing beyond that amount can be claimed of him under any circumstances." Whilst we refer to these authorities, we are not called on, as we have said, to express (nor could we from the data in the record) any opinion as to whether the succession has been discriminated against or not, and, if so, what its precise course should be.

After consideration of the different grounds of defense set up, we have reached the conclusion that they are not well founded. For

the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that there be judgment in favor of the Citizens' Bank of Louisiana against the succession of Adam Thomson for the sum of \$17,080, being the aggregate amount in principal of the calls made each year from 1881 to 1890, both inclusive, under the charter of the said bank, and the laws relative thereto, upon the shares of stock in said bank owned by Adam Thomson, with interest at 8 per cent. per annum on each annual call from the 1st of December of the year each call was made until paid, subject to a credit on the 13th day of June, 1891, of \$8,040, the sum being the proceeds of sale by executory process of the shares of stock, and property mortgaged to secure the same, and that this judgment be placed upon the account of the executrix. It is further ordered that the succession of Adam Thomson pay the costs in both courts.

MILLER, J., recused.

(46 La. Ann. 833)

COONEY v. RYTER et al. (No. 11,405.)¹

(Supreme Court of Louisiana. May 7, 1894.)

DONATION—PRESUMPTION—BANK DEPOSIT IN ANOTHER'S NAME.

1. No one is presumed to have intended to make a donation.

2. In case a person makes a deposit in bank for the account of another, pursuant to a previous agreement that on a certain condition the latter is to employ it for a designated purpose, and the former afterwards calls for the restitution of said sum before the fulfillment of said condition, he is entitled to have such custodian of the fund deposited respond to his call.

3. In case the claim of the respondent to such demand be that an absolute donation of said sum of money was intended, she carries the burden of proving such donation by a fair preponderance of proof.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by John Cooney against Mrs. Mary Ryter and the Whitney National Bank. Judgment for plaintiff, and defendant Mrs. Ryter appeals. Affirmed.

Wynne Rogers and Bernard Titcher, for appellant Mrs. Ryter. J. J. McCann and Lazarus, Moore & Luce, for appellee.

WATKINS, J. This suit has for its object the recovery of \$2,500, on deposit in the Whitney National Bank. It appears that this sum of money was deposited by the plaintiff for the account and in the name of his sister, Mrs. Ryter, the defendant, on or about 29th of June, 1893, his contention being that this deposit was for safe-keeping, merely, during his temporary absence on a

visit to California; while that of the defendant Mrs. Ryter is that it was an absolute donation to her; or, to employ the language of plaintiff's petition: "That, being unmarried, and without forced heirs, it was his purpose and intention to make provision, in the event of his death, for the children of his said sister Mary Ryter, and that the deposit of the funds as aforesaid was made in view of petitioner's absence from the state as aforesaid. * * * That said Mary Ryter was fully advised of the purpose and intention of your petitioner, and consented to allow the said fund to be deposited in her name, recognizing at all times that your petitioner was the owner of said fund, and entitled exclusively to the use and disposition thereof." Availing himself of the demand without avail, the plaintiff demands possession of said fund, and a decree recognizing him as owner thereof; and he prays for the maintenance of his writ of sequestration, and the perpetuation of his writ of injunction. The defendant first pleaded a general denial, and subsequently amended her answer, and specifically denied that she held this fund in trust, and, on the contrary, averred that the plaintiff had made her an absolute donation of it. On the trial there was judgment in favor of the plaintiff for the sum of \$2,500, less \$50 that had been checked out of bank by Mrs. Ryter; and the latter has appealed.

All parties admit that the relation of the Whitney Bank to the other parties to the suit is that of a mere stakeholder, and without interest in the result of the controversy. Aside from the fact that the fund was deposited in bank by the plaintiff to the credit of the defendant, there is but little evidence which throws any light on the controversy, outside of the evidence of the parties to the suit; and the substance of the story of each is of like character as their respective judicial declarations. The following points are collated in the plaintiff's brief as those established by the evidence, and relied upon by him as showing that no gratuitous donation was intended by him, to wit: "The parties, though brother and sister, had not visited one another, or been on speaking terms, for several years, and they had no love or affection for each other. That the plaintiff had not approved or liked the deceased husbands of the defendant. The plaintiff gave to the defendant, immediately before making the deposit in the bank, \$20, with which to purchase such necessaries as she might need. The defendant asked permission of the plaintiff to draw on the amount deposited in case of necessity, and this permission was granted by the plaintiff after the deposit had been made. The defendant, according to her own testimony, had another source of revenue or livelihood, being the wages of herself and children, from which her rent was paid and herself and family supported; and, independent of this, she ex-

¹ Rehearing refused May 30, 1894.

pected, at the time, to sell her house for \$210. This was known to the plaintiff, and this amount of \$210, in addition to her wages and the wages of her children, would, under ordinary circumstances, have supported them during the absence of the plaintiff. The alleged donation would have left the plaintiff virtually a pauper, and, in case of sickness or accident, he would be entirely dependent upon the charities of the world, or of a sister for whom he had no love or affection, and who had none for him." In addition to the foregoing (and which are substantially proven by the record) we find in an extract from the record the following statements of the plaintiff, viz.: "Before I left, I say to her: 'Mary, come with me to the bank. I want to put \$2,500.00 in your name until I get back from California. But when I get back from California I will try and buy a piece of property to put you and the children in, to keep you from paying rent. She went to the bank, and I pulled out the twenty-five hundred dollar bills, and handed them to the clerk of the bank,'—instructing the bank official to put it in the name of his sister, Mrs. Ryter, the defendant. Coupled with this statement is the positive declaration of the witness that he never gave the money to his sister, but that she was to hold it for him in trust until his return from California. Again, the plaintiff states that he went with his sister to a real-estate agent,—the latter introducing him,—and he said: 'I am glad you are selling that house of hers [Mrs. Ryter's], because she has never been able to pay any taxes or insurance upon the place; and it was more an incumbrance than a benefit to her. And I told him, in the presence of her, that if he would negotiate to buy but one of those four corners, that I would buy it, and put my sister and her children in it.' He says the sum of \$1,800 was named. Again, this witness states that he told his sister that when he returned from California he would try and get her a house, and give her a chance once more to make a living for herself and children; and that he offered her 'a couple of hundred dollars, if she got the grocery, to buy a stock.' He further states he said that when he returned from California he would buy a piece of property, and put her and the children in it. The following question and answer puts the plaintiff's view of the case very clearly: "Q. Why was the money placed in the name of your sister,—for her or your protection? A. I put it in her name [so] that, if I would get killed, she would be the owner of it. It was my money. When I would get back I was supposed to draw it out, and buy a house, and put her in it. Q. Did you intend to give her that house, if you put her in it? A. No, sir; because she had a house taken away from her,—sold for debt. Q. Did you make a donation of the \$2,500 involved in this controversy to your sister? A. Give it to her? Q. Yes. A. No, sir; no, sir. Oh,

no! * * * Q. Did you give your sister authority, when you deposited that money in bank in her name, to draw out any part of that money? A. Never. Only in case of sickness or death. I told her she could draw only on that condition; and, if Mr. Danziger could purchase that piece of property, for her to give him a couple of hundred dollars to bind the sale, and when I got back I would attend to the rest." One of the defendant's witnesses confirms the story in reference to the plaintiff's contemplated investment in property in which his sister and her children were to live; that "he would fix up to pay her debts, and she would be on top again." The only material difference there is between the statements of the plaintiff and defendant consists in the fact that the former insists that the money was only intrusted to the latter to be ultimately employed in purchasing a house for the use and occupancy of the latter and her children, while the latter contends that the money was actually given to her, to enable her to buy a house for herself and children. She states what she conceived to have been the exact words of the plaintiff thus: "Q. What were his exact words when he spoke to you about giving you this money? A. The exact words were [that] this money was to buy a place, and in case of want I could draw and use it. These are the last words. I asked him when he was going away. I says, 'In case I would want money, * * * can I draw on that money, and use it?' He says, 'certainly.'" The foregoing is substantially all the testimony in this record on the matter in dispute, and in our opinion it fully confirms the correctness of the conclusions of the district judge. Judgment affirmed.

(46 La. Ann. 1174)

MEYER et al. v. ROTHSCHILD et al. (No. 11,397).¹

(Supreme Court of Louisiana. May 7, 1894.)

LANDLORD AND TENANT—RIGHT TO SUBLET.

No valid sublease of premises can be made without the consent of the lessor, when the lease prohibits the subleasing of the premises without the lessor's consent.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by A. Meyer & Bro. against M. H. Rothschild & Co. Judgment for defendants, and plaintiffs appeal. Affirmed.

Lazarus, Moore & Luce, for appellants. Farrar, Jonas & Kruttschnitt, for appellees.

McENERY, J. The plaintiffs leased the building No. 100 Canal street, in the city of New Orleans, from the agents of the lessor, a nonresident. The agents were Robinson & Underwood, of the city of New

¹ Rehearing refused May 30, 1894.

Orleans. The lease contained the stipulation that the property could not be subleased without the owner's consent. Plaintiffs sue the defendants for the price upon an alleged verbal lease made on 10th August, 1892, for the unexpired term of their lease for the price of \$5,250. The defendant M. H. Rothschild had negotiated with the attorney of A. Meyer & Bro. for the unexpired term of the lease. Security was demanded from Rothschild, who was either unable or unwilling to give it. On the 10th of August an agreement was reached, by which the defendant consented to take the unexpired term by paying in advance, with a discount of 8 per cent. He declined to take the premises after the agreement; hence this suit. The defendant denies that there was any valid contract of lease.

It is evident that no valid lease could be made without the consent of the original lessor. This was never given. Underwood, of the firm of Robinson & Underwood, 'emphatically states that he had declined to accept the defendants as lessees without security, and they were never tendered as lessees with the required security. The attorney for A. Meyer & Bro. proposed the names of several responsible parties to Underwood, and asked him if he would accept them as security. He assented, but says the security was never tendered. In reference to the agreement made by the attorney with Rothschild about paying in advance with 8 per cent. interest discount, he says that he has no recollection of any such proposition having been made to him. He is a disinterested witness, and was sworn in plaintiffs' behalf. As he is a real-estate agent, it is reasonable to suppose he would have positive knowledge of a fact which it was essential for him to know in order to give his consent to the subleasing of the premises. He says the manner in which it was brought to his knowledge, before the 10th of August agreement, was, when he was asked by plaintiffs' attorney if he would not at any time accept the cash if it could be discounted, but he never mentioned Rothschild's name. The question seems to have been hypothetical. It is not shown that Underwood was made acquainted with the rate of discount, or that any definite understanding was ever made with him to accept defendants as lessees on any particular condition. As the consent of Robinson & Underwood, the owner's agents, was essential to a sublease of the premises, it is certain that the agreement between the attorney and defendants was without effect, as this consent was wanting. In a brief opinion the district judge says that the verbal agreement between plaintiffs and defendants is clearly proved, but the concurrence of the two wills was not sufficient to impart vitality to it, without the consent of Underwood & Robinson, the agents of the original lessor. Their consent was essential

to the perfection of the contract of lease, and neither plaintiffs nor defendants could supply the missing link. It does not appear that Robinson & Underwood were even made acquainted with the 10th of August agreement. Underwood says positively it was never submitted to him for his ratification or signature, and that he has never consented to the subleasing of the premises to the defendants. Judgment affirmed.

(46 La. Ann. 859)

STATE ex rel. WARD v. BOARD OF ASSESSORS. (No. 11,492.)

(Supreme Court of Louisiana. May 7, 1894.)

TAXATION—EXEMPTIONS—PROPERTY LEASED FOR BUSINESS PURPOSES.

1. Property leased for manufacturing purposes is not exempt from taxation, under article 207 of the constitution.

2. The word "employed," used in said article, means "invested."

3. The lessor not having invested said property in the manufacturing interest for which he leased it, the property so leased is not exempt from taxation.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Mandamus by the state of Louisiana, on the relation of John Ward, against the board of assessors. Judgment for relator, and defendants appeal. Reversed.

E. A. O'Sullivan, City Atty., and Henry Renshaw, Asst. City Atty., for appellants. Charles Louque, for appellee.

McENERY, J. This is a mandamus proceeding to compel the canceling of assessments against relator's property for the year 1893. The exemption from taxation is claimed under article 207 of the constitution, relieving the capital and machinery employed in certain manufactories from the payment of taxes. The relator was formerly engaged in the manufacture of machinery, and his property engaged in said business was exempted from taxation, under the provisions of article 207 of the constitution. He sold his tools and machinery to other parties, and leased to them the lot and building. They continued the same business. Relator claims exemption for the lot and building because the property is still employed in the production of machinery.

It is a universal rule that exemption laws must be construed strictly. They must be confined within the limits intended by the law-giver. The object of the article in the constitution is to encourage the production of certain articles mentioned in the article. The exemption was intended to induce the owner of capital and machinery to employ them in the manufacture of said articles. The exemption was based upon the ownership or interest in the capital, machinery, and property employed in the enterprise, and

interest in the products. It is addressed to manufacturers,—those who would have an interest, by the investment of capital, in the products of manufacturing establishments. The relator has no interest in the manufacture of machinery by his tenant. He is an utter stranger to the enterprise, and has no capital invested in it. He is the lessor of the property in which the manufactory is conducted, and, because it is leased for the purpose of carrying on a manufacturing establishment, cannot, by any possible reasoning, convert it into capital or property invested or employed in the industry conducted by his tenants. The article of the constitution is very plain. It says: "The capital, machinery, and other property employed in the manufacture of * * * machinery shall be exempt for twenty years from taxation." The word "employed" means "invested," as used in the article. Under the interpretation of the article asked by relator, every species of property not used by the manufacturer, but used about the premises or in the manufactory, would be exempt. Carts and wagons employed in hauling to depots for shipment, and bringing materials to the factory, would be exempt, notwithstanding they are hired to it by other parties, who pursue a distinct and separate calling. The article does not intend to exempt these, nor does it intend to exempt the lessors of property who happen to find a tenant who is a manufacturer, and uses the property in his special calling. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that the rule granted herein be discharged, at relator's costs.

(46 La. Ann. 1113)

BETZ v. LIMONGI (No. 11,394.)

(Supreme Court of Louisiana. March 26, 1894.)

DEFECTIVE STREET—LIABILITY OF ADJUTING OWNER.

1. Private actions do not lie for breach of public duty.

2. Section 36 of Act 20 of 1882 (the charter of the city of New Orleans), requiring owners of lots to keep the banquettes in front of same in repair, and Act 114 of 1886, authorizing the city council to establish a uniform grade of banquettes, and requiring the owner of lots fronting on the banquettes to make the grade, impose upon the lot owner a public duty, and a person injured by the neglect of the lot owner to repair the banquettes or to make the uniform grade cannot bring a private action against the owner of the premises for the injury sustained by his breach of public duty.

3. There has been no grant of power to the city of New Orleans to change the general law, and to transfer the responsibility for injuries resulting from defects in the public ways from the public to an individual who is not directly responsible for their existence.

4. The duty of the property owner in repairing the banquettes, and conforming to an established grade, is to the whole public of the city,—all of the inhabitants, who own, in common, the

banquettes. The punishment for breach of this public duty must be in some form of public prosecution, and not by a suit for damages by an individual.

5. There are certain burdens imposed upon individual members of a community for the benefit of individual and particular members of the same, which, for a violation of the duty imposed, may give rise to an individual right of action, as well as a public prosecution.

6. The distinctions between the duty imposed as due to the collective community, and that due to individuals, are readily distinguished by the nature of the obligation.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Philip M. Betz against Francois Limongi. Judgment for defendant, and plaintiff appeals. Affirmed.

Benjamin Rice Forman and B. R. Forman, Jr., for appellant. Chrehan & Suthon, for appellee.

McENERY, J. The plaintiff's wife was injured on the banquettes in front of defendant's house, in the city of New Orleans, while passing in front of the same. It is alleged that the injury was in consequence of the defendant having neglected to repair the banquettes. It is not alleged that the injury resulted from any obstacles placed on the banquettes by defendant. There was judgment for defendant, rejecting plaintiff's demand. The plaintiff appealed.

Section 36 of the charter of the city of New Orleans provides "that all paved banquettes in the city of New Orleans shall be kept in repair by the owner of real property fronting thereon," and section 8 of the same says the "city council shall have power to compel the owners of property or tenants to keep their side walks in front of such property clear and in repair." Act 114 of 1886 authorized the city council to establish a uniform grade for the banquettes in the city. When the city council, in its discretion, deems it necessary to alter the grade on any street, it is made the duty of the city surveyor "to give the grade and make it known," upon which the proper notices shall be issued by the commissioner of public works to owners of property, or their agents, to conform to the newly-established grade within 10 days after the service of the notice. In default of the owner doing the required grading after the proper notice, it is made the duty of the comptroller of the city to have the work done, at the request of the commissioner, at the expense of the owner. A certificate for the cost of the work is recorded, which becomes a lien on the property, with 6 per cent. interest per annum.

We are asked by plaintiff's counsel, in default of judgment in his favor, to remand the case, to correct certain alleged errors of the district judge in his ruling in reference to the scope and meaning of Act 114 of 1886. It will be unnecessary to remand the case, for the reason that, conceding all the plaintiff

¹ Rehearing refused May 23, 1894.

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asks in reference to said rulings, we do not think he is entitled to a judgment. Conceding that the defendant had failed to make repairs to the banquettes, and the council had ordered the banquette raised or lowered on the street on which defendant owned the property, and that he had been served with proper notice, and had failed to comply with the same, still only a public duty would have been imposed upon him, the neglect to perform which could not render him liable to an individual who had been injured on the sidewalk or banquette in consequence of the failure to repair it, or to raise or lower it in conformity to the established grade. Dill. Mun. Corp. § 1028. In the case of Taylor v. Railway Co., 45 Mich. 74, 7 N. W. 728, the council of the city of Monroe had full and complete power over the streets; and the legislature had granted to said city, in its charter, the power to compel owners and occupants of property to repair the banquettes in front of same, and to keep them free from obstructions and snow and ice. The plaintiff in that case sued the defendant for an injury suffered by her in consequence of slipping and falling upon the ice which had formed on the sidewalk in front of premises occupied by defendant, who had failed to remove it in accordance with the city ordinance. Judge Cooley, the organ of the court, held: "An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owner of the premises." The syllabus of the case is brief, and is as follows: "Private actions do not lie for breach of public duty." In the case of City of Hartford v. Talcott, 48 Conn. 525, the action was by the city against the defendant to recover the amount of a judgment against plaintiff for damages for an injury caused by ice upon a sidewalk in front of his premises. The city had been held liable because of the duty imposed upon it to keep the sidewalks in repair, and free from obstructions. The city council of Hartford had passed an ordinance requiring every owner or occupant of a building or lot bordering upon a street with paved or graded sidewalks to remove from the walk all snow and ice within a certain time, and imposing a penalty for the nonperformance of the public duty. The ordinance was passed in conformity to a general law of the state which placed upon municipal corporations the burden of keeping the highways in their respective limits in a reasonably safe condition. The court held that there was no grant of power to the city council to change the general law, and transfer the responsibility for injuries resulting from defects in the way from the public to an individual who is not directly responsible for their existence. And we can find no such power to transfer responsibility in the charter of the city of New Orleans, or in Act 114 of 1886. The charter and Act 114 only au-

thorized the enactment of an ordinance requiring each proprietor fronting on a street to assist the city in keeping the banquette in repair, and to keep it to a certain grade; and such seems to be the intent of the legislature in relation to the city of New Orleans. No penalty is imposed, by fine, for the nonperformance of the public duty imposed. The work is to be done at the expense of the owner, if he fails to do it, with an additional burden of 6 per cent. interest. By this legislation the city is not relieved from responsibility. It is still its duty to do the work, and, as it has no authority to shift the responsibility for failure to do it, it remains answerable for injuries resulting from negligence of the owner, on its own omission to act.

It is claimed by plaintiff that under section 36 of the city charter, quoted above, the obligation to keep the banquettes in repair imposed a duty upon the owner of the lot, in favor of all persons who use them, and that the neglect to keep them in repair, in consequence of which any one lawfully using the banquette is injured, renders the owner liable to him in damages. But the duty imposed was not for the benefit of individuals, or a particular class of individuals. The duty was to the whole public of the city, to all its inhabitants, who own the banquettes and streets in common. The neglect to repair the banquettes was such a breach of public duty that its punishment must be in some form of public prosecution, and not by a suit for damages by an individual. 45 Mich. 74, 7 N. W. 728. There are certain burdens imposed upon the individual members of a community, for the benefit of a particular individual or class of individuals, which, for a violation of the duty imposed, may give rise to an individual right of action, as well as a public prosecution. *Id.* Such actions generally spring from franchises granted by the state, or some subordinate political corporations, to be used for the benefit of the individual members of the community, or from the performance of a public duty by an official for the benefit of a particular individual. The distinction between the duty imposed as due to the whole community collectively, and that due to individuals, is readily distinguished by the nature of the obligation. Judgment affirmed.

(46 La. Ann. 559)

DURWARD et al. v. JEWETT et al. (No. 11,408).¹

(Supreme Court of Louisiana. April 23, 1894.)

FOREIGN RECEIVERS—INSOLVENCY OF BENEVOLENT ASSOCIATIONS—TRANSFER OF FUNDS.

1. In an association like the Iron Hall, where all the members, although residing in different jurisdictions, are bound by a common contract by the supreme representative of the order, which manages a trust fund for the

¹ Rehearing refused May 22, 1894.

benefit of the entire membership, if a court at the domicile of the association appoints to it a receiver, on account of its insolvency, it is competent for a court in another jurisdiction to order trust funds forming a part of the trust funds held by a local branch to be paid into the hands of the receiver.

2. It is no objection to such an order that the central authority has made a regulation that only a certain portion of the trust fund shall be forwarded to it at stated times. The insolvency of the association makes the whole fund demandable for the purposes of distribution among those who have acquired rights on it.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Petition of Widow S. Durward and others against Mrs. Jennie Jewett and others. Decree granting an injunction as prayed for, and defendants appeal. Reversed.

Branch K. Miller, for appellants. Morris Marks and Albert Voorhies, for appellees.

McENERY, J. The plaintiffs are members of branch No. 1148 of the Order of the Iron Hall. This society or association is insolvent, and is in the hands of a receiver appointed in the state of Indiana, at its headquarters or domicile at Indianapolis. The plaintiffs allege that the Iron Hall has ceased to exist, does no business, and, as members of said branch 1148, they fear that the officers thereof will send the money, property, etc., of said branch to the receiver in Indiana. They pray for an injunction restraining them from sending said money, etc., beyond the limits of this state. The injunction issued as prayed for, and on its trial was perpetuated, and, in accordance with the prayer of the petition, the property was deposited in court. Subsequently an order was granted distributing the fund among the members of branch 1148. The officers against whom the injunction issued resist the same, on the ground that the money belongs to the "supreme sitting" of the order,—that is, to the entire membership of the order, of which the former is the representative.

The fund in controversy is the reserve fund from assessments made prior to the appointment of a receiver. It is true that the Iron Hall is hopelessly insolvent, but, as it is a corporation organized under the laws of Indiana, the appointment of a receiver did not destroy its corporate existence, unless there had been a judgment forfeiting its charter, and a receiver appointed to wind up its affairs in accordance with the decree. But it does not appear that any such decree of forfeiture has been rendered. When the receiver was appointed, he undertook, under the supervision of the Indiana court, to manage the affairs of the corporation, suostituting the court's administration of its affairs for that of the officers of the corporation. *Falley v. Talbee*, 55 Fed. 893. The Iron Hall was organized as a mutual benefit society. Assessments were made for various purposes,—to take care of the sick, to pay in-

surance on the lives of deceased members, and to provide a benefit fund, for all who had complied with the rules and regulations, of a sum not exceeding \$1,000. All who became members of the order were bound by the rules and regulations, and there was a contract between and among all its members throughout the many states in which the order existed. All who have complied with the rules and regulations have rights upon the reserve fund,—the sick, the heirs of deceased members, and those who are entitled to the benefit fund shown by certificates against the assessments of which the reserve fund forms a part. The assessments were made for the purpose of meeting these obligations, and the fund arising therefrom is a trust fund, held by the order, either immediately or through its branches, for destination to its proper uses. Section 1 of law 11 of the order is that 20 per cent. of the amount reserved by each branch on each assessment shall be set aside and retained as a reserve fund, which is declared to be the property of the supreme sitting, and shall be subject to its control at all times, as provided by the order. After the expiration of six years and six months from the date of the organization of the order, one-seventh of the reserve fund then on hand shall be called for to pay benefits, and annually thereafter one-seventh of the reserve fund shall be called in for like purposes. Section 2 intrusts the investment of the reserve to the local branch, and provides for the manner of its investment. Plaintiffs contend that the order having ceased to exist, and being no longer able to carry out its object and purposes, said fund reverts to the original subscribers of the branch. This was a trust fund, and held, not alone for the benefit of the members of the local branch, but for all the membership of the order. The fact that the trust could not be carried out as originally intended cannot deprive these members of the rights which they have acquired in the trust fund. Every member of the order must be to some extent likened to a shareholder in a business corporation. The forfeiture of the franchise does not include forfeiture of property, and, when this has been declared extinguished, property rights are not destroyed. Courts will so manage the property as to preserve all rights upon it according to law (*Mor. Priv. Corp.* par. 1033), and the fact that the legal title to property becomes extinguished by a dissolution of the corporation does not destroy the rights of beneficial owners upon it (*Id.* par. 1032). The members of the order, like shareholders, are the beneficial owners of the 20 per cent. reserve fund. All who have paid assessments have an interest in this fund, whether they reside in Indiana, New Jersey, or this state. It was made for a specific purpose, the benefit of which was to inure to the whole brotherhood, and not for any particular branch. "Equity will always protect the rights of a cestui que trust,

without regard to the strictly legal title; and therefore, when a corporation is dissolved, a court of equity will recognize and protect the equitable rights of the shareholders, for whom the corporate body, as recognized by law, was merely a representative or trustee; and the assets of the dissolved corporation will be treated in equity as a trust fund belonging to the shareholders of the company, subject to the rights of its creditors." *Id.* The organization of the courts of Louisiana, the principles enunciated in the Code, and the rules of practice enable them to fully carry out this equity doctrine. The supreme sitting is unquestionably the owner of the fund. It was held for it by the local branch, and, for the purposes of carrying out the trust, it has the right to demand the fund from the local branch. The fund was to be called for after a lapse of time in small amounts. But when the corporation became insolvent, and was placed in the hands of a receiver, the entire amount became due and demandable in order to satisfy those who had claims upon it. The fund had been paid in on assessments. Individual ownership over the amount ceased. Title was vested in the supreme sitting, and the local branch only held it for it, and it did not relinquish ownership, but only regulated a call on it at stated periods. The inability to carry out this regulation did not cause the fund to revert to those who had paid the assessments. In the case of *Falley v. Talbee*, 55 Fed. 892, there was a proceeding instituted by the receiver of the Iron Hall to gain possession of the reserve fund held by a local branch in Rhode Island. The defendants in that case argued, as the plaintiffs do here. The United States district judge in that case said: "The argument, then, is that, according to this law, the supreme sitting can call for the reserve fund only at certain times and for certain purposes, and therefore the receiver can call it in only at these times and for these purposes, and not for the general purpose of liquidating the whole trust fund. This argument, I think, rests on a misapprehension of the effect of the laws of the society. They undoubtedly do impress upon the funds the character of trust funds, and perhaps affect different parts of the fund with different equities, but as to the time and manner of ascertaining and marshaling these equities, and as to the method of administration of the fund accordingly, they must be taken to be abrogated in the case where, as this bill alleges, the society is insolvent."

In an association like the Iron Hall, where all the members of the society, although residing in different jurisdictions, are bound by a common contract to the supreme representative of the order, which undertakes to manage a trust fund for the benefit of all its members, if a court of the domicile of the order which assumes jurisdiction appoints a receiver on account of insolvency, it is competent for a court in another jurisdiction to or-

der funds, forming a part of the trust fund, to be paid into the hands of the receiver. *Falley v. Talbee*, 55 Fed. 892. The receiver is not here demanding this reserve fund, but the injunction issued on the hypothesis that he might demand it. Hence, we have of necessity been compelled to treat the case as though the receiver was plaintiff in a demand for the fund. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed. It is now ordered that the demand of plaintiffs be rejected, and the injunction dissolved.

(46 La. Ann. 1189)

LEMAN v. MANHATTAN LIFE INS. CO.
(No. 11,427.)¹

(Supreme Court of Louisiana. May 7, 1894.)
ACTION ON LIFE POLICY — PROOFS OF LOSS — SUICIDE — BURDEN OF PROOF.

1. In an action on a life policy, proofs of loss, stating suicide as the cause of death, are admissible, but not conclusive against the assured. *Bliss, Ins. § 285; Association v. Sargent*, 12 Sup. Ct. 332, 142 U. S. 699; *Insurance Co. v. Newton*, 22 Wall. 36; *Phillips v. Insurance Co.*, 26 La. Ann. 404.

2. In such actions, when the defense is self-destruction, the burden of proof is on the insurer to establish the suicide; and when circumstantial evidence, only, is relied on, the defense fails, unless the circumstances exclude, with reasonable certainty, any hypothesis of death by accident, or by the act of another. *Bliss, Ins. §§ 366, 367; Mallory v. Insurance Co.*, 47 N. Y. 52; *Phillips v. Insurance Co.*, 26 La. Ann. 404.

3. No such exclusion of any hypothesis save suicide can be predicated on the mere fact of the dead body of the person insured, found with a mortal wound from a gunshot, the discharged pistol wedged on the thumb, "as if thrust in forcibly," and there being other circumstances inconsistent with self-destruction.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Caroline Leman against the Manhattan Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed.

A. H. Leonard and Morris Marks, for appellant. Dinkelspiel & Hart, for appellee.

MILLER, J. The plaintiff sues on a policy of insurance issued by the defendant on the life of her husband. The defense is, the husband committed suicide, and the policy excludes liability in cases of self-destruction, sane or insane. The jury found for the defendant, and plaintiff appeals from the judgment on the verdict.

The proof of loss furnished the company, i. e. statements of the undertaker, physicians, agent, and friend, as well as the coroner's inquest, stated suicide as the cause of death. The defendant, offering these proofs, insisted plaintiff was bound by them; that is, defendant objected to any testimony contra-

¹ Rehearing refused May 30, 1894.

dicting these proofs. The court admitted the testimony. It is to be observed, at the outset, the cause of death, in this case, is purely a matter of opinion. There is no testimony whatever on the subject, except the fact the insured was found dead, from a mortal gunshot wound, with a pistol wedged in the bend of his thumb, and the body so disposed (as will be discussed in another place) as to suggest inferences entirely consistent with accidental death, or, at least, not of a character to exclude every supposition but suicide. If opinions of witnesses as to the cause of death are to be accepted as conclusive, contained in statements which the company exacts under their policy, it is a harsh application of the supposed rule as to the effect of such statements. In our opinion, neither reason or authority support the contention of the company in this respect. We think the proofs of death were admissible, to be weighed by the jury with other testimony administered. Such was the ruling of the lower court, and we sustain it. See *Association v. Sargent*, 142 U. S. 699, 12 Sup. Ct. 332; *Insurance Co. v. Newton*, 22 Wall. 36; *Phillips v. Insurance Co.*, 26 La. Ann. 404. The authorities, perhaps, do not go the full length here affirmed; but they tend to give the proofs of death admissibility, but certainly do not assert their conclusiveness. The better opinion is, the insurer is not estopped by the proofs. *Bliss, Ins.* § 265.

The discussion on the point that suicide should be regarded as proceeding from insanity, and not bar recovery, even though the policy stipulated no recovery in cases of self-destruction, has been ended, as life policies now, usually, we believe, contain what is known as the "sane or insane clause," i. e. no recovery in cases of suicide, sane or insane. That clause is in this policy. But still, notwithstanding the sane or insane clause, to defeat a recovery on this policy, it must appear the deceased took his life. In this case the testimony, mainly, the mute witness of the dead body, is all on which the company relies, besides the statements in the proofs of loss, from those who were possessed of no knowledge, save that afforded by the body of the deceased. There is in the record a mass of what is termed "expert testimony." It, of course, consists of theories as to the cause of the death. The testimony is of those who testify from their experience in the use of firearms; and from physicians, who draw their inferences from the gunshot wound, the position of the body, and other circumstances. The admissibility of such testimony is, at best, doubtful. *Bliss, Ins.* §§ 378, 379. The court, at last, must determine the basis and potency of all such theories, arising from all the facts. These facts are: The body, found with the wound from a gunshot, causing death; the discharged pistol, wedged, or as if it had been forced, on the thumb of the right hand; the body reclining on the sofa,

as of one sleeping; the left arm rested on the breast; the right leg crossed on the left; the head in the usual position of one in repose, and there being no evidence of any convulsive movement, if we correctly translate the technical word "jactitation," used by the physicians who testify. The pistol was "tightly wedged" to the thumb, so as to require force to remove it. The question is whether these appearances point to suicide, to the exclusion of any other cause. Why not, with equal potency, to accidental death, or death by the hand of another? Dr. Gray, who was one of those who gave a statement, at first, attributing the death to suicide, seems to have changed his opinion. He testifies: "I was first led to believe it was suicide from the fact that the body was dead, and the pistol was on his hand. But the fact, as stated in a previous answer, viz. that the thumb was thrust through guard of pistol, and tightly wedged, as if it had been thrust in forcibly; the force necessary to draw the thumb from the guard; the absence of any evidence of jactitation, or of having been any, as shown by the precise manner in which the body laid, with arms folded, the legs crossed at ankles, as in a person sleeping,—have raised doubts in my mind as to how his death did occur,—whether by his own hand, or by that of another." The testimony of others professing to be experts as to the handling of firearms, and the causes of this death, reaches a conclusion different from that of Dr. Gray. We think, giving all due effect to the expert testimony, it is at least fair to say it does not establish the suicide. In any consideration of the cause of the death, weight is due to the condition of the deceased in life, i. e. his domestic relations, his means, his health, and the state of his mind. It is human experience that the motive or prompting for self-destruction, is to be sought, and usually found, in domestic unhappiness, ill health, financial troubles, or insanity. In this case, no such causes are exhibited by the record. The deceased was fortunate in business; had a wife and children to whom he was attached, and with whom he was happy. He parted with them on the day of his death in the best of spirits, and the shock of his death came a few hours later. No physical malady or mental disturbance or financial trouble existed to furnish any cause for taking his life. In this condition of the record, there is no adequate basis to refer the death to the intentional act of the deceased. If there are indications that point to suicide, there are other features not consistent with that theory. When, as in this case, circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must be of a character to exclude, with reasonable certainty, any other cause of death. If the evidence falls short of this exaction, the suicide is not proved. The fact of death remains, and

that casts the liability on the company insuring against death, with the excepted case of self-destruction, which the company fails to establish. This appreciation of the evidence and of the burden of proof constrains us to set aside the verdict and judgment of the lower court in favor of the defendant. *Bliss, Ins.* §§ 366, 367; *Mallory v. Insurance Co.*, 47 N. Y. 52; *Phillips v. Insurance Co.*, 26 La. Ann. 404. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that plaintiff do have and recover from defendant \$5,000, with legal interest, and that appellee pay costs.

(46 La. Ann. 527)

STATE v. TOUCHET. (No. 11,546.)¹

(Supreme Court of Louisiana. May 8, 1894.)

CRIMINAL LAW—PRESCRIPTION OF ONE YEAR—KNOWLEDGE OF PUBLIC OFFICER.

1. Section 1010 of the Revised Statutes makes it the duty of a justice of the peace to order arrests for alleged crime upon the oath of one or more "credible" witnesses. It is not the statement, or even the affidavit, of every person upon which he is called to act, or which furnishes the "knowledge conveyed to a public officer," which opens the running of prescription against a prosecution for crime.

2. The law contemplates that an officer shall bring a sound legal discretion to bear in ascertaining whether a charge, if made, should be seriously considered; and where, under the special facts of a particular case, an officer was warranted in not taking action upon what is afterwards set up in a plea of prescription as his knowledge of the commission of a crime by a particular person, the plea is properly overruled.

(Syllabus by the Court.)

Appeal from district court, parish of Vermillion; A. C. Allen, Judge.

Joseph E. Touchet was convicted of larceny, and appeals. Affirmed.

L. L. Bourges and W. P. Edwards, for appellant. M. J. Cunningham, Atty. Gen., and M. T. Gordy, Jr., Dist. Atty., for appellee.

NICHOLLS, C. J. The defendant was convicted of having stolen a coat, and he has appealed. He urges in this as he did in the lower court the prescription of one year in bar of the action. The crime is charged to have been committed on the 19th of April, 1892. The information against the accused was filed on September 12, 1893. It contained a declaration that it was filed within one year from the time that the information in relation thereto came to the knowledge of a public officer having power to direct investigations and prosecutions. Testimony was introduced to disprove the correctness of this statement. It appears that one Sevenne Conners was originally charged with the crime upon an affidavit made against him before J. Nelson Greene, justice of the peace of the Third ward for the parish of Vermillion. As the result of

a preliminary examination he was sent before the district court. He was twice tried. On the first trial the jury disagreed. After the second trial the record shows he was discharged, but does not show under what circumstances the discharge took place. We infer that he was either acquitted, or there was another mistrial, and an abandonment by the state of the charge against him; for on the day of his discharge the information mentioned was filed against the defendant, Touchet. The district attorney says in his testimony that it was only upon the second trial of Conners that the evidence pointed to the present defendant as the guilty party; that the evidence taken on the preliminary examination and that on the first trial indicated that the charge against Conners was well founded; that, immediately on ascertaining the new state of the evidence, he filed the information against Touchet; that the change in the evidence resulted from the bringing forward of several witnesses who had not testified before. The justice of the peace before whom the affidavit against Conners was made, and who conducted the preliminary examination referred to, states that the daughter of Conners testified as a witness on the preliminary examination that Touchet had taken the coat, but that he did not believe her. He also states that after the preliminary examination was over, and after Conners had been sent for trial on the charge, Conners offered to take an affidavit against the defendant, but he declined to have it taken, assigning as a reason that Conners, on the preliminary examination against himself, had not then taken the stand and sworn to the facts against Touchet. It is evident from the testimony of the justice of the peace that he did not believe either the testimony of the daughter or the statement of Conners, and that, so far from considering that Touchet was the person to be prosecuted, he was of the opinion that the persons who were accusing him were attempting to improperly shield the person really chargeable,—Conners. His official action shows that he believed Conners to be the guilty party, and, as we have said, the district attorney says the evidence on the preliminary examination justified that belief. We do not think that, under the circumstances stated, it could be held that the justice had such knowledge of Touchet's having committed the crime as would in law serve as the starting point for prescription. The knowledge conveyed to an officer, to have that result, must be such as would have warranted him, acting in the exercise of sound judicial discretion, in ordering an arrest. It is not the statement or even the affidavit of every person on which the justice is to act. Section 1010 of the Revised Statutes makes it the duty of the justice to make an arrest upon the oath of one or more "credible" witnesses. The law contemplates that he should bring his judgment to bear

¹ Rehearing refused May 21, 1894.

in reaching a conclusion as to whether an arrest would be justified, and whether the charge, if made, should be seriously considered. The whole evidence in this case then at hand having been submitted to the justice of the peace, he could well refuse to receive Conner's affidavit, he having himself just determined on that evidence (so far as he could determine) that Conners was chargeable with the act. The legal situation is not affected by subsequent developments, showing that the actual facts of the case were different from what they had every appearance of being when official action was called for. We think, under the facts of this special case, that prescription only began to run when the district attorney became advised of the real situation. There is no claim that prescription has run from that date. It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

(46 La. Ann. 911)

Succession of VON HOVEN. (No. 11,428.)

(Supreme Court of Louisiana. May 14, 1894.)

EXECUTORS—ACCOUNTING—NOTICE TO HEIRS.

Where a person in his will bequeaths to his wife certain property, and appoints her as his executrix without seisin, it is her duty, in filing her final account, to account for all property left by the testator at his death, including that specially bequeathed to her, and to pray that she be authorized to dispose of the same in such manner and to such persons as she believes should be made under the terms of the will and the law. The heirs must be cited and made parties to this account and demand, and they have a legal right to make available all objections which they have to the same by oppositions thereto. Objections to the special legacy to the wife, as being in excess of what could be bequeathed to her by her husband, can be urged in that way, as can also all objections to the items of the inventory, as being either appraised too high or too low. Code Pr. art. 1004.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Petition by Marie Engelbrecht and others against Louisa Von Hoven and others for partition and distribution of the estate of Jacob Von Hoven, deceased. Judgment for petitioners, and Mrs. Casimir Muller, an heir, appeals. Affirmed.

Henry P. Dart, for appellant. Benjamin Rice Forman, for appellees.

NICHOLLS, C. J. Jacob Von Hoven died on the 9th of February, 1893. He left surviving him two daughters, issue of his first marriage, and a widow. He left a will, dated October 31, 1890, by which he bequeathed to his widow certain real and personal property, and appointed her as executrix without bond, but without seisin. She accepted the executorship, and, with the consent of Magdalena Von Hoven (wife of Edward Engelbrecht), one of the heirs, she administered the

succession, the property of which was inventoried on February 13, 1893, under an order of court. On the 16th of March, 1893, the widow, as testamentary executrix and widow in community, joined by Mrs. Engelbrecht, presented a petition to the court, in which they declared that they annexed thereto a detailed statement of the estimated debts and liabilities of the succession, and alleged that the bricks left and the outstanding accounts would not realize enough to pay the debts; that it was necessary to sell property to pay debts, because the movables and money left by the deceased were given as a particular legacy to the widow, and that certain landed properties (describing them) were acquired during the last community, and one-half belonged to the widow as widow in community, which community she accepted under benefit of inventory; that both petitioners were unwilling to hold the same in common with Louisa Von Hoven (wife of Casimir Muller), the other heir of Jacob Von Hoven, and that it was necessary to sell the said property in order to settle the community, and that it could not be divided in kind without greatly depreciating its value, and that it was necessary to sell certain specified real estate belonging to the separate estate of the deceased to pay debts, petitioner Marie Engelbrecht averring that she was unwilling to hold said property in common, and that this cannot be divided in kind without a depreciation of value, and that she could not come to any agreement with reference to a partition with her sister Louisa Von Hoven. In view of the premises, petitioners prayed that Louisa Von Hoven be cited, and that enough of the property described be ordered to be sold to pay debts; that experts be appointed to report whether or not the residue of the property, not ordered to be sold to pay debts, and not included in the particular legacy to the widow, can be conveniently divided in kind without a depreciation of its value, and if they so report, or the same be admitted by the defendant Louisa Muller, that a decree for a sale be made, and in any event that a decree of partition be made of all the property of the succession, not sold to pay debts, and not included in the particular legacy to the widow; that enough of the proceeds be left in the hands of the executrix to pay the debts and liabilities, and the residue be partitioned between the parties in interest, according to their respective rights, and that they be referred to a notary to effect said partition. Mrs. Louisa Von Hoven, joined by her husband, filed an answer to this petition, in which, after pleading the general issue, they averred that Jacob Von Hoven was thrice married. That his first wife was the mother of respondent and of Mrs. Engelbrecht, that she died in 1866, and the property which belonged to the community between herself and Von Hoven is in the main the property now forming the estate of Jacob Von Hoven, in which property re-

respondent Louisa Von Hoven claims an interest as heir of her mother. That recently respondent's father admitted judicially, in proceedings had in the courts of Louisiana, that he had omitted from the inventory, and had not accounted to his children or included in the succession of their mother, some \$50,000 belonging to the succession. That while it is true said Von Hoven caused the succession of his first wife to be opened in and during the minority of respondent, and caused the real estate to be adjudicated to himself, it is still true that he failed to account therein for the sum of \$50,000, and respondent was not aware that said money was and formed part of said community until the facts were acknowledged by her father in the proceedings had in the matter of *Weller v. Von Hoven* (No. 18,116 of the docket of this court), and under the circumstances, and as heir of her deceased mother, she is entitled to recover from the estate of her deceased father her virile share thereof, namely, one-sixth (her mother having left three children, issue of said marriage), that is to say, \$8,333.33, with legal interest from demand. That, about the year 1868, respondent's father contracted a second marriage, with Barbara Weller, from whom he was judicially separated in 1884, and no children were born of that marriage, and that community was closed by the judgment rendered by the supreme court of Louisiana in the case between them reported in 42 La. Ann. 602, 7 South. 702. That respondent is informed that thereafter Von Hoven contracted a third marriage. That, under and according to the terms of the last will of said deceased, he attempted to give to plaintiff, his third wife, about one-half of his estate, which legacy is in excess of the share or portion reserved by law to respondent and her coheir, and is in contravention of the law of this state, and especially in violation of the act of 1882, amendatory of article 1752 of the Revised Civil Code, and said legacy should be reduced to the one-third of her estate, after paying the debts and charges of the same, including the amount due to respondent as aforesaid. That the community between plaintiff and Von Hoven, if one existed (which is denied), did not acquire the real property referred to in the petition; on the contrary, the same was and is the separate estate of the decedent, bought and paid for with the separate funds of Von Hoven, and the acquisition or transfer of title when made to him was paid for merely by credit on the payment which plaintiff Von Hoven, in the suit of *Von Hoven v. Elizabeth Barlow*, obtained in said proceedings, the judgment being mere recognition of the debt due by said Barlow to Von Hoven before his marriage with the plaintiff. But, should it be decided that said realty was and is an acquisition by and for the second community, then the said property and second community should be charged

with the amount of said debt, interest, and costs, to wit, the sum of \$22,000, or thereabouts. That the list of debts furnished by the plaintiff is not a true showing; on the contrary, the said amounts are not due by the estate, and, if due in any sum whatever, they are grossly overcharged, and should not be recognized or admitted by the court. That the plaintiff has taken possession of the decedent's estate, and sold the property thereof without authority of the court, and without right so to do, whereby she has made herself liable for the debts of said estate, if any, and respondent avers that she has not filed any showing or account of the sums of money of which she has possessed herself in this and other ways, the same being the funds and property of the estate; and respondent asks that the plaintiff be ordered to render a just and true account of what she has done in the premises, and that she be condemned to restore to the estate the sums of money thus by her obtained. That, in the inventory taken in her absence by the plaintiff, the property of the estate which she claims has been donated to her, and which she claims and reserves as her particular legacy, has been grossly undervalued, as respondent will prove on the trial; that the live stock and vehicles, and utensils of various kinds have been particularly undervalued, and the real value of the things contained in the special legacy exceeds by at least \$10,000 the valuation affixed thereon in said inventory. That in the said inventory is entered and valued at \$10,000 five certain claims in suits by Von Hoven against the Texas & Pacific Railway Company, which claims have no value at all, and certainly no such value as has been given therein. That other claims mentioned therein have likewise been therein overvalued, the whole for the specific purpose of inflating the apparent share coming to respondent as heir at law of her father, and the said inventory is therefore not a just and true inventory of the estate. That the decedent left upwards of \$9,000 in bank which can and should be used in paying debts, and it is not necessary to burden his estate with an administration for the purpose of paying said debts, if any, that being a matter which can be adjusted in the partition herein sought. Respondent declares that she is willing to partition and divide said estate, and she admits that the property composing the same cannot conveniently be divided in kind. Wherefore she prays that there may be judgment decreeing a full, final, and definitive partition of the estate of Jacob Von Hoven by litigation in the manner provided by law, on such terms and conditions as will subserve the best interest of all parties in interest. That the claim and pretenses of the widow, Annie M. Von Hoven, to a community interest in the property referred to in her petition be denied, or, if said property shall be held community, then that it and said community be

condemned to pay, and be subjected to the payment and return of, the amount expended therefor and thereon by said Jacob Von Hoven out of his separate estate, namely, \$22,000, with interest from judicial demand. That there be judgment in respondent's favor against the plaintiff recognizing respondent to be a creditor of said estate in the sum of \$8,333.33, with legal interest from judicial demand, and that same be paid out of the proceeds herein to be realized, and in the manner pointed out by law. That the alleged debts claimed by plaintiff to be due by the estate be rejected, or, if allowed in any amount, that they be reduced to fair and reasonable figures. That the widow aforesaid be condemned to file a just and true account of the moneys obtained by her from every source from the sales of the property of this succession. That she be condemned to pay and return the full value to the estate of property wrongfully sold by her as beforesaid. That the valuation of the items composing the special legacy to her be inquired into, and that said valuation, as fixed in the inventory, be increased by the sum of \$15,000. That she be prohibited from disposing of any of the remainder of said property, except as the same may be ordered in this proceeding. That she be held liable as a widow intermeddling in the estate. That the overcharged and overvalued items in said inventory be stricken out, and reduced to a fair and just estimate. And, finally, that the court refer all parties to a notary to adjust and partition the estate on the basis to be fixed by the court's judgment, and for all and general relief.

Subsequently to the filing of the above answer, Mrs. Marie Von Hoven, as testamentary executrix and widow in community (under benefit of inventory), and Mrs. Engelbrecht filed what they designate as "exceptions" to the demands of Mrs. Louisa Muller, set up in her answer: To so much thereof as she claims to be a creditor in the sum of \$8,333.33, because (1) she has not presented her claim to the executrix and had it approved, and she cannot set it up in this collateral manner, but only by a direct action; (2) the rights and interest of the said Louisa Muller in and to the succession of her mother, Margaret Grosz, have been fixed by a final judgment of the parish court of Jefferson parish, liquidating her interest in the said succession, 11 years old, and said judgment is res judicata for fraud in a direct action, and her action is prescribed by one, four, and ten years, which prescriptions are specially pleaded. To so much of the demands of Louisa Muller as seeks to reduce the particular legacy, that it is premature, and cannot now be presented in this form, and that the demand for an account is premature. No action was sought or obtained on these exceptions. The parties went to trial, evidence was adduced, and the case submitted. The district court finally render-

ed a judgment ordering "that a partition be granted herein, and to that end all the real property described in the inventory be sold at public auction, with the exception of that which has been bequeathed to the widow, said sale to be made by W. A. Kernagan, auctioneer, who shall sign an act of sale upon the terms of one-third or more cash, at purchaser's option, and the remainder on credit at one and two years, with 8 per cent. interest and the usual security clauses; that the funds arising from said sale be deposited in the judicial depository, and the executrix do immediately thereafter file her account; that the issues not herein disposed of, raised by plaintiff and defendant, be postponed, and reserved to be tried and decided upon by way of opposition to the account aforesaid." Mrs. Louisa Muller has appealed suspensively from that judgment.

It was admitted in the lower court that the executrix is still in possession of all the property described in the inventory, except that which she has sold under the orders of the court, and that she has never filed any account. Appellant's counsel in his brief says: "The only complaint we make against the judgment which we have appealed from in this case is, briefly, that it has not decided the questions raised in the pleadings, and does not protect the appellant and preserve her clear rights under the law. Appellant set up claims against her father's succession, and averred that the legacy to the widow was in excess of the disposable portion. She charged that the inventory was inflated so as to reduce the apparent value of the legacy to the widow, and increase the apparent value of the residuum, inasmuch as it appraised at its face value certain lawsuits for damages brought by the decedent against the Texas Pacific Railway Company, claiming \$10,000 damages for their illegal action in laying its rails and roadway in the public street upon which decedent's property abutted. For the purpose of this discussion, the other issues raised in the pleading are pretermitted, as the right to discuss them is reserved in the judgment after the partition is obtained. On the question of reservation of the right to attack the legacy, as being in excess of the legitime, we submit that the judgment will not be any protection to the heir, inasmuch as a suit to reduce the will cannot be set up by way of opposition to the account. * * * The Code seems to require a direct action to reduce a donation. Rev. Civ. Code, art. 1504 et seq. If the judgment appealed from had dismissed, as a case of nonsuit, the action to reduce the will, the exigencies of the situation would have been satisfied, but reserving, as the judge does, the rights of the pleaders to urge those things by way of opposition to the account, it seems to us no protection, should an objection be raised by the legatee, or should she insist that the legacy forms no part of the succession to be

accounted for on her account. This is the solitary question presented, and we respectfully submit that the judgment should be reversed, and one rendered reserving the heirs' rights to establish by direct action the excessive donation." Mrs. Von Hoven, the testamentary executrix and widow in community (the legatee mentioned in the pleadings), and Mrs. Engelbrecht have both acquiesced in the judgment.

The initial step in the immediate proceeding before us was a petition by the widow of Jacob Von Hoven, who was not only the widow in community with the deceased, but a legatee under his will, and his testamentary executrix, in which she was joined by one of the two heirs of Von Hoven, asking for a sale of so much of the property as was necessary to pay debts, a sale of all the residue (not including certain property bequeathed by the decedent to his wife), to effect a partition, and a full and definitive partition between the plaintiffs and Mrs. Muller, the sole remaining heir. This heir, on being made a party, consented to a partition,—in fact, prayed herself that one should be made. The effect of the proceeding was to group together all parties interested in this succession, the executrix to a certain extent being charged with the settlement and liquidation of the estate. The effect of the judge's order or judgment will be to bring about a sale of all the property of the succession (save that specially bequeathed to the widow) for the double purpose of paying debts and of leading up to the ascertainment, settlement, and liquidation of the rights of all concerned. The value of properties will be ascertained by public bids, and not by conjectural estimates. The funds realized will be placed securely in bank, and there remain to be made primarily available to the extent shown to be necessary for the payment of debts, and, finally, for purposes of distribution. The account ordered to be filed will afford a direct and proper method of fixing the exact liability of the estate, and enable Mrs. Muller to contest contradictorily with those whom the testamentary executrix recognizes as creditors the correctness of that recognition. The reality and amount of their claims could not be passed upon in their absence, and definite knowledge as to their reality and their amount is an important factor in this litigation. The proceedings reach us freed from all trouble as to questions of form, the only exceptions taken in the lower court having been abandoned, the parties having presented squarely by their respective pleadings their various contentions, and having gone to trial upon them. Possibly the case was in a situation to have had determined by the court more of the issues raised than it thought proper to decide, but we do not think that any of the parties have been or will be aggrieved or injured by this course. On the contrary, when the judge will be called on hereafter to pass

upon the issues, he will deal with certain matters as fixed facts which now would be more or less matters of conjecture,—approximations, at best.

We do not understand that the law forcedly requires the district judge to dispose, prior to the sale of the property by licitation, or prior to the rendition of the account by the executor (when the succession is under administration with such a representative), of all the issues which the parties to a partition may raise. The particular course to be pursued will be dependent upon the facts of different cases as they present themselves. What might be proper in one would not be at all proper or advisable in another. In the case at bar, as matters now stand, not only are all the parties in interest before the court on issues raised by each without objection, but all the property left by the deceased is, for the purposes of this litigation, still in the hands of the executrix. The record shows no transfer of property to third persons, nor the existence of any adverse rights which would be injuriously affected by the form in which matters have shaped themselves. Appellant seems to be apprehensive that the legatee Mrs. Von Hoven could successfully object to the trial of an issue contradictorily with her as to the reduction of her legacy when presented in the form of an opposition to her account as executrix. Even could a legatee make such objection under circumstances different from the present, the widow, as executrix and legatee, certainly could not object by reason of the form of the proceeding in the present case, for she has acquiesced in the judgment of the court postponing the determination of the issues not passed on, and directing that they be tried and decided upon by way of opposition to the account.

We do not understand the judgment of the lower court to have thrown any of the parties out of court. Matters are to stand as they now are, both as to parties and as to pleadings, until the executrix files her account, when all issues which have been raised and have not as yet been passed upon are to be renewed. The only issues disposed of up to the present time are as to the sale of the property of the succession other than that bequeathed to the widow, the right of partition, and the necessity and duty of the executrix to account. The judgment contemplates, first, the sale of the property, and, next, an account by the executrix, to which the pleadings already filed by Mrs. Muller are to be taken as an anticipated opposition. When the executrix files her account, she will have to charge herself with the funds, not only arising from the sale now ordered, but those already made of movables under order of court. In addition to this, it will be her duty to refer to all property placed upon the inventory, and show what has become of it; to

state what disposition should be made of that remaining, under her understanding of the rights of parties, and to pray that this disposition be authorized and ordered. She will have to file a list of the debts and liabilities of the succession which she recognizes, and have the usual advertisement made under the order of court, calling on all parties in interest to show cause why the account should not be approved and homologated, and the funds and property disposed of as prayed for in the account and petition of the executrix. The account which the executrix will have to file is not simply an account for the payment of creditors, but an account for the settlement of the succession finally and contradictorily with the heirs. They will have to be specially made parties, and regularly cited in the premises. In the case at bar, the property bequeathed to the widow will have to be referred to in the account and petition of the executrix, and she will have to pray contradictorily with the heirs that it be recognized as hers under the legacy, and delivered to her. She will not be at liberty to take possession of that property without orders of court, or omit it from the account. When cited, Mrs. Muller will unquestionably have the right to oppose the proposed delivery of the property to the widow, and the right to attack the legacy. Article 1004 of the Code of Practice is express to that effect. It declares: "If the curator or executor obeys the order, and renders his account, the heirs or other claimants shall within three days afterwards file their written objections, if they have any, signed by themselves or their counsel, to each item of the account to which they object, or of which they pray for the rejection." In this case, Mrs. Muller, on being cited, will be entitled to raise all objections which she may have to anything which has been done by the executrix, or to anything which she proposes should be done through order of court. Succession of Bright, 38 La. Ann. 141; Morris v. Cain, 35 La. Ann. 759; Herber v. Thompson, 46 La. Ann. —, 14 South. 504. She will be at liberty either to stand on her pleadings as already filed by mere reference thereto and annexing them to her opposition, or she may do this and enlarge the present pleadings and prayers if she chooses so to do. As we have said, the account which will be hereafter filed by the executrix will have a broader scope than the ordinary administrator's account, involving a mere payment of certain funds to specified creditors. Succession of Conrad, 45 La. Ann. 94, 11 South. 935.

We think the apprehensions of injury which Mrs. Muller refers to in her brief are totally unfounded. Her right to claim in this case the reduction of the legacy to the widow, on the ground stated by way of opposition, is undoubted. It is very questionable whether she has as yet fairly raised an is-

sue on that question, for, while matters incidentally connected with, and which may have a bearing on, that issue are referred to, and relief asked in respect to them, the plaintiff's statement that no prayer has yet been made for the reduction of the donation is true. We see no basis for the present appeal. Judgment affirmed.

(46 La. Ann. 1176)

ROMANO et al. v. THEIR CREDITORS.

(No. 11,451.)

(Supreme Court of Louisiana. May 23, 1894.)

INSOLVENCY—FRAUDULENT SCHEDULE—TRIAL BY JURY—VOLUNTARY SURRENDER—TIME FOR OPPOSITION.

1. The placing by the insolvent (without intent to defraud), on his schedule, claims which do not exist, and amounts which are to some extent exaggerated, does not amount to a fraud against other creditors, within the meaning of the insolvent laws. The claims of these creditors are mere matters of legal right, subject to be disputed or controverted in the concurso.

2. In an accusation of fraud made against the insolvent, he has the right to trial by jury.

3. No opposition to a voluntary surrender, charging fraud, can be filed after the lapse of 10 days next following the meeting of creditors.

4. The maxim, "Contra non valentem agere non currit prescriptio," does not apply to the prescription of 10 days for filing oppositions to a voluntary surrender. 11 La. Ann. 36.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Petition by Romano & Guerriero against their creditors. The application of said petitioners for discharge in insolvency was refused, and they appeal. Reversed.

E. Howard McCaleb, Jr., for appellants. Dinkelspiel & Hart, for appellees.

McENERY, J. On the 26th December, 1892, the plaintiffs filed a petition, annexing thereto a schedule of their affairs, and prayed for a meeting of creditors, and a discharge from their liabilities. The usual order was granted, the meeting of creditors held, a syndic appointed, the insolvents' estate was administered; and they were discharged, by a vote in number and amount, from their liabilities. The syndic presented his account for the final distribution of the assets in the insolvents' estate. On the 26th February, 1893, certain creditors opposed the syndic's account, and the discharge prayed for by plaintiffs, on the following grounds: (1) That the plaintiffs did not receive the affirmative votes cast at the meeting of creditors, for their discharge, of a majority in number and amount. (2) That the schedules herein filed by the plaintiffs do not correctly represent their assets and liabilities; that many of the names placed thereon as creditors are not creditors, or, if creditors at all, for amounts less than given and voted for; that the plaintiffs have not accounted for

all their assets, but, on the contrary, have omitted a large quantity thereof from their schedules; that a few days before their surrender the plaintiffs purchased from the New Orleans Auction & Commission Company, Limited, one of the opponents, lemons to the amount of \$456, and never accounted for the lemons, or the proceeds of their sale; that, also within a short time before their failure, the plaintiffs purchased a large quantity of peanuts, of the value of \$1,500, and never accounted for them, or the proceeds of their sale; that they also purchased from Selnshelmer Paper Company, of Cincinnati, under same circumstances, a large quantity of paper for which they never accounted. (3) That the plaintiffs did not keep proper books, and did not turn over their books to the notary appointed by the court to conduct the insolvent proceedings. (4) Opponents oppose the vote of A. Xiques for the discharge of the plaintiffs on the ground that, voting as agent of a creditor, he had no personal knowledge of the indebtedness. (5) The opponents oppose the votes cast by certain named creditors because they were not creditors of the plaintiffs for the amounts stated. There was judgment in favor of opponents Hills Bros. & Co., placing them on the account as ordinary creditors, against the city of New Orleans, dismissing its opposition; and as thus amended the account was approved and homologated, and the funds ordered distributed accordingly. It was "further ordered, adjudged, and decreed that the opposition of the New Orleans Auction & Commission Company, Limited, and others, be maintained, and the application for the discharge of the insolvents, Romano and Guerriero, is refused, at their cost."

The controversy is in relation to that part of the judgment refusing to discharge the insolvents. It was based on the alleged frauds of the insolvents prior to the filing of their petition and the surrender of their property in order to obtain the benefits of the insolvent laws. The judgment does not deny the claims of the creditors, alleged by opponents not to be creditors of the insolvents, and who voted for their discharge. The claims of these creditors were matters of legal right, subject to be disputed or controverted in the concurso. Their mere appearance in the schedule does not amount to a fraud against creditors, within the meaning of the insolvent laws. *Montilly v. His Creditors*, 18 La. 383. The evidence does not show that these creditors were placed on the schedule with the intention of defrauding other creditors, nor is there any reason to believe that the other creditors were injured by the mere statement on the schedule of the amount due these creditors. If the amounts were not due at all, or some of them exaggerated (both of which are al-

leged), the errors could have been easily and promptly corrected in the concurso. The proces verbal of the notary shows that a majority in number and amount voted for the discharge of the insolvents. The proces verbal makes a prima facie case for them, and we do not think the evidence in the record sufficiently convincing to destroy the effect of the votes cast by the 5 creditors who, it is alleged, were not creditors for the amounts stated, and the votes of the 26 creditors who are alleged to be the creditors of the individual members of the insolvent firm. The specifications contained in Nos. 2 and 3 are embraced within the definitions of "fraud" in sections 1802, 1803, Rev. St. The fraud specified in these sections must be distinctly and positively particularized in the opposition, and, if it be sustained by proof, the insolvent is punished by being debarred forever from the benefits of the insolvent laws, and incurs the penalty of imprisonment for a term not exceeding three years. Section 1802 of the Revised Statutes says: "Should any creditor of an insolvent debtor deem it necessary to oppose the appointment of a syndic, or to charge fraud against the debtor, he shall within the ten days next following the meeting of creditors, lay before the court his written opposition, stating specifically the several facts of nullity of the appointment or fraud alleged against the insolvent debtor. Whereupon the judge shall decide said opposition; and in case of accusations of fraud, after having received the insolvent debtor's answer, the court shall order a jury to be summoned for the purpose of deciding on the accusation." The plaintiffs were entitled to have the accusation of fraud made against them referred to a jury. *McCloskey v. Ingram*, 17 La. Ann. 85; *Beste v. His Creditors*, 14 La. Ann. 522; *Thompson v. Chapman*, 7 La. Ann. 258. The opponents failed to charge fraud against the insolvents within 10 days after the meeting of creditors, as required by section 1802, Rev. St. No opposition charging fraud to a voluntary surrender can be filed after the lapse of 10 days next following the meeting of creditors, although the creditor did not know of the fraud complained of within that time. *Matthews v. Creditors*, 11 La. Ann. 36. In the case cited the reasons for excluding the maxim, "*Contra non valentem agere non currit prescriptio*," from its application to the 10-day prescription for filing oppositions in insolvent proceedings are fully and sufficiently stated. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to reverse that part of it which refuses to discharge the insolvent plaintiffs, and it is now ordered that they be discharged. In all other respects the judgment is affirmed; the insolvents' estate to pay costs.

(46 La. Ann. 546)

STATE v. LEDUFF. (No. 11,551.)

(Supreme Court of Louisiana. May 23, 1894.)

QUALIFICATION OF JURORS—CHALLENGES FOR CAUSE.

1. Whatever the answers of the juror on his voir dire to the questions of counsel for the accused, if it appear on his whole examination, and especially to the questions of the judge, that the juror has no fixed opinion, i. e. that cannot be changed by the testimony, and his mind is in a condition to do justice according to the testimony and the charge of the court, he is a good juror. *State v. Revells*, 35 La. Ann. 302; *State v. Farrer*, Id. 317; *State v. Simmons*, 38 La. Ann. 41; *State v. Creech*, Id. 480.

2. If the accused obtains an acceptable jury without exhausting his peremptory challenges, this court will not direct a new trial because the bill assigned error in the overruling of challenges for cause by the accused. *State v. Simmons*, 38 La. Ann. 41; *State v. Creech*, Id. 480.

(Syllabus by the Court.)

Appeal from district court, parish of Pointe Coupée; Edward B. Talbot, Judge.

Charles Leduff was convicted of manslaughter, and appeals. Affirmed.

Yoist & Claiborne, for appellant. M. J. Cunningham, Atty. Gen., and Alex. Hébert, Dist. Atty., for the State.

MILLER, J. The appeal is by the accused from the sentence passed on him for manslaughter. His reliance in this court is on bills of exception to the overruling by the lower court of his challenges to three jurors presenting themselves to be sworn. The ground of the challenges was that the jurors had formed and expressed opinions of a nature to disqualify them as jurors. The jurors were afterwards challenged by the prisoner peremptorily. After the jury was obtained, the accused had left 10 peremptory challenges.

This court has often had occasion to define the character of the opinion that disqualifies the juror. Whatever the answers of the juror on his voir dire to the questions of the accused, if it appear on the juror's whole examination, especially by his answers to the presiding judge, that he has no fixed opinion, and can render a verdict according to the law and the testimony to be produced, he is a good juror. We think at least two of the jurors whose competency is called in question in this case met this test, and as to the other there might be some question. See *State v. Revells*, 35 La. Ann. 302; *State v. Farrer*, Id. 317; *State v. Foster*, 36 La. Ann. 877; *State v. Dorsey*, 40 La. Ann. 740, 5 South. 28. But the ground entirely conclusive in our opinion on the bills is that the defendant obtained a jury acceptable to him without exhausting his peremptory challenges. He had 10 left. No harm was done the accused by the ruling of the court as to the three jurors. *State v. Simmons*, 38 La. Ann. 41; *State v. Creech*, Id. 480. It is

therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed, with costs.

(46 La. Ann. 548)

STATE v. RUTLEDGE. (No. 11,557.)

(Supreme Court of Louisiana. May 23, 1894.)

CRIMINAL LAW—DISMISSAL OF APPEAL—FILING RECORD.

The transcript of appeal was not filed on the return day, or within the three judicial days following the return day. The appeal is dismissed.

(Syllabus by the Court.)

Appeal from district court, parish of Jefferson; Emile Rost, Judge.

Grant Rutledge was convicted of murder, and appeals. Dismissed.

Hamilton N. Gautier and William L. Thompson, for appellant. M. J. Cunningham, Atty. Gen. (A. E. Billings, of counsel), for the State.

BREAUX, J. The defendant, Grant Rutledge, was indicted for murder. He was tried in April last, and found guilty as charged. The trial judge passed sentence upon him on the 24th day of April, 1894. On the same day he moved for an appeal to this court, which was granted. The appeal was lodged in this court on the 11th day of May, 1894. The appellee, the state, moved to dismiss the appeal on the ground that the transcript of appeal was not filed in this court within the delay allowed by law. The defendant, through counsel, filed an appearance, setting forth that the motion to dismiss, interposed by the appellee, is supported "by the law," and for that "and other reasons" joins in the application of the state to dismiss the appeal. The time within which to appeal having elapsed as alleged on the part of the state and by the defendant, it only remains for us to dismiss the appeal. The appeal is therefore dismissed.

(46 La. Ann. 870)

BEHAN et al. v. BOARD OF ASSESSORS et al. (No. 11,500.)

(Supreme Court of Louisiana. May 7, 1894.)

TAXATION—ASSESSMENT—EXEMPTIONS—LIEN.

1. Under the law of 1890, real estate, with the buildings, improvements, and appurtenances, are directed and required to be separately assessed from the machinery, apparatus, etc., appertaining to a jute factory thereon placed.

2. Notice having been served upon the parish board of assessors, to the effect that the property of a manufacturing establishment is exempt from taxation, cannot serve as a demand for the reduction of an excessive assessment.

3. The filing of an assessment roll in the office of the recorder of mortgages acts as a lien upon each specific piece of real estate thereon assessed, and the same property becomes subject to a legal mortgage after the 31st day of December of the current year.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by William J. Behan and others against the board of assessors and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Farrar, Jonas & Kruttschnitt, for appellants. Richard Lyons, for appellees.

WATKINS, J. Alleging themselves to be the joint owners of certain real property situated in the city of New Orleans, and described in their petition, together with all of the buildings and improvements thereon, as well as all of the rights, ways, servitudes, and privileges thereto appertaining, and also of the entire machinery, engines, boilers, loom, frames, shafting, pulleys, elevator, etc., thereon situated,—the whole constituting the plant and fixtures on said property,—the petitioners represent that, on the 3d day of May, 1893, same was purchased for their account at sheriff's sale, and that the process verbal of adjudication thereof was duly registered in the conveyance records of the parish of Orleans on the 19th of July, 1893. That, upon examination of the tax records and the recorder's office, they find certain assessments against the property, which, in their estimation, are null and void, and should be so adjudged and declared, and canceled and erased, for the following reasons,—same being summarized in the plaintiffs' brief as follows, viz.: "The points for which we contend, and upon which we rely to establish the absolute nullity of the second assessment, are as follows, to wit: (1) That the assessment for machinery and appurtenances is a dual assessment, as the property is covered by the assessment of the real estate upon which it is located. (2) That, even if it be not a dual assessment, it is null and void, because it is an assessment of fixtures or immovables by destination separate from the real estate to which the same are attached. And, even if the assessment be not entirely null and void, we claim that it does not operate a lien upon the property of the plaintiffs, for the reason that they acquired this property at sheriff's sale before the taxes for the year 1893 had matured so as to become a lien." The prayer of the petition is, in substance, that the judgment of the court decree that the assessment placed by the board of assessors on the assessment rolls of 1893 for the sum of \$120,000, "on jute factory, all machinery and appurtenances, locomotive and all other motive power" is absolutely null and void and of no effect, or that, in the alternative, it decree that said assessment does not bear a lien and privilege upon said property; and that, in the event both the assessment and lien be maintained, the latter be so reduced as to correspond with the true value thereof. The answer of the board of assessors and tax collector is a general denial.

On these issues the case was tried, and judgment rendered in favor of the defendants, and the plaintiffs have appealed.

The case of the plaintiffs is very carefully stated in their counsel's brief, and, for the purpose of being accurate, we extract the portion that is deemed most pertinent, to wit: "That both of said assessments are in the name of the Crescent Jute Manufacturing Company; that they are both on the same property; that all of the machinery, appurtenances, and motive power of every description whatsoever in the jute factory at the corner of Chartres and St. Ferdinand streets are upon the real estate described in the first of said assessments, and are appurtenances and a part of said real estate, and are immovables by destination; that said assessment upon the cash value of lands and lots of ground aforesaid, including buildings and improvements of whatever kind, assessed at twenty-nine thousand four hundred dollars, exhausted the power of the board of assessors, and that said second assessment is a duplicate or dual assessment, and therefore null and void; that the Crescent Jute Manufacturing Company, which was the owner of said property at the time when the assessment rolls of the parish of Orleans were exposed for inspection in the year 1893, applied for the cancellation of said assessment to said board of assessors during the time prescribed by law, but that the assessors nevertheless failed to cancel the said assessment, and that the assessment is null, not only because it is a dual assessment, but also because the said machinery, motive power, and everything included in said assessment of one hundred and twenty thousand six hundred dollars constitutes machinery and property employed in the manufacture of textile fabrics in a factory where in more than five hands are and were employed, and that the same is therefore exempt from taxation by article 207 of the constitution for the year 1879; that the sum of twenty-nine thousand four hundred dollars, at which the said real estate is assessed, is greater than the full market value of the real estate, and of all the machinery, appurtenances and improvements thereupon, including the property covered by said second assessment, and that the real value of all said property, so assessed at twenty-nine thousand four hundred dollars, does not and did not at the time of the assessment exceed twenty thousand dollars; that, even if the assessment on machinery were not a dual assessment, it is null and void, because an assessment of improvements on real estate separate from the real estate upon which the same are located, contrary to the laws of this state; that, even if the assessment be declared legal and valid assessment against the Crescent Jute Manufacturing Company, it is nevertheless inoperative in so far as the property acquired by petitioners is concerned, and does not bear a

lien or privilege upon the same, because the same was acquired by petitioners at sheriff's sale, prior to the time when the same became a lien upon said property under the laws of the state of Louisiana."

(a) The following is a verified copy of the assessment complained of, viz.:

Assessment Roll for the Parish of Orleans,
1893.

Objects of Taxation.

Names of Tax- able Persons.	Names of Streets.	(1) Cash Value of Land, etc.
Crescent Jute Manuf'g Co.	Chartres and St. Ferdinand.	\$29,400
• • •	• • •	• • •
		(18) Cash Value of Machinery.
Crescent Jute Manuf'g Co.	Chartres and St. Ferdinand.	\$120,600

The foregoing constitutes a single assessment, and is not in any sense a dual or double assessment, or one that was made by piecemeal, and at different times or dates. The roll, an extract from which is brought up in the original, plainly shows that, under heading No. 1,—"Cash value of all lands and lots * * * including buildings and improvements of whatever kind,"—the lots of ground, and the buildings and improvements thereon, belonging to the Crescent Jute Manufacturing Company, were assessed \$29,400; while, under heading No. 18, "all machinery and appurtenances, locomotive and other motive power" belonging to said company were assessed at \$120,600. The assessment was made in exact compliance with the blanks furnished to and in use by the parish assessors. An examination of section 1 of Act No. 106 of 1890 shows that the assessment was made in exact conformity to its provisions, the act, in terms, requiring an assessment of "all real estate, with the buildings and improvements thereon, or thereto attached," as one item of property that is subject to assessment; and separate and apart from this is the assessment of "engines, boilers, apparatus, appurtenances, appliances, and attachments for steam, electric, and other engines," and the like. It matters not that a portion of the last description of property was at the time immovable by destination. The legislature was perfectly competent to authorize and require an assessment made in this manner, and it was the manifest duty of the revenue officers to accept it, and act under it, as their guide.

(b) As the proof shows that all the properties assessed belonged to the Crescent Jute Manufacturing Company, and this establishment had not been actually engaged in manufacturing jute for at least two years prior

to the assessment in question, same is not exempt from taxation under article 207 of the constitution. But the exemption is not pressed in argument.

(c) With respect to the objection that was urged on the part of the Crescent Jute Manufacturing Company to the assessment, previous to the sale to the plaintiffs, the preponderance of evidence shows that the objection urged by the corporation was that it was not liable to assessment at all, and not that the assessment was based upon too great a valuation; consequently, the board of assessors did not have before them for consideration the question of the reduction of the assessment at all. One of the notices that was served on the president of the board will suffice. It is of the following tenor, viz.: "New Orleans, March 15th, 1893. Mr. J. M. Gleason, Pres. Board of State Assessors, Parish of Orleans, City Hall—Dear Sir: I am instructed by our president, Mr. F. A. Behan, to say that we object to any taxes being levied against our factory, as our laws exempt manufactures in textile fabrics from any and all taxes. The supposition that we made no continual runs last year does not debar us from beneficence, according to our legal adviser's opinion. Very respectfully, Crescent Jute Manf'g Co. [Signed] Louis Moths, Sec." In July, 1893, long subsequent to the sale of the property to the plaintiffs, the secretary of the company addressed a communication to the state auditor, requesting the cancellation of the assessment, on the ground that the factory had been shut down for three years, and portions of the machinery had been used for other purposes; but this application was declined by the auditor, on account of his want of authority to make the cancellation. As there was made no preliminary application for the reduction of the assessment of the property of the Crescent Jute Manufacturing Company prior to the sale thereof to the plaintiffs, the latter cannot now be heard to make complaint in a court of justice that the assessment was erroneous or excessive. *Shattuck v. City of New Orleans*, 39 La. Ann. 206, 1 South. 411.

(d) Under the law, it was the duty of the assessor in the city of New Orleans to file with the recorder of mortgages a complete assessment roll by the 1st of June, and it is made the duty of the recorder of mortgages to immediately file said roll, and to retain and keep same among the records of his office, though the inscription thereof in the mortgage office "shall not operate as a lien or mortgage upon the property, until the 31st of December of the current year." Act No. 106 of 1890, §§ 31, 32. But the following section qualifies the provisions of the former thus: "That from the day said tax-roll is filed in said mortgage office it shall act as a lien upon each specific piece of real estate thereon assessed which shall be subject to a legal mortgage after the 31st day

of December of the current year," etc. Id. § 33. Consequently, plaintiffs' property is subject to the lien, if not to the legal mortgage of the statute, their deed of sale having been recorded on the 19th of July, subsequent to the filing of the assessment roll. Judgment affirmed.

(46 La. Ann. 178)

HELM v. O'ROURKE et al. (No. 11,345.)

(Supreme Court of Louisiana. Feb. 12, 1894.)

DEATH BY WRONGFUL ACT — PARTIES — ACTION AGAINST FIRM—PLEADING—INJURY TO SERVANT.

1. Where a widow sues for the death of her husband, caused by negligence of defendants, there is no misjoinder of parties plaintiff if she sues individually and as tutrix of her minor child, issue of her marriage with deceased.

2. Where the parties are liable in solido, and each is cited, they are all before the court; and the fact that the petition alleges that the injury was inflicted by a commercial firm, composed of the individuals who are liable, is not sufficient for the dismissal of the suit, although the firm had been dissolved at the time of the institution of the suit.

3. The petition discloses a cause of action when it set out the manner in which the deceased was killed, and charges negligence on part of defendants, and the absence of contributory negligence on part of deceased.

4. A servant, an "all-around workman," subject to the orders and directions of the master, whenever he is called upon to work in pursuance of conditions created by the master, has the right to assume superior knowledge, judgment, and skill in the master, under whose orders he is immediately acting, and to believe that he will be protected from danger.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Mrs. Henrietta Helm, individually and as tutrix, against Edward and James O'Rourke. Judgment for plaintiff, and defendants appeal. Modified.

Moise & Cahn and James Timony, for appellants. Thomas M. Gill, for appellee.

McENERY, J. The petitioner alleges that the defendants, composing the commercial firm of Edward & James O'Rourke, are indebted to her individually and as tutrix of her minor child in the sum of \$20,000, "for this: that on or about the 16th day of May, 1891, while petitioner's husband, Frank M. Helm, was working at the furnace where he was employed in the boiler works of the aforesaid firm of Edward & James O'Rourke, in this city, he was called from said work by Edward O'Rourke, a member of said firm of Edward & James O'Rourke, to witness the testing of a boiler, which, upon his arrival, exploded, and he was thrown many feet distant, and struck by many fragments of said boiler, and so injured, notwithstanding the best of medical skill and care, as to cause his death, after suffering seven days' great pain and agony, on or about the 23d of May, 1891. * * * That petitioner's husband was guilty of no fault, but that all the injuries, suffer-

ing, agonies, death, and damages aforesaid were caused solely by the carelessness, imprudence, gross negligence, fault, and want of skill of the aforesaid firm of Edward & James O'Rourke, and Edward and James O'Rourke individually. That said boiler was old, rejected, and condemned before the purchase of the same by the said defendant firm of Edward & James O'Rourke; and was not only unsafe, but utterly unfit for use, as they well knew, and which petitioner's husband did not know." The prayer is for judgment for said sum of \$20,000 against the commercial firm of Edward & James O'Rourke and James O'Rourke, individually, in solido, and for the same amount jointly against the heirs of Edward O'Rourke, deceased. The defendants were all cited, and were before the court. To this petition exceptions were filed: First. That at the time of the service of the petition and citation the firm had been dissolved, and that the defendant James O'Rourke had no authority to answer for said firm, and that he could not be cited with another party, but that citation and petition should be served on him separately. The defendants, if liable, were bound in solido. They were all cited. All *pardes* in interest were therefore before the court. Second. That the petition is vague, and shows no cause of action, and that it is a misjoinder of parties plaintiff. The petition is explicit in showing the manner in which the deceased, Frank Helm, met his death, and it explicitly charges and avers that it was caused by the negligence of defendants. The only facts at issue were the negligence of defendants and the absence of contributory negligence on the part of deceased. The first is averred and the second negated by averments. There was no misjoinder of parties plaintiff, as both the widow and child have an interest in the damages, if any were due for the death of the husband and father. The exceptions, therefore, were properly overruled. The defendants answered, pleading a general denial, and specially averring that the testing of the boiler was done by defendant's brother and partner, who was seriously injured at the time the explosion occurred; that Frank M. Helm was a skilled mechanic; that he had inspected the boiler, and from his report Edward O'Rourke believed the boiler could stand the test; that the explosion was caused by no fault of defendants, and that the accident was one of that character which is the risk of the business in which said Helm was engaged; that the boiler had been repaired according to the instructions of said deceased, Helm, and many repairs were put on the same which he had not recommended, and that it was thoroughly repaired when tested, and that the explosion was one of those accidents which will happen in despite of every care and caution. Contributory negligence on the part of Helm, the deceased, is also averred. There were four trials by jury. The first trial was in favor of plaintiff, the

jury returning a verdict for \$8,000. This was set aside. The case was again tried on the same evidence by agreement of counsel, and a verdict in favor of plaintiff for \$20,000 was returned. A new trial was granted. On the third trial the jury failed to agree; and on the fourth and last trial, on the same evidence, a verdict was returned for \$8,000, and a judgment in favor of plaintiff rendered thereon. From this judgment defendants appealed.

The firm of James & Edward O'Rourke were engaged in making new boilers, buying second-hand boilers, and repairing them, if necessary, for sale, and repairing boilers for other parties. The firm bought two boilers from a blacksmith in Algiers. These boilers had been used for many years on the McLellan dry dock, and had undergone many repairs. They had become useless, worn out, and rotten to the extent that they could no longer be repaired, and were discarded and condemned by the owners. They were unsalable, even for old iron, and to get rid of them arrangements had been made to throw them in the river. Finally they were given to the blacksmith Daniels, to be used as water tanks. From Daniels, Edward & James O'Rourke purchased them for a trifling sum. These boilers were moved to the works of the defendants, and remained there some time before repairs were made upon them. During this time, until a short time before the test which ended so tragically, Frank M. Helm, the deceased, was not employed at the boiler works, and it is not shown that he was acquainted with the history of the boilers. Frank M. Helm was employed at the furnace. He was a skilled mechanic, and handy at any work about the establishment. He was, as stated in the testimony, an "all-around man." It was not his special business to test boilers. Edward and James O'Rourke were their own foremen, and the employees of the establishment acted under their instructions, and obeyed their orders, doing what work was imposed upon them by their employers. It appears by the testimony of James O'Rourke that it was not the business of any particular employe to test the boilers, and that a workman who happened to be out of a job was selected for this purpose. The deceased, Helm, was not out of a job, as he was employed at the furnace. It does not appear by the testimony, except that of James O'Rourke, that Helm, the deceased, worked on this boiler, which was purchased from the blacksmith, Daniels. Those who worked on the boiler named George Helm, brother of deceased, as the mechanic who did the work on it, putting in the new crown sheet and some of the braces, which were made by Frank M. Helm at the furnace or forge. There is some confusion in the testimony as to whether there was one or two cold water tests of the boiler. But there was certainly one, made after the new crown sheet was put in, under a pressure, stated by

one witness, at 65 pounds, and another at 30. Under this test the boiler gave way, and Edward O'Rourke ordered George Helm to caulk—that is, to rivet—the defective point in the boiler. The defect was in the old iron. After the explosion the boiler gave evidence that it was the old iron around the new crown sheet which gave way. Experts who, from the responsible positions they occupy, are familiar with the testing of boilers, say that after defects have been shown by the cold water test it would be unsafe—in fact, rash—to resort to the steam test which the boiler was undergoing the day after the cold water test without repairing the defective portions of the boiler. And these experts also state that no more steam pressure should be employed in testing than that used in the cold-water test. P. H. Kelly, a boiler maker, and superintendent of the Whitney Iron Works, says that no practical man will test a boiler by steam pressure before he has convinced himself by hydrostatic test that the boiler will hold a certain amount of hydrostatic pressure. It does not appear that after the cold-water test, and the defects were exhibited, and the boiler caulked or riveted, any other hydrostatic test was made, but that a steam test was employed the next day at a pressure of at least 85 pounds.

We conclude that the defendants were negligent in attempting to test an old boiler beyond the ability of any one to repair or make safe, and that they were negligent in putting on the steam test at a pressure in excess of the hydrostatic test, even if the boiler had shown no defects by said test; and that they were grossly negligent, after the defect by hydrostatic test had been exhibited, by resorting to the steam test, without satisfying themselves again, after the repairs, by hydrostatic pressure, that it was safe to resort to the steam test. *Railroad Co. v. Phillips*, 49 Ill. 234.

Frank M. Helm, the deceased, was employed at the forge or furnace, and was going to his work at the forge, and was some 30 feet away from the boiler, when Edward O'Rourke called to him, and said he wanted him. He responded to this call, and went to Edward O'Rourke, who was superintending the testing of the boiler by steam. At this time there were 85 pounds pressure on the boiler, and Edward O'Rourke instructed Claude Helm to put on 100 pounds pressure. He started to put on more steam, and it was at this time that his brother, Frank M. Helm, was called by Edward O'Rourke. Claude Helm was instructed to call James O'Rourke, the other member of the firm. Frank M. Helm and Edward O'Rourke were left standing at the boiler when he left to call James O'Rourke. He was in the office, not very far away, and started immediately with Claude Helm to where the boiler was being tested. When within 30 feet of the boiler it exploded.

It is in evidence that the employees of de-

defendants' establishment obeyed what orders were issued, and that Frank M. Helm, being handy and expert in all things connected with boiler making, was called upon to do almost any kind of a job. But it was not his business to test boilers. He was not employed specially for this purpose. This duty was assumed by Edward O'Rourke. Frank M. Helm took no part in directing the operations, but was present by invitation of his master and superior, and was under his orders. He was not, therefore, employed in an occupation, the risks of which he assumed. The authorities cited by defendants have no bearing on this point, as the facts do not bring the case within them. Frank M. Helm, being in the service of defendants as a general all-around workman, subject to the orders and directions of his superiors, whenever he was called upon to work in the presence of conditions created by his master and superior, had the right to assume superior knowledge, skill, and judgment in his superior, under whose orders he was immediately acting, and that he would not expose him to needless danger. In the case of *Faren v. Sellers*, 39 La. Ann. 1011, 3 South. 363, Mr. Justice Fenner, in an elaborate and able opinion, thus states the law: "When the master has created the danger he is bound to guard against it, and, if he himself does not know or believe that the danger exists, he cannot require superior knowledge and judgment from the servant." To review the instant case at length would be only to repeat the views expressed in the opinion of *Faren v. Sellers*, and a collation and reference to the authorities cited. It is only necessary to state that the defendants created the danger which the deceased, Helm, was instructed and ordered to confront. They are therefore liable in damages for their negligence in putting in operation the cause which led to the death of Frank M. Helm.

There are circumstances attending this case that impress us with the belief that the amount of damages assessed by the jury is excessive. The verdict of the jury was probably induced by testimony permitted to go to the jury showing the amount of property owned by defendants. We will amend the judgment, and fix the amount of damages at \$3,000. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to fix the amount of damages at \$3,000. In all other respects the judgment is affirmed, appellees to pay costs of appeal.

(46 La. Ann. 547)

STATE v. JACKSON. (No. 11,509.)

(Supreme Court of Louisiana. May 14, 1894.)

RAPE—PLEADING AND PROOF.

In an indictment for rape, the averment that the act was committed against the will and consent of the female is equivalent to the averment "without her consent." Hence, under such indictment testimony is admissible that

she was under the consenting age, the testimony supporting the averment "without her consent." 1 Whart. Cr. Law, para. 556, 558, 559; 2 Bish. Cr. Law, para. 1121, 1122; 1 Bish. Cr. Law, para. 261.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; W. C. Perrault, Judge.

Henry Jackson was convicted of rape, and appeals. Affirmed.

John N. Ogden and W. W. Bailey, for appellant. M. J. Cunningham, Atty. Gen., and E. B. Du Buisson, Dist. Atty., for the State.

MILLER, J. This is an appeal from the sentence of the lower court of imprisonment of defendant for life in pursuance of the verdict of the jury convicting him of rape. The indictment contains the usual averment of the commission of the act against the will and consent of the female. On the trial the state offered testimony to show the female was under the age of consent. To this testimony the counsel for the prisoner objected, and to the ruling of the court against him reserved his bill. The question is whether that ruling was correct.

It is well settled that the averment "against her consent" in an indictment for rape is equivalent to "without her consent." 1 Whart. Cr. Law, para. 556. The offense is deemed committed when the subject of the act is an insane woman, or an idiot female, or on the married woman yielding to one supposed to be her husband. So if the crime is committed on the child of tender years, incapable of consent. In all these cases, proof of the insanity, idiocy, fraud on the married woman, or that the child is under the consenting age, is admitted as supporting the averment "without her consent,"—the equivalent of "against her consent." In this view, we think the testimony was properly admitted. See Whart. Cr. Law, cited above, notes in connection with paragraphs 556, 558, 559; 1 Bish. Cr. Law, para. 554, 261; 2 Bish. Cr. Law, para. 1121, 1122. It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed.

(46 La. Ann. 545)

STATE v. JONES. (No. 11,547.)

(Supreme Court of Louisiana. May 14, 1894.)

HOMICIDE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—WANT OF DILIGENCE—CUMULATIVE EVIDENCE.

1. The accused appealed from the verdict and sentence on the ground that he should have been granted a new trial because of newly-discovered evidence.

2. Want of Diligence. The refusal to grant a new trial on the ground alleged is not subject to review. The court's ruling is supported by facts and circumstances disclosed by the record.

3. Cumulative Evidence. The court that sat on the trial, heard the witnesses, and had opportunity to form an opinion of the facts and attending circumstances, determined that the

alleged newly-discovered evidence was cumulative. A new trial will not be ordered.

4. Examination of Witnesses. The matter of examining witnesses to prove newly-discovered evidence was within the discretion of the trial judge. The accused having applied for an order to examine witnesses on a day fixed, his failure to call witnesses that were within the process of the court adds to the reasons supporting the refusal to grant a new trial. The district judge did not believe the affidavit of the prisoner.

5. It is not shown that error has been committed. The ruling refusing the new trial is affirmed.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; James C. Moise, Judge.

Gabe Jones was convicted of manslaughter, and appeals. Affirmed.

Louis P. Paquet, for appellant. M. J. Cunningham, Atty. Gen., and John J. Finney, Dist. Atty., for the State.

BREAUX, J. The defendant was indicted for murder in September, 1892. He was found guilty of manslaughter in February of this year. He appealed from the verdict and sentence. He alleges that the trial judge committed an error in overruling his motion for a new trial, based on newly-discovered evidence. In the first motion for a new trial, the accused alleged that the newly-discovered evidence consisted of the testimony of two of the sons of the deceased, who would testify that they were present at the time of the homicide; that they saw three persons, whom they name, make an attack upon the defendant with a pistol, knives, and baseball bats; that it was only after he (the defendant) had been struck, while retreating, that he fired his pistol in defense of his life and person; that the shooting was indiscriminate; it was impossible for any one to conscientiously say who killed their father. Subsequently the defendant tendered a supplement to the first motion for a new trial, and added the names of two other witnesses, who would swear that the defendant acted in self-defense. The minutes of the court show that the court fixed a day to hear witnesses, and try the motion for a new trial. On the trial of the motion, no witnesses were examined. The affidavits of three of these witnesses were offered and admitted in evidence. They contained in substance the facts alleged in the motion. The trial judge's recital of the facts, contained in the bill of exceptions is, in substance, that there was an absolute want of ordinary diligence on the part of the accused in failing to secure the testimony of the witnesses whose affidavits were made the basis of the application; that the evidence is merely cumulative in this, that defendant attempted to prove by his witnesses that he was the first attacked, and that he did not fire the first shot; that he (the trial judge) did not believe the statement contained in the affidavit; that the accused voluntarily

stated at his preliminary examination before the recorder that he fired the first shot; that the admission is of record; that the fact was proved beyond any reasonable doubt, and sustained by the surrounding circumstances; that no weapon had been drawn when the prisoner fired, dispersing all but a few, who returned his fire to protect themselves and prevent his murderous attacks; that the effect of his first shot was to kill the deceased, a disinterested bystander; that the second shot wounded a black man in the ankle. The trial judge further states that on the day fixed to hear the motion for the new trial the accused moved for a continuance for the purpose of having witnesses summoned and heard in support of his motion; that the continuance was granted, but at the appointed time the defendant did not ask to have the witnesses called, nor offer to put them on the stand; that nothing was done to have witnesses heard. The day preceding the appointed day to hear witnesses, affidavits were made, and they were offered in support of the motion for a new trial on the day that the witnesses who made affidavits were to be heard.

Diligence.

To render newly-discovered evidence sufficient cause for the granting of a new trial, the defendant must show that it was not owing to a want of diligence on his part that it was not offered on the trial of the case. Great reliance is placed by the appellate court in the statement of the trial court in the matter of refusing a new trial in a criminal case. *State v. Washington*, 36 La. Ann. 341. The trial judge, who has direct opportunities to observe if diligence has been exerted, states in positive terms that there was an absolute want of even ordinary diligence on the part of the accused to obtain the evidence. Application on the ground of newly-discovered evidence must be received with caution. *Id.* The utterances of the trial judge in refusing the motion must receive due weight, unless it clearly appears that he has fallen into an error.

Cumulative Evidence.

We must presume that the trial judge weighed all the testimony; that, in order to lay down applying principles to guide the jury, he taxed his mind at the time with the material facts developed by the testimony. After having considered the evidence the defendant alleged was discovered after trial, and compared it with the evidence given on the trial, he determined that the former was cumulative. The purpose, he states, was to add to what had been given before. The facts and circumstances support the statement. The accused pleaded self-defense, and contended that he had not fired the first shot. That testimony was offered to establish that defense is the natural inference. The statement of the trial judge makes it

conclusively appear that the testimony written down in the affidavit was of the same kind as that previously given, and was therefore cumulative.

Court's Discretion.

It is settled that the exercise of the discretion vested in inferior judges in such matters and on such grounds will not be disturbed by this court. *State v. Bealrd*, 34 La. Ann. 105. In the decision from which we quote, the exception was taken to the refusal of the judge to grant a new trial on the ground of newly-discovered evidence. The judge of the lower court in that case refused for the reason that he did not believe the affidavits. In the case at bar the reasons for not believing the affidavit are stated. These reasons are not controverted by reference to anything contained in the record.

Examination of Witnesses.

The defendant made an application to have these witnesses examined. *Ex gratia*, the trial judge issued an order for their appearance. The fact that the witnesses were not called by the defendant, and the court given an opportunity to examine them after having obtained the order for their examination, divests the affidavit of all importance as evidence. In a matter in which so much is necessarily addressed to the discretion of the trial court, it was competent for that court to hear the witnesses. An opportunity was offered of which the accused should not have failed to avail himself. The district judge drew an unfavorable inference from the fact that the affidavits were interposed and the witnesses were not examined. Under the circumstances, we do not think he has erred. Judgment affirmed.

(46 La. Ann. 1017)

Succession of LANGE. (No. 11,447.)

(Supreme Court of Louisiana. May 21, 1894.)

PROPERTY OF SUCCESSION—SALE BY ADMINISTRATOR—RESIDUARY INTEREST OF MINOR—BOND OF TUTOR.

1. The purchaser refused to accept the title tendered to him as adjudicatee, on the ground that the minor heirs were the owners of the property, and not the succession of *de cuius*. That, in consequence, their property cannot be sold without the exact observance of the formalities provided for the sale of minors' property.

2. Property of a Succession to Pay Debts. The court holds that the property belonged to the succession, and not to the minors, who only had a residuary interest, and that, as property of the succession, it could be sold by the administrator to pay debts of the succession.

3. Where a sale is made, for the payment of debts, of property belonging to a succession in which minors have an interest, it is not necessary to observe the formalities required by law for the alienation of minors' property, the interest of the minor being residuary.

4. The Amount of Tutor's Bond. The court, *ex officio*, holds, further, that though the property was sold in succession for the payment of debts, and without the formality for the

alienation of minors' property, the tutor, who is to receive the price, in the interest of all parties concerned must furnish bond in the amount required by law.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

In the matter of the succession of Harriet A. Lange. Rule by administrator to compel one Stich to accept the title to certain property purchased by him. From a judgment for said administrator, said purchaser appeals. Affirmed.

Felix J. Dreyfous and Bernard McCloskey, for appellant. Dinkelspiel & Hart, for appellee.

BREAUX, J. The purchaser of a city lot, and the improvements thereon, appeals from a judgment condemning him to accept the title tendered. The purchaser admits that he bought at public adjudication, but refuses to accept title, on the ground that the property was vested in the children of Mrs. Harriet A. Lange as to one-half, and that the other half was burdened with a general mortgage, resulting from her qualification as tutrix. James Wilson acquired the property on 31st of October, 1871, and died a short time after that date. His succession was opened, and Mrs. Harriet A. Wilson, his widow, was placed in possession of the property as owner of the undivided half, and her children of the other half. At a date subsequent, on her petition, a family meeting was held. They (the family meeting) fixed the value of the property, assisted by the report of experts, and recommended a private sale to effect a partition. The proceedings of the family meeting were approved by a judgment of the court. Mrs. Harriet A. Johnson, in her individual capacity, and acting also as tutrix of her minor children, under authority of this judgment, sold the property at private sale to Mrs. Mary Renturia. In 1880 Mrs. Renturia sold it to Mrs. Ellen Markey, widow of John Johnson. After the death of Mrs. Harriet A. Johnson, who was the wife of Lange at the time of her death, Mrs. Ellen Markey, widow of John Johnson, signed a deed containing the following declaration: "That though said purchase was made in her name, that said property then and always has belonged to Mrs. Harriet Augusta Johnson, then the widow of James Wilson, and afterwards wife of Henry J. Lange, and that this appearer never had any interest in, or claim to, on, or against said property, but the title thereto was simply placed in her name as a matter of convenience."

The Declarations Contained in the Deed of Acknowledgment do not Affect the Preceding Title.

The title passed regularly from Mrs. Harriet A. Wilson (formerly Mrs. Johnson and subsequently Mrs. Lange), personally and as tutrix, to Mrs. Renturia. The records do not

disclose any irregularity in the title from the former to the latter. It was absolutely the property of the vendee. As her property, she sold it to Mrs. John Johnson. This authentic deed of her agent was dated the 30th September, 1880, transferring the property. Mrs. John Johnson, for reasons not explained, in 1890, after the death of Mrs. Harriet A. Lange, placed a title of record recognizing the ownership as being in her succession. Counsel for the defendant in rule argues that the acknowledgment of Mrs. John Johnson has the effect of reinvesting the minors with the ownership of half of the property. Her declarations in her deed to the succession of themselves, without any other facts or circumstances going to show simulation and fraud in the proceedings preceding the title of Mrs. Renturia, did not have the effect of clouding the latter's title to the property. She (Mrs. Renturia) paid for it a full and fair consideration, and sold it for a clearly-expressed amount. During 10 years Mrs. Renturia was the unquestioned owner of the property. It does not appear that her vendor had any right on the property. She (Mrs. Renturia) was a stranger to the declarations her vendee chose to make. Those declarations bind Mrs. John Johnson, but they have not the effect of destroying the right of her vendor, Mrs. Renturia, the former owner. The property in the soil was in her name, and that fact must continue unaffected by any *ex parte*, unexplained declarations of her vendee. The title, by the acknowledgment of Mrs. Johnson, having passed to the succession of Mrs. Harriet A. Lange, it was subject to sale for the payments of the debts of the succession. Her heirs, the Wilson children, have no interest in the property. It was owned exclusively by the succession. The administrator applied to sell this property to pay the debts. The adjudicatee (defendant and appellee) has acquired title under the adjudication of property of the succession. The property is considered as belonging to the succession, and not to the minors. *State v. Judge*, 17 La. 500; *Succession of Smith*, 9 La. Ann. 107; *Succession of Fluker*, 32 La. Ann. 292; *Towle v. Weeks*, 7 La. 312.

The Security the Tutor should Furnish.

For his protection as owner, as well as for the protection of the minors, we have considered all the proceedings, and, to the end that the protection be complete, we nounce *ex proprio motu* the insufficiency of the tutor's security, in order that proper security be required. From the records we gather that the administrator, who applied for this sale, and who is also the tutor of the James Wilson minor children, has not, in so far as appears on the face of the papers, furnished bond as tutor in the amount required. It was made evident in these proceedings that it was to the interest of all concerned to sell the prop-

erty. The adjudication will now be followed by a deed and the payment of the price. Having thus affirmed the validity of the title, we feel compelled to state that the tutor must comply with the law regarding security he should furnish before he can be permitted to receive the amount of the sale due by the adjudicatee. The tutor, in the first place, executed a tutor's bond in the sum of \$1,000. This was not sufficient, if the record is taken as a basis. Subsequently he furnished a special mortgage in lieu of this bond. The property mortgaged was appraised at \$2,500; being 25 per cent. more, it is alleged, than the amount to which these minors are entitled. The inventories made and the facts appearing of record are proof that the security, in the present condition of affairs, and the unsettled state of the rights of the minors, is not in amount 25 per cent. over and above their claims. The price of the property adjudicated to the plaintiff in rule in this case is \$4,950. Of this amount, possibly, the minors own half. There is other property in which they have at least a residuary interest. It may be that there are debts to be deducted which will reduce their claims; of this we have no evidence before us. Until a satisfactory showing is made, and such security is given as will prove acceptable to the district court, the purchase price of the property involved in this case must remain in the immediate control of that court. We know that our learned brother of that court will bring to bear thoughtful and wise discretion to amply protect these minors. The title in this case is not dependent upon the sufficiency of the security offered to protect the minors, for another remedy lies for the protection of the minors. But the law is always jealous for the protection of the interests of minors, and courts are not inclined to withhold their equity powers, when needful, in their behalf. In rendering judgments, conditions may be included as may be equitable to shield them, and at the same time protect those who became owners of property in which they have a residuary interest from other litigation. The many decisions classed under the headnotes "Conditions of Judgment" and "Equity" by Mr. Hennen in his Digest establish broad grounds in support of equitable principles. They support the correctness of our conclusion in this case in requiring *ex officio* that the tutor shall furnish additional security, if further statement prove that the facts regarding amounts due them are as appear at this time in the record of appeal. It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed; and it is further ordered that the minors' rights be protected by inquiry in the matter of the tutor's security, in accordance with previously expressed views, and that appellee pay the costs of appeal.

(46 La. Ann. 355)

STATE v. HOBGOOD et al. (No. 11,549.)

(Supreme Court of Louisiana. May 9, 1894.)

DISCHARGE OF JUROR—POWERS OF JUDGE—ROBBERY AND LARCENY—OWNERSHIP OF PROPERTY—DEGREE OF PROOF—CREDIBILITY OF WITNESS.

1. The right of a trial judge to discharge a juror, in case of evident moral and physical necessity, before the panel is completed, or before evidence is introduced on the trial, is now a part of the fixed jurisprudence of this state.

2. Possession of property and apparent ownership are sufficient to support the charges in an indictment for robbery and larceny. It is therefore immaterial whether the party from whom the goods were taken had placed them on the assessment roll.

3. The fact that the prosecutor had made oath to the assessment roll, and left off the same the money alleged to have been stolen, is not admissible in evidence to impeach his testimony for truth and veracity.

4. It is inadmissible in order to attack veracity to prove the bad character of a female witness for chastity, or to show that she is a prostitute.

5. Testimony that the accused broke jail is admissible testimony.

6. A side remark made by the assistant prosecutor, sotto voce, to the associate counsel, that he will make no further objections to what the witness says, is not a comment on the testimony of the witness, and is not of that character to affect the rights of the defendant. Where no ruling of the court is asked, it is not apparent to what a bill in such a case applies.

7. Matters in the course of the trial which should be at once excepted to, and bill reserved, cannot be urged in motions for a new trial.

(Syllabus by the Court.)

Appeal from district court, parish of Livingston; Robert R. Reid, Judge.

William Hobgood and Wiley Stafford were convicted of robbery, and they appeal. Affirmed.

Joseph A. Reid, for appellants. M. J. Cunningham, Atty. Gen., and Bolivar Edward, Dist. Atty., for the State.

McENERY, J. The defendants were indicted for the crime of robbery, convicted, and sentenced to hard labor. They appealed. They present eight bills of exceptions, including two for overruling separate motions for a new trial.

Bill No. 1 was taken to the ruling of the trial judge in discharging a juror who had been sworn and accepted, but discharged for cause before the completion of the panel. The juror's wife was related to the accused. She was their second cousin, and this was sufficient for the dismissal of the juror from the panel. The right of a judge to discharge a juror in case of evident moral and physical necessity is now a part of the fixed jurisprudence of this state, established by a number of decisions. In this case the jury had not been completed, and no evidence had gone to the jury. Reason and authority sustain the action of the trial judge. State v. Costello, 11 La. Ann. 283; State v. Diskin, 34 La. Ann. 919; State v. Moncla, 39 La. Ann. 868, 2 South. 814; State

v. Nash, 46 La. Ann. —, 14 South. 607, and cases and authorities cited therein.

Bill No. 2. The question was asked the prosecuting witness for the state, on cross-examination, if he had sworn to his tax assessments for the last few years. The object of the testimony was, as stated in the bill, to impeach the credibility of the witness, and also as tending to destroy the allegations of ownership of the property in said witness. The witness had testified that he had accumulated the money said to have been stolen before, during, and some since the war. For neither of these purposes was the testimony admissible. The fact that he did not swear to his assessment, or that he did, by itself, has no bearing on the case, and was not competent to impeach his testimony for veracity. The fact that he swore to the assessment, and failed to place the money alleged to have been stolen on the assessment rolls, would not in itself destroy his actual or apparent ownership of the property. His possession of the thing without title would be sufficient to support the charge in the indictment. But the effect of the objection was done away with when the trial judge in his ruling permitted the introduction in evidence of such an oath, if made. It was not offered in evidence.

Bill No. 3. The witness Sophronia McLin, having been sworn for the state, to impeach her testimony, a witness was asked, on cross-examination, "Do you know what the general reputation for chastity of Sophronia McLin is, in the community in which she lives?" On the objection of the prosecuting attorney, the trial judge ruled against the admission of the testimony. The defendants reserved a bill. They rely upon the cases of State v. Parker, 7 La. Ann. 83; State v. Jackson, 44 La. Ann. 160, 10 South. 600; and McInerny v. Irvin (Ala.) 7 South. 841. The practice in our courts has been settled in the first case cited, but it goes no further than to allow the introduction of evidence as to general bad character, so as to show such moral turpitude in the witness that no one would be justified in believing him under oath. In such a case it is not necessary to restrict the inquiry to reputation for truth and veracity, but to show that his character was such that the witness would not, from its viciousness, believe him under oath. The inquiry must be into general character of the witness, and not as to any particular act or any particular line of conduct, although, after the general reputation is established, the witness may, as in the case of State v. Parker, state the disreputable lines of conduct of the witness,—that he was "idle, dissolute; had a notorious character for acting fraudulently and falsely, and extorting money by force, and cheating the unwary and the feeble, and had no means of support, and lived among low and abandoned women."

From such vices it is an inference that no truth can spring. In the case of *State v. Jackson*, 44 La. Ann. 180, 10 South. 600, the testimony received was as to the habits of the witness in associating with lewd and abandoned women. On appeal to this court, we said the inquiry was restricted, and therefore did not come within the reasons stated in the case of *State v. Parker*, 7 La. Ann. 83. In paragraph 486, Whart. Cr. Ev., it is stated, and supported by reference to many cases in the several state reports, that "It has been held inadmissible in order to attack veracity to prove the bad character of a female witness for chastity, or to show that she is a prostitute; or to prove habits of intemperance which do not affect the perceptive or narrative powers. In the case of *McInerney v. Irvin* (Ala.) 7 South. 841, the rule as to general reputation to impeach the credibility of a witness is in all essential respects similar to the rule here. In that case, in reference to the impeachment of a female witness for chastity, the court said, "In refusing to permit the witness to be impeached by evidence of her alleged bad character for chastity and virtue, or by showing that she was a common prostitute, the circuit court but followed the settled rule of law announced by this and other courts on the subject."

Bill No. 4 is the same in effect as No. 3, and the reasons stated therein for the sustaining of the ruling of the trial judge will apply to this bill.

Bill No. 5 was reserved to the ruling of the trial judge in the admission of testimony to show that the defendant J. W. Stafford subsequently broke jail. In his statement to the bill the trial judge says the testimony was offered "to prove flight by the accused, and admitted by the court to show guilt, if unexplained." The testimony was admissible. *State v. Beatty*, 30 La. Ann. 1266; *State v. Dufour*, 31 La. Ann. 804; *State v. Melton*, 37 La. Ann. 77.

Bill No. 6. The defendant William Hobgood was on the witness stand, and was asked to give a certain conversation, which was permitted over the objection of the state. W. B. Kemp, assisting the prosecution, remarked aloud that he would not thereafter object to anything which Mr. Hobgood might choose to say. The defendant reserved a bill of exceptions to said remark. It does not appear from the bill that the trial judge was called upon to make any ruling, and we do not see to what the bill is applicable. There was nothing in the remark to throw discredit on the testimony, and it was addressed to the associate counsel, who had just urged an objection to a question to the accused by his counsel. "The remark," says the judge, "was made sotto voce." The objection was frivolous.

Bill No. 7 is reserved to the overruling of the motion of the defendant J. W. Staf-

ford for a new trial. There was no testimony taken on the motion for a new trial, and it will not of course be necessary to notice that part of the formal allegation that the verdict was contrary to the law and the evidence. The motion alleges that the "assistant prosecuting attorney and the district attorney argued to the jury, and led them to consider, evidence which had been ruled out by the court as to this defendant, and further induced the jury to base their verdict upon the testimony so ruled out." The defendants' counsel made no objection to the argument at the time it was made, and called for no ruling of the court upon which he could, if adverse to him, have reserved his bill. It is too late to make the objection in a motion for a new trial. And this statement will apply to objections to the charge of the judge to the jury in the motion. Objection to it should have been made in season. It cannot be presented in a motion for a new trial.

Bill No. 8 is taken to the overruling of the motion of the defendant William Hobgood for a new trial. A motion for a new trial solely on the ground that the verdict is contrary to the law and the evidence is not entitled to notice by this court. This has so often been decided that its discussion here is wearisome. Judgment affirmed.

(46 La. Ann. 382)

STATE ex rel. ZEIGLER v. TAYLOR, Judge.
(No. 11,552.)¹

(Supreme Court of Louisiana. May 14, 1894.)

SUSPENSIVE APPEAL—PROVISIONAL JUDGMENT.

1. A judgment which may be provisionally executed, notwithstanding an appeal has been taken therefrom, is not susceptible of a suspensive appeal.

2. That proposition involves a contradiction in terms.

(Syllabus by the Court.)

Application on relation of Samuel J. Zeigler for writs of mandamus and prohibition against S. L. Taylor, judge of the first judicial district, parish of Caddo. Application refused.

Land & Land, for relator. S. L. Taylor, in pro. per.

WATKINS, J. The object of this application is to coerce the respondent to grant relator a suspensive appeal, grounded on the judgment and decree in the proceedings in the court of the respondent, which are thus described in the relator's petition, viz.: That in certain proceedings in the respondent's court, in December, 1892, relator obtained judgment granting him a respite of one and two years. That recently several persons, claiming to be creditors of his, obtained rules against him, under the provisions of Act No. 184 of 1888, in which they aver his failure

¹ Rehearing refused May 22, 1894.

to make payments to them in conformity to the terms of said respite, and pray that he show cause why the judgment decreeing such respite should not be vacated and annulled, and why he should not forthwith make a cession of his property to his creditors. That in his answer to said rules he set up, *inter alios*, the unconstitutionality of the act of 1888. That, on trial of said rules, judgments were rendered making same absolute, and decreeing that the judgment granting the respite be vacated and annulled; that he forthwith make a cession of his property to his creditors; and that a provisional syndic be at once appointed, and the clerk of court be directed and required to convoke a meeting of his creditors. That immediately thereafter, on the following day, he applied to the respondent for an order of appeal, suspensive and devolutive, made returnable to this court according to law; the amount in dispute, as well as the fund to be distributed, exceeding \$2,000. That the respondent declined his application, making on his motion the following indorsement, *viz.*: "I decline to grant a suspensive appeal from the judgment rendered in this case, on the authority of the case of *State ex rel. Levy & Son vs. Ellis*, Judge, 40 A. 818, but am willing to grant a devolutive appeal." The respondent's return is, in substance, the same as the aforesaid indorsement. An examination of our opinion in the *Levy Case*, 40 La. Ann. 818, 5 South. 530, discloses its complete analogy to the case under consideration, in every essential particular, and a close observance of the terms and provisions of Act No. 134 of 1888. The object of that statute was evidently to speed the liquidation and settlement of estates of insolvents; and, if they are to be halted or impeded by suspensive appeals, the remedy would be practically valueless. The act provides that, in case the respited debtor shall fail or neglect to make payment according to the terms of his respite, any creditor may proceed against him summarily, by rule, to have his respite vacated and annulled, and to compel him to make a cession of his property to his creditors; and it further provides that the court, in making such rule absolute, shall appoint a provisional syndic, and order a meeting of creditors. That is precisely what the respondent has done, and the question is whether or not the debtor is entitled to suspensively appeal from said judgment. According to the opinion of this court in *State ex rel. Levy v. Ellis*, such a judgment belongs to the class of judgments which are provisionally executed, although an appeal has been taken. The Code of Practice distinctly provides that judgments relating to the appointment of syndics are of that class. Code Pr. art. 580; Rev. Civ. Code, 3093; Act No. 184 of 1888. It is evident that the decision of the court in that case is correct, and for that reason the relief prayed for by the relator must be denied. *Vide State ex rel.*

Marx v. Judge (La.) 14 South. 57, giving a construction to Act No. 134 of 1888. It is therefore ordered and decreed that the restraining order herein, made in limine, be rescinded, and that the applications for writs of prohibition and mandamus be refused, at relator's cost.

(46 La. Ann. 1031)

STATE v. PEOPLE'S SLAUGHTERHOUSE & REFRIGERATING CO. (No. 11,559.)

(Supreme Court of Louisiana. May 31, 1894.)

INSPECTION OF LIVE STOCK — POLICE POWER OF STATE — TITLE OF ACT — AMENDMENT OF CORPORATE CHARTER.

1. An act providing for the appointment by the governor of an inspector with power, under the supervision of the board of health, to inspect throughout the state animals intended to be slaughtered for human food, and providing for his fees, is not in conflict with article 46 of the constitution, because the act professes to amend a legislative act embodying the charter of a corporation, the proposed amendment being immaterial, and the act assailed being valid, if the proposed amendment is stricken out.

2. Nor will such act, relating altogether to the inspection of animals intended for human food, be deemed to include more than one subject, in violation of article 29 of the constitution, because it professes to amend a prior act on the subject of inspectors, the act assailed being entirely sufficient to effect its object if the proposed amendment had not been inserted.

3. The title to charge the board of health with the supervision of the inspection of stock to be slaughtered for human food carries the appointment of an inspector of such stock, and the provision for his fees.

4. Nor does such an act for the inspection of stock throughout the state require previous notice under article 48 of the constitution.

5. The authority conferred by article 248 of the constitution of the state on municipal corporations and parishes to regulate within their limits the slaughtering of animals for human food does not strip the state of the police power to provide for the appointment of an inspector of all such articles slaughtered throughout the state, such inspection to be under the supervision of the board of health. *Cooley, Const. Lim. c. 16, on "police power;" Slaughterhouse Cases, 16 Wall. 36; Beer Case, 97 U. S. 25.*

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Petition by the state of Louisiana for an injunction against the People's Slaughterhouse & Refrigerating Company. Judgment for defendant, and plaintiff appeals. Reversed.

M. J. Cunningham, Atty. Gen. (Farrar, Jonas & Kruttschnitt, of counsel), for the State. J. R. Beckwith, for appellee.

MILLER, J. This is an appeal from the judgment of the civil district court against the state on its petition for an injunction to restrain defendant from slaughtering animals for human food until inspected by the state inspector, and the inspection fees paid, as directed by the act of the legislature No. 87 of 1888. The defense was, besides the exception of no cause of action, that the act of 1888 is unconstitutional, because violative of

articles 29, 43, 46, 48, and 248 of the state constitution. The argument in this court on behalf of defendant is mainly directed to the asserted repugnancy of the act to article 248. The prohibition in article 46 is against amending charters of corporations. The act of 1888 does, in its title, express the purpose to amend the Act 118 of 1869, which, besides creating the Crescent City Live-Stock Landing & Slaughterhouse Company, was an act to protect the health of the city of New Orleans, and in its sixth section provided for the appointment by the governor of an inspector of animals to be slaughtered for human food. This sixth section in no sense formed part of the charter of the Crescent City Company, though that company was subjected to its operation. It is this sixth section the act of 1888 proposes to amend, and the change is to extend the inspection of animals to be slaughtered, places the inspection under the supervision of the board of health, imposes certain additional duties on the inspector, specially with respect to the cleanliness of the slaughterhouse, and changes the disposition of inspection fees. An amendment within the purview of the forty-sixth article. It would be a valid enactment if the title of the act of 1888 made no reference to the act of 1869, and hence cannot be assailed because the title of the act of 1888 refers to the act of 1869. We group for consideration the objections to the act of 1888 based on article 29, to wit, that the title to the act does not express its object, and that the act embraces more than one object. The purpose of the act was, as already stated, to enlarge the duties of the inspector of live stock so as to extend to all animals slaughtered for human food in all slaughterhouses, place inspectors under the supervision of the health officers, and to make other changes incident to inspection, already stated. From first to last the act deals only with inspection of animals, and the supervision under which it is to be conducted. The provisions with respect to fees and their disposition and other details are all germane to the subject of inspection, and the reference to the act of 1869 introduces no new subject, and, for all practical purposes, might as well be omitted. Viewing the act as not covering two objects, and holding that the substantial purpose is fairly covered by the title to charge the board of health with the supervision of all stock to be slaughtered, the appointment of the inspector and his fees being incident to that supervision, we hold there is no repugnancy of the act of 1888 to articles 43, 29, 43, and 248 of the constitution. The title of the act is certainly broad enough to cover the appointment of the inspector, and that appointment is all that the suit involves. We are safe in holding the title sufficient for that purpose.

The second and fifth exceptions—that the act attempts to appropriate public money

that should go into the treasury, and that the act was local, and required notice—we think hardly deserve serious consideration. An act looking to the inspection of all live stock to be slaughtered anywhere in the state, and providing for inspection commensurate with the scope of the act, can hardly be deemed local. Money derived from taxes and licenses—i. e. the ordinary revenues of the state—can be taken out of the treasury only by legislative appropriations. But fees required to be paid in aid of inspectors or health laws are manifestly within the scope of article 46 of the constitution.

The remaining exception is that article 248 of the constitution of the state strips the legislature of all police power with respect to the inspection of animals to be slaughtered for human food. That power, it will be conceded, extends to all the incidents of the subject within its scope. It will doubtless occur that the power with respect to some of those incidents may well be exerted to the full extent required by the municipalities and parishes. But it is not easy to conceive that, with reference to other incidents within the police power, the municipalities and parishes could exert the functions required. Thus, if legislation is required to act on the subject generally, and to be effective throughout the state, so as to bring the subject within the operation of a uniform rule, such rule would have to be prescribed by the state, the authority of towns, cities, and parishes being limited by their territorial jurisdiction. An inspection law, to operate on animals intended to furnish human food, from the time the animal is introduced wherever it is carried within the state, would, from the very nature of such a law, require state authority for its enforcement. It is not, therefore, reasonable to hold that it was ever intended by the constitution to deprive the state of all competency for such general legislation. All canons of interpretation are against the presumption of the relinquishment of the police power existing in the state. *Cooley, Const. Lim. c. 16. Slaughterhouse Cases, 16 Wall. 36, passim.* The 248th article of the constitution delegates to the parishes and municipalities the regulation of the slaughtering of animals within their respective limits. It would be, we think, giving to the "regulating" a significance far beyond the import of the word if we were to hold that the state was thereby deprived of all power to pass an inspection law to operate throughout the state on animals before they can be slaughtered. This court has held in cases simply involving the location of slaughterhouses in this parish that the power to prescribe the location was in the local authorities under this article of the constitution. The court, in reaching that conclusion, used some general language with respect to the supposed divestiture of the state of its police power under this article 248. All that the determina-

tion of the cases required was the adjudication that the power with respect to the location of slaughterhouses was in the parish or municipal authorities. Any reasoning of the court on those cases is, of course, controlled by the single point at issue,—i. e. the location of slaughterhouses. *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. 599; *Darcantel v. Refrigerating Co.*, 44 La. Ann. 632, 11 South. 239. The act of 1888, in question here, provides for the appointment of an inspector, to act under the supervision of the board of health, to inspect all animals slaughtered for food in the slaughterhouses here and in all other slaughterhouses in the state. The validity of such an act was in no manner involved in the previous decisions of this court. In so far as the act provides for the inspector and his fee, it was the exercise of the general police power left in the state untouched by article 248, delegating the police power only to a limited extent to the municipalities and parishes. The injunction in this case is to prohibit the slaughtering or permitting the slaughtering of animals in defendant's slaughterhouses until the animals are inspected, and the inspector's fee paid. To that extent we are clear the act is valid. The defendant is without interest with respect to the fees, and, if there are other questions beyond that presented by the application for the injunction, it will be time enough to meet them when the questions arise.

We have given the case, we believe, all the consideration it requires. The parties are anxious for a speedy decision, and, submitted as the case has been, at the close of the term, we have not been able to elaborate the opinion, but have presented sufficiently, we trust, the grounds of our decree. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed that the defendant be enjoined and restrained from slaughtering or permitting to be slaughtered in its slaughterhouse any animal intended to be slaughtered for human food, until inspected by the state inspector, and the fees paid, as directed by the legislative act No. 87 of 1888; and that defendant pay costs.

(46 La. Ann. 421)

TROEGEL v. KING, Judge. (No. 11,477.)
(Supreme Court of Louisiana. March 12, 1894.)

MANDAMUS—CERTIORARI—JURISDICTION OF CIRCUIT COURT OF APPEALS.

1. The relator sues for peremptory writs of certiorari and mandamus, under the supervisory jurisdiction of this court. The appeal was returnable to the circuit court of appeals. The circuit courts of appeals are vested with authority to issue writs of mandamus, prohibition, and certiorari in aid of their appellate jurisdiction.

2. If the relator has a right to relief, he must apply to the court in which the appeal is lodged, the only court having jurisdiction of the questions propounded in his application.

(Syllabus by the Court.)

Application by Ernest Troegel against Fred D. King, Judge, for writs of certiorari and mandamus. Denied.

A. B. Phillips and B. R. Forman, for relator. Fred D. King, in pro. per.

BREAUX, J. The relator seeks, by the interposition of the writs of certiorari and mandamus, to compel the respondent to rescind his order for a suspensive appeal. The appeal was made suspensive on a bond for an amount sufficient to pay costs. The record of appeal is now lodged, under the order of appeal issued by the respondent, in the clerk's office of the court of appeals. The controversy involves an amount of \$1,144 in the hands of the agent of the Massachusetts Mutual Life Insurance Company. The relator claimed to be the owner of that fund. The testamentary executrix of the succession of August Bernau also claims the amount. The insurance company is represented as being a mere stockholder, with no interest save to obtain a valid and sufficient receipt. The relator (plaintiff in injunction) sued out a restraining order commanding the executrix not to receive the amount, and the agent of the insurance company not to hand over the amount in contest to the executrix. He prayed for judgment making the injunction perpetual, and recognizing him as owner of the amount. There was judgment for plaintiff, Troegel, and against the defendants, decreeing that plaintiff was entitled to the amount of the life policy, in New York exchange, in the sum above stated. On application of the legal representative of the succession of August Bernau for a suspensive appeal, returnable to the court of appeals, respondent granted it, and fixed the bond at \$200. The respondent returns that there was no monied judgment pronounced; that in granting the appeal on that bond he was governed by the principles enunciated in *Succession of Clark*, 30 La. Ann. 801, approvingly cited in *Pasley v. McConnell*, 38 La. Ann. 470; *State v. Judge*, 30 La. Ann. 285; *Succession of Edwards*, 34 La. Ann. 219; *Brewing Co. v. Boebinger*, 40 La. Ann. 278, 4 South. 82. This court has no authority to make the writs sued for peremptory under its supervisory jurisdiction. The amount in contest is within the jurisdiction of the court of appeals, and the appeal is now before that court. It has authority to issue writs of mandamus, prohibition, and certiorari in aid of its appellate jurisdiction.

The question involved in this application for certiorari and mandamus relates to the requirement to perfect an appeal before that court. The proceeding is within its control and jurisdiction. That power was recently interpreted as exclusive. It was determined that the circuit court of appeals to which an appeal is granted is not only competent, but the only court having jurisdiction of such issues. In the case of *State v. Judge*, 43 La.

Ann. 936, 9 South. 899, the complaint was, as in the case at bar, that the district judge should have required a bond for one-half exceeding the amount of the claim. The relator applied to this court to compel the judge to rescind his order. This court decided that the question, the amount involved being less than \$2,000, was not within its jurisdiction, and that the relator was without right to writs from this court in aid of the appellate jurisdiction of the court of appeals. The court in that case refers to articles 95 and 104 of the constitution as absolutely controlling in the matter involved. The principles laid down in that decision are not assailed, and no argument advanced in the case at bar bears against their force and correctness. The authority of that decision controls the case at bar. It is similar in all important respects. It is not possible to difference the two cases in so far as relates to the proposition of law involved. As in the case cited, the relator has no right under the supervisory powers of the court, and, if he has any rights, he must apply to the court of appeals in which the appeal is lodged. The writ nisi issued in the case at bar is rescinded, and the application for writs of certiorari and mandamus is dismissed, at relator's costs.

(46 La. Ann. 1194)

STATE v. LEFTWICH. (No. 11,543.)

(Supreme Court of Louisiana. May 21, 1894.)

INDICTMENT—MOTION TO QUASH—SELECTION OF JURY—ENTRY OF PLEA—CONCLUSIVENESS OF RECORD—HOMICIDE—NEW TRIAL.

1. If the motion to quash an indictment for alleged defect in drawing the jury may in certain cases be made after the 1st day of the term, such motion will be deemed too late made several days after the indictment is found, and 10 days after the beginning of the term, especially when the accused is in custody, awaiting indictment, when the term begins, and all the facts on which the motion is based are then known to the counsel. Act 44 of 1877, §§ 10, 11; *State v. Shaw*, 5 La. Ann. 342; *State v. Daniel*, 31 La. Ann. 94; *State v. Johnson*, Id. 369; 37 La. Ann. 216.

2. The statement of the judge in the bill of exceptions that he ordered of his own motion the plea of not guilty to be entered for the accused will be deemed conclusive in this court, and the verdict will not be set aside and a new trial ordered because the judge ordered the minutes corrected so as to show the entering of the plea, and refused to hear testimony contradicting his statement of the performance of an official act and the corrected minutes. 82 La. Ann. 1227; 84 La. Ann. 881; *State v. Harris*, 39 La. Ann. 1105, 3 South. 344.

3. Nor will the verdict be set aside, and a new trial ordered, because the lower court overruled questions to the jurors on their voir dire, whether or not they would follow the instructions of the court in the contingency of circumstantial testimony, the questions supposed might be presented, it appearing by the bill the court gave the jury an accurate charge as to nature and degree of circumstantial testimony required to convict.

4. After trial and verdict in a criminal case, i. e. a murder, there must be conditions highly exceptional to authorize the appointment of experts to examine and report whether stains

on a dress of the deceased, produced before or referred to in the testimony given to the jury, were bloodstains, the report to be used on the new trial sought to be obtained. No such conditions exist in this case, nor will the new trial be granted on the ground of newly-discovered testimony which, if attainable, with due diligence could have been obtained on the trial.

(Syllabus by the Court.)

Appeal from district court, parish of Assumption; Walter Gulon, Judge.

Randall Leftwich, alias Randall Butler, was convicted of murder, and appeals. Affirmed.

Pugh, Pugh & Marks, for appellant. M. J. Cunningham, Atty. Gen., and O. D. Billon, Dist. Atty., for the State.

MILLER, J. The defendant appeals from the sentence of death for murder. The record brings up 10 bills of exception. There was a motion to quash the indictment, based on a challenge to the array of jurors for alleged irregularities in the drawing. It is claimed that one of three who acted as jury commissioners had vacated his office by accepting the position of deputy sheriff, that persons other than the commissioners suggested names and participated in the drawing, and that all the names of the jury drawn for the term were not in the box when the grand jury was selected by whom the indictment was found. Our examination has not impressed us with the force of these grounds, but it is enough, in our view, to dispose of the motion to quash, that the law requires that it should have been made earlier. The defendant was in custody on the charge of murder when and before the term of court began, the counsel who made the motion had been employed on the preliminary examination, and all the facts relied on to sustain the motion to quash were known to counsel before the indictment found on the 22d March, 1891, the term commencing on the 19th, the defendant arraigned on the 22d, and the motion to quash not filed until the 30th of the month. The requirement of the law that the motion to quash for supposed defects in drawing the juries shall be made on the first day of the term is to secure the prompt administration of justice, and with that view to prevent the holding back of motions of this character, presenting alleged irregularities, easily corrected, without serious delay or expense, if made at the beginning of the term. If the statute should be relaxed when the indictment is found after the term, as was the case here, although the accused was in custody and represented by counsel cognizant of all the facts on which the motion to quash the venire was based, still the motion should not have been delayed until the 30th March,—10 days after the term began,—and the day fixed for the trial. In any view, we hold that to be too late. We are fortified in this, too, by the absence of any fraud or wrong to the accused arising from the alleged defect in

drawing the jury. Act 44 of 1877, §§ 10, 11; State v. Johnson, 31 La. Ann. 369; State v. Daniel, Id. 94; State v. Shaw, 5 La. Ann. 342.

Another bill—the second—is to the refusal of the court to permit the propounding to jurors on their voir dire the question as to whether they would follow the instructions in the contingency of a charge as to circumstantial evidence. Hypothetical questions how the jury would or would not be influenced in certain supposed conditions of the testimony are calculated to mislead and confuse jurors, and to ask the juror whether he would respect the instructions of the court is certainly out of the usual course. In this case, while the court declined to permit the question in the form counsel presented it, the charge as to the nature and force of circumstantial evidence was given with entire accuracy and great liberality to the defendant. We think the question proposed was properly overruled.

Another bill—the fifth—denies the right of the state to close the argument when the defendant, as in this case, offered no testimony. There is nothing in this exception. State v. Millican, 15 La. Ann. 557; State v. Daniel, 31 La. Ann. 91. It was part of the case of the state to offer testimony that a dress found in a bureau removed from the house of the deceased belonged to her, and that there were bloodstains on the dress. The defendant objected to the testimony of two physicians tending to show the bloodstains. It is claimed the search soon after the crime was committed developed no such dress, or at least none that was stained; that the mother of the deceased produced the dress some time after the killing, and, exasperated as she was against the accused, the statement of the mother that she had found the stained dress in the bureau was not entitled to credit. All that is urged by the defense in this respect might well tend to deprecate the weight of the testimony as to the dress and the character of the stains, but the testimony was certainly admissible, and this disposes of the third and fourth exceptions, if, indeed, the last, referring to the introduction of the dress, is pressed.

The sixth and eighth bills may be considered together. One, made after trial and verdict, is to the refusal of the judge to appoint experts to examine and report as to the stains on the dress,—whether or not caused by blood. The application was supported by affidavits of a number of witnesses to the effect, generally, that in the search for evidences of the crime at the house of the deceased soon after the killing no such dress, or at least none that was stained, was found, and in other respects the affidavits tended to discredit the dress theory and the testimony of the mother of the deceased, a witness on the trial. The rule for the new trial assigned as some of the grounds that, the search developing no such dress, the de-

fense was surprised by the testimony in this respect; that newly-discovered evidence would show that when the body of the deceased was found the dress was not in her house, and would in other respects present the case in a more favorable light for the accused. We have weighed with care these bills, and the able argument of defendant's counsel in support of the application. We think the propositions to give a new trial, or, practically the same thing, to appoint the experts after the trial, is inadmissible. The time to appoint experts, if deemed necessary, was while the trial was in progress, and that was the time for offering the testimony suggested in the rule for new trial. The materiality of that testimony should, we think, have suggested itself when the state's testimony on this branch of the case was being given to the jury. The testimony claimed to be newly discovered tended to repel that of the state as to the dress and the criminating stains. The witnesses suggested in the rule for new trial were at hand, some of them in court had testified, but not in regard to dress or stains, because not asked, and, as to other witnesses not present, the court would doubtless have compelled their attendance. Under these circumstances, we cannot, on the ground of surprise or due diligence, or any other ground, sanction the opening of the case. The showing for the new trial is not in our view sufficient, and there is no ground after trial and verdict to appoint experts for obtaining and reporting information with a view to another trial. We think there is no merit in the sixth and eighth exceptions.

From an early period the law has provided that standing mute shall be no bar to the trial of the accused. In such case the court is directed to enter the plea of not guilty. Rev. St. § 996. In this case the plea was made by counsel for the accused, but was entered, of course, under the direction of the court. It is not easy to appreciate that the plea, entered necessarily under the eye and sanction of the court, is vitiated because made through counsel. If the prisoner does not plead, the court is to order the plea to be entered. He does not plead in this case, and therefore the court, in effect, directs the plea to be entered. Utile per inutile non vitiatur would seem to apply to the circumstance that the counsel pleads when, if the counsel had not spoken at all, the court would have caused the plea to be entered. Besides, in the argument on the rule for trial, the bill recites the judge stated he had ordered the plea to be entered of his own motion, and he then, i. e. on this argument, directed the minutes amended so as to state the facts. The minutes were amended accordingly, and to this the defendant took a bill of exception, as well as to the refusal of the court to hear testimony that the minutes were correct as they stand, i. e. stating the plea by counsel of the accused. The right of the court to or-

der an amendment of the minutes so as to conform to the fact, and show this performance of an official duty, we think is beyond question. *State v. Chatman*, 34 La. Ann. 881; *State v. Tessier*, 32 La. Ann. 1227; *State v. Harris*, 39 La. Ann. 1105, 8 South. 344. If defendant had been permitted to offer the testimony suggested in the bill, tending to show the judge had not directed the plea to be entered, this negative testimony would have encountered the corrected minutes, and the direct and positive statement of the judge contained in the bill that he did direct the entry of the plea, and that his recollection was clear and positive on the point distinctly announced when the testimony on the point was proposed to be offered. We think the statement of the judge of a fact within his own knowledge pertaining to his official duty must be deemed conclusive, and accepted as such by this court. In this view the proffered testimony was useless, and properly excluded. This disposes of the seventh exception.

As to the ninth exception to the exclusion of testimony that a juror had been approached by the mother of the deceased, and urged to find a verdict for the state, we concur with the judge that, if offered to impeach his verdict, it was inadmissible, and, if for any other purpose, it was irrelevant.

The tenth exception was to the overruling of the motion in arrest based on the word "prerent" in the indictment instead of "present." It is obvious this is a mere clerical error, and did not vitiate the indictment. *State v. Moore*, 38 La. Ann. 66; *State v. Morgan*, 35 La. Ann. 293. Our consideration has embraced all the points in the numerous bills of exception, and the views expressed in this opinion, we think, embody all that need be said. It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed.

(46 La. Ann. 1180)

FREDERICKS v. ILLINOIS CENT. R. CO.
et al. (No. 11,493.)¹

(Supreme Court of Louisiana. May 14, 1894.)
DANGEROUS PREMISES — INJURIES TO TRESPASSERS
—LIABILITY OF OWNER.

1. The possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for other persons than those whom he invites, and consequently he is not liable to trespassers for injuries they may receive from defects not amounting to traps in such premises.

2. If a person allows a dangerous place to exist on premises occupied by him, he will be responsible for injury caused thereby to any other person entering the premises by invitation or procurement, express or implied. The question of importance, then, is whether the place was dangerous per se, and was the situation such as to operate an invitation to trespassers. (Syllabus by the Court.)

¹ Rehearing refused May 30, 1894.

Appeal from civil district court, parish of Orleans; George H. Theard, Judge.

Action by Joseph Fredericks against the Illinois Central Railroad Company, the Rosetta Gravel Paving & Improvement Company, and another. Judgment for plaintiff against said paving and improvement company, and it appeals. Reversed.

Farrar, Jonas & Kruttschnitt, for appellant Rosetta Gravel Paving & Improvement Co. Fenner, Henderson & Fenner and Walter B. Spencer, for appellees.

WATKINS, J. This is an action in damages, and the defendant the Rosetta Gravel Paving & Improvement Company is the sole appellant from the verdict of the jury, and the judgment of the court a qua, thereon based, for the sum of \$1,500, the Illinois Central Railroad Company and the New Orleans Belt Railroad Company having been discharged from liability. This suit is brought by the plaintiff for the use of his minor child, who suffered serious injuries as the result of a fall through an open culvert, part of a switch track connecting the yards of the defendant with the main belt-road track on Louisiana avenue; the averment of the petition being that in the construction of this switch track the defendant dug a deep trench or excavation on the south side of said avenue, in order to obtain earth to make an embankment on which to lay its track, and same was permitted to remain open, notwithstanding the duty was imposed on the company to restore the street to its original condition. The further averment is made that in laying said switch track from the main line to the company's private yards, in the vicinity, it became necessary to lay it across the said trench or ditch, which is several feet deep and several feet in width, and that the place where it crosses this ditch is near the place where the crossing for pedestrians is constructed; that the only crossings over that ditch are such narrow plank walks as have been placed over it by the people living in the neighborhood, for their own convenience; that this switch track over the ditch is laid on an open culvert, consisting of cross-ties of about eight inches in diameter, laid about two feet apart, and at right angles with the avenue,—the culvert being about eight feet in length, and on a level with the street; that the spaces between the cross-ties are not covered or closed, and the culvert is in no way guarded or protected so as to prevent children or other persons from falling into same, as they are liable to do in crossing from one side of the avenue to the other; that said open culvert is a dangerous trap to wayfarers passing that way. It is alleged that on or about the 16th of September, 1892, at about 4 o'clock p. m., plaintiff's daughter, a child of seven years and seven months, left his house, on the north side of Louisiana avenue, to go across the street to the house

of one of her playmates, on the south side of the avenue, as was her custom to do; that, taking the most direct route, she went diagonally across the street, and, on reaching the first place where she could cross the ditch, she attempted to cross over the trestle, fell, and, striking against the sharp edge of one of the cross-ties, received serious injury. Grounded on this statement of fact, the charge is made by the plaintiff that in the construction and maintenance of an open culvert over a deep ditch on a street in a populous part of a city, in close proximity to the houses of the citizens, and in a place frequented by children of all ages, and used by them as a playground, and lying in their customary path across the street, the defendant was guilty of gross negligence, and a wanton disregard of the equal right of every inhabitant thereon to the undisturbed enjoyment of the street. The only question of fact that the defendant controverts is that with reference to the digging of the trench, and leaving it open; the fact being that the ditch had been dug by the city, and had been in use by the city as a drain some time prior to the building of the switch track, and thus necessitated the defendant to construct the trestle over it. This is not denied, but admitted, by the plaintiff. Practically, all of the other allegations of the petition are undenied.

The question at the threshold is whether this statement makes out a case of negligence on the part of the defendant. The counsel for the defendant puts the question thus: "The only point of alleged negligence against the defendant is that the spaces between these broad cross-ties ought to have been filled in so as to make a passageway over the gutter where none was intended by law, and where people, as a rule, had no business or right to cross. There are street crossings on every street, at the crossings. The gutter in the middle of the street is not a normal place to cross, and it is not expected that anybody will cross there." Again: "There was no such passageway over this gutter," at this point, before this structure was erected. It was not intended that there ever should be any passageway at this point. Our structure was not intended as a passageway for foot passengers, and they had no right to cross the street at this point, where it was not contemplated that foot passengers should cross. We were therefore under no legal obligation to provide a safe passageway over a place where the law provided none. * * * If the defendant in this case is guilty of any negligence, then every person who lays a twelve-inch plank across a gutter in the middle of a street in the city of New Orleans, for his own convenience, with the consent of the city, is liable for negligence to any person who undertakes to walk that twelve-inch plank, and, missing his footing, falls in." The culvert in question was a ditch or drain which had been constructed

by the city, and had been in use by the city long prior to the time of the construction of the trestle or culvert in question. That ditch or drain is just such as exists in all parts of the city for like purposes. The switch track turned out from Louisiana avenue in a curve, crossing this ditch in the direction of the defendant's private grounds. The place of the intersection of this track with the gutter was neither in the street nor in the crossing or foot path on the side of the street. The track was between the two, and impeded the using of neither in any manner. To all appearances, the street was left just as free for the use of vehicles, and the sidewalk and crossing of the gutter just as free for the use of pedestrians, as before the defendant's culvert was constructed over this gutter. Consequently, there is no causal connection between the two; the structure complained of not being in the street, or sidewalk adjacent to the street. On the contrary, the evidence shows, and the fact is, that there was a good crossing over the gutter, within a few feet of the switch-track crossing; and it was the legal and commonly used footpath for all pedestrians, and the switch track did not lie in the customary path of pedestrians going across Louisiana avenue. Wherefore, this structure could not have been built "in wanton disregard of the equal rights of every inhabitant thereon to the enjoyment of the street," as plaintiff alleges it was.

The case cited by the plaintiff from Hawkins' Pleas of the Crown (page 404) was that of digging a ditch in a highway, making a hedge over it, or of laying logs of timber in it. The case cited from Wood on Nuisances (section 266) is that of an unauthorized excavation in or near a highway. Barnes v. Ward, 19 L. J. C. P. 195. The case cited from Rorer on Railroads (page 546) is that of leaving impassable obstructions or an open culvert in a public road. Judson v. Railroad Co., 29 Conn. 434. The case cited from 5 Dill. 96, and Fed. Cas. No. 9,802 (Morgan v. Bridge Co.), is that of a railroad company making an excavation in a street, and leaving it unguarded, whereby children may be injured. The case from Pierce on Railroads (page 248) is that of a railroad company causing defects or leaving obstructions in a highway. Gillett v. Railroad Corp., 8 Allen, 560. The case stated in Wasmer v. Railroad Co., 80 N. Y. 212, is one of the company failing to place planking or filling on the side of the rails at a crossing. Gray v. Railroad Co., 65 N. Y. 561. The case of City of Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, was that of the city making an excavation in a street, at a place where it knew children living in the vicinity were accustomed to play, and where they had a right to be, at all proper times, without being intruders on the premises. In our opinion, neither of these cases meets the requirements of this case, because of the fact that the structure of the defendant was not built

in the street or sidewalk, and was constructed in a good, substantial manner. There was nothing in the structure, within itself, to tempt children to it, or to induce them to use it. In putting a crossing over the gutter for its use and convenience, the defendant did no more than the citizens residing in the community did for their convenience and utility. There are, doubtless, similar gutters in all parts of the city; and, if every one who puts a bridge or walk over one of them for use or convenience becomes liable for the happening of any accident or injury that may occur to any chance pedestrian who may use it at any time, a strange condition of things would, in all likelihood, take place. But the defendant did not act capriciously. It placed this culvert where it did from sheer necessity of its situation; and, in constructing the switch track as it did, it apparently did the best thing for the community, in not putting same in either the street or sidewalk, and thus avoided trespassing on the rights of any one, or disregarding the equal rights of every inhabitant of the city to the undisturbed enjoyment of the street and banquette, as well as of the crossing. In thus constructing this switch-track crossing, the defendant did not put it "in a place frequented by children of all ages, and used by them as a playground," because their playground was in a square of ground near by. This switch track was not built "in their [the children's] customary path across the street," because the evidence shows, and the proof is, that the customary path of children, as well as of adults, was over the crossing near by,—a covered and safe crossing of the gutter established by the city. Indeed, the proof does not show that the children of the neighborhood, who were accustomed to assemble on the adjacent square for purposes of play, had ever been accustomed to use this switch-track crossing at all. On the contrary, we gather from the evidence that this crossing was rarely used in this way, and the incident under consideration was exceptional. Evidently, this is not such a case as that plaintiff's counsel cite from *Judson v. Railroad Co.*, 29 Conn. 434, as will appear from the following extract from their brief: "A railroad company constructed its road across the main street of a village, about a foot and a half above the level of the street. The street was twelve rods wide, with two traveled paths on each side of the street, and an open common between them. The company was required by its charter to restore any highway intersected, so as not to impair its usefulness. The company put the two traveled tracks in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths, they constructed a culvert under the timbers of the track to let the water accumulating from rains pass through, which was left uncovered. A person walking across

the street upon the railroad track at a time when the culvert was filled with snow, and could not be seen, fell into it, and was injured. Held, that the railroad company was liable for the injury." In their opinion the court ask: "Why should not the defendants place the whole of the highway, as well as part of it, in such a condition that it could be safely and conveniently used by the people? Why leave in it, anywhere, uncovered ditches and culverts, so far rendering it unsafe for foot people to pass along or across it?" As will appear from the facts recited supra this is a very different case. The case of *McCloughry v. Finney*, 37 La. Ann. 27, cited in plaintiff's brief, is one of an accident happening to a small boy passing along the banquette in front of a feed store on Poydras street, in the city of New Orleans, from a sack of corn which fell from the top of a pile of corn that had been placed on the banquette by the defendant. The case of *Railroad Co. v. Stout*, 17 Wall. 657, is one involving the condition and management of its turntable, constituting it a dangerous machine. In *O'Connor v. Railroad Co.*, 44 La. Ann. 339, 10 South. 678, we held, upon the examination and citation of a great many decisions and opinions of text-writers, that the possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers, but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not liable to trespassers for injuries they may receive from defects not amounting to traps in such premises. That was a case of a little child who had resorted, in company with other children, to the yards and premises of the defendant, for purposes of play, and was injured by a coal dump, of peculiar construction, which was left standing on its track. After quoting with approval from a decision of the Massachusetts court (*Coombs v. Cordage Co.*, 102 Mass. 572) to the effect that, "if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for any injury caused thereby to any other person entering the premises by his invitation or procurement, express or implied," we made this inquiry in the *O'Connor* case: "With reference to children of tender years, it may be conceded that they proceeded with due care; but can it be said that the condition of defendant's fence operated as an invitation or procurement, express or implied?" In that case a verdict in favor of plaintiff was reversed. The instant case is easily distinguished from the case of *Westerfield v. Lewis*, 43 La. Ann. 67, 9 South. 52, as in that the negligence of the defendants was fully established; they having left a heavy iron roller, with two mules attached thereto, unattended by a driver, on an open public street; the mules not fastened, and the wheels of the roller unlocked. The peti-

tion in this case alleges that the switch track of the defendant was constructed "under and by virtue of ordinances 4884 and 5822, C. S., and consequently same was authorized." And the petition further recites that, in constructing and maintaining an open culvert in a deep ditch in a street in a populous part of the city,—one dug or excavated by the company in order to obtain earth to make an embankment,—the company was guilty of negligence. But this state of facts is not borne out by the record, as has been already stated. It is our opinion that the negligence of the company is not made out, and the judgment should be reversed. It is therefore ordered and decreed that the verdict of the jury, and the judgment thereon based, be annulled and set aside; and it is further ordered that there be judgment in favor of the defendant, rejecting the plaintiff's demands in both courts.

(46 La. Ann. 645)

HYDE v. TEAL. (No. 11,460.)¹

(Supreme Court of Louisiana. March 12, 1894.)
JURISDICTION ON APPEAL — POLICE JURY — VALIDITY OF ORDINANCE — OBSTRUCTION OF HIGHWAY — INJUNCTION.

On the Motion to Dismiss.

The affidavit of plaintiff in support of his petition for an injunction places the damages at issue in the suit at over \$2,000. The charge that they are fictitious and inflated, to give this court jurisdiction, is not sustained by the facts. Motion to dismiss fails.

On the Merits.

1. The police jury passed an ordinance changing the direction of a public road. To annul this ordinance at the instance of an individual, an interest must be established.

2. A strip of land between the public road and the landing, to which plaintiff hauled his freight for shipment, is the private property of the defendant. Before obtaining the right of passing over this strip of land, plaintiff is without interest, and cannot sustain an action to compel the defendant, acting under an ordinance of the police jury, to remove an obstruction placed on the road, which prevents plaintiff from hauling his freight over defendant's land to the landing on the river.

3. The injunction issued did not restrain. It was suspended pendente lite. The damages claimed are therefore not allowed.

(Syllabus by the Court.)

Appeal from district court, parish of Grant; George Wear, Judge.

Action by James A. Hyde against Charles H. Teal. Judgment for defendant. Plaintiff appeals. Modified.

Robert P. Hunter, for appellant. W. C. Roberts and Henry Bernstein, for appellee.

BREAUX, J. There is a landing place on the Red river, about a mile above the town of Colfax, known as "Buckeye Landing." The old road from that town to that landing, about the distance just stated, runs along

the bank of the river. At Buckeye landing this road leaves the bank of the river, turns at right angles, and runs through a lane a short distance, thence parallel to and along the bank of Boggy bayou. Plaintiff is a merchant, and Buckeye landing is the nearest landing to his store. Since 1887 he receives and ships his freight at this landing by the boats navigating Red river. Two or three others, dealers in lumber, shipped lumber from this point. The plaintiff sought to enjoin the defendant, who is a merchant, to prevent him from fencing this road, and to compel him to remove his fence. He says that the defendant, moved by business rivalry and jealousy, recently built a fence across the public road leading from his store to the landing on the river, thereby stopping him and the public from all use of the road to the landing and the landing itself. The damages alleged, consisting of injury to business, actual loss, and other items, aggregating \$3,750. In his petition for an injunction he prays that the defendant be restrained from interfering with his access to the landing, and that he be ordered to remove the fence, and that the sheriff enforce compliance with the order. The papers were served on the defendant. The sheriff was notified by the district judge not to enforce the writ of injunction. The defendant in his answer denies that he acted arbitrarily, as charged, and that he was actuated by a desire to thwart and annoy plaintiff in his business. In a motion to dissolve, which was referred to be tried with the merits, he sets up that injunction will not issue to restrain an accomplished act, that he cannot by an injunction be ousted of possession, and that plaintiff is without capacity to champion a cause alleged by him to be public. The judgment appealed from rejects plaintiff's demands, dissolves the injunction, and sets aside the order to remove the fence,—the order previously suspended by the judge,—and decrees that defendant's reconventional demand be sustained to the amount of \$150 damages as attorney's fees. From this judgment the plaintiff appeals.

On the trial it was shown that the police jury passed an ordinance to authorize the defendant to move the road back some distance. The change in the road, the defendant contends, was made necessary by the caving banks extending into and carrying away a portion of the road. He also contends that the river at its most extreme flood has never reached Buckeye landing, and that it is therefore not on the bank of the Red river. The record shows that there is a strip of land between the public road and the Buckeye landing, of some 35 or 40 yards, i. e. between the road and the landing at the point the road leaves the direction parallel to the river, and turns at right angles, and runs towards plaintiff's place. It is admitted that the defendant is the owner of the land all the way from where the new

¹ Rehearing refused April 23, 1894.

road referred to in the pleadings commences to the town of Colfax, and that his lands extend from the new road to the river, as shown by a map annexed to the record. The defendant and appellee moves to dismiss the appeal, on the ground that the court is without jurisdiction *ratione materiae*, and urges that the damages claimed are fictitious and inflated.

On Motion to Dismiss for Want of Jurisdiction *Ratione Materiae*.

The allegations for the injunction are supported by the required affidavit. Plaintiff represents in his petition that the fences of which he complains effectively obstruct all transportation to or from the landing at which he received freight, or from which he shipped produce to the market. That these obstructions seriously interfered with his business, and placed him to considerable disadvantage as compared to those who are more favored in this respect. Other causes of his are alleged and supported by his affidavit. Judged by reference to the premises stated and pleaded by the plaintiff, the amount of damages do not appear to have been fixed with the view only of giving this court jurisdiction. There are items of damages claimed which cannot be added in computing the appealable amount. Sufficient of the damages laid, however, remain to save the demand from being considered entirely unfounded. The amount thus remaining, in so far only as relates to jurisdiction, is within the jurisdiction of the court. The premises upon which the plaintiff relies may be error, but arguing in support of the grievances he alleges, and assuming, for the purpose of testing a question of jurisdiction, that the law he invokes bears him out, the court has jurisdiction of the case. In reference to the damages, the defendant claims \$1,900. This does not give this court jurisdiction. It cannot be calculated in determining the question of jurisdiction. But these damages, as claimed, in a measure corroborate plaintiff's jurisdictional allegations. Arising from the same differences between the parties, the amount claimed by the defendant makes it not unreasonable that plaintiff should claim jurisdiction on the ground that his damages exceed \$2,000.

On the Merits.

The gravamen of plaintiff's petition is the right of shipping freight and of receiving freight at Buckeye landing, and of passing over the public road leading to that place. The grounds set forth all converge to the maintenance of that alleged right. Each item of the damages claimed is laid as arising from the obstructions across the public road which prevent access to the landing. The action of the police jury is assailed in so far as that body may have sanctioned the closing of the road. If there were no landing at the place on the river referred to in

the petition, the damages would be groundless, for they all point to the alleged injury suffered by plaintiff in his business, not because of the closing of the public road *per se*, but on account of the impediment to his shipments. He shows no other interest in the public road. Plaintiff does not sustain the right he claims,—that which moved him to bring the suit. It, therefore, cannot be a matter of any concern to him that the police jury authorized a change in the road over defendant's lands. Should the fence be pulled down, the short distance in the public road leading to the river in the direction of Buckeye landing would not be of any service to any one, for the strip of land between the road and the landing is an obstacle, in this case, entirely in the control of the owner, the defendant. If the road ran to the landing, there would then arise an interest that would enable plaintiff to sustain his action. In *Railroad Co. v. McCloskey*, 35 La. Ann. 785, to which our attention is directed by plaintiff's counsel, "the defendants had a *right of way to and from the pavilion* and that for their purposes they need and are entitled to the use of a wagon." (Italics are ours.) The court in that case sustained the claim to a right of way to the pavilion. In another case, under the same headnote as that under which the case in 35 La. Ann. is cited, we are referred to the case of *Barbin v. Police Jury*, 15 La. Ann. 544, in which it was held that "when the action of the police jury made the road a public highway, it became subject to the use, not only of all the citizens of the parish of Avoyelles, but of the whole state." This was a controversy between the police jury and a private individual, who sought to obtain compensation for private road, subsequently established as a public road. The right of the public to use the road was absolute. In the case at bar the plaintiff seeks to have a road reopened, only that he may be enabled to transport his freight to a landing on the river which he cannot reach if his prayer be granted. In *Torres v. Falgoust*, 33 La. Ann. 580, another case cited by plaintiff, the road was a public road, and necessary to the plaintiff, as part of the public, in the carrying on their agricultural operations, and the transportation of their crops to market. There was no question of passing over land not dedicated to public use. We have read all the decisions cited. They do not support the proposition that roads can be ordered reopened so that a particular person may haul his freight over private property to a landing. A road may be established over private property. Though it is of little value, that value must be compensated, and the right secured, in conformity with the provisions of the statutes upon the subject. The owner without a road, to whom his neighbor obstinately refuses a passage over a strip of land, ought not to lose through the caprice or hostility of an unrea-

sonable neighbor. But, to prevent the abuse of a principle so delicate in the laws of property, rules are laid down which should be literally followed in order not to disturb the stability in the right to property. The law gives him a remedy. The rules have not been complied with by plaintiff, and no attempt has been made by him, under the law, to obtain the right of passage over the private property of the defendant. Article 497 of the Revised Civil Code declares "that no one can be deprived of his property, unless for some purpose of public utility, and in consideration of an equitable and previous indemnity and in a manner previously prescribed by law." Granted that the banks of a navigable stream are public property, and that any one may freely land their boats, tie to trees, and deposit their goods on navigable streams, that there is a servitude of way in favor of the public along the banks of navigable streams, for levees and public roads, and that no one may obstruct a public road by building a fence across it without authority, it does not follow that a plaintiff can have annulled the proceedings of a police jury changing the direction of a road in order that he may retain the privilege of reaching a landing place on a public stream over the lands of private individuals. These landings may be reached over public roads running to them, but not by passing over the land of private owners. The road known as the "Old Road," that which was closed under an ordinance of the police jury, did not extend to Buckeye landing, and therefore did not give to the plaintiff the right for which he contends.

In *Dennistoun v. Walton*, 8 Rob. (La.) 214, the court says: "The lot leased extends from the public road to the water's edge. Whatever space there is between the levee and the road is private property, and the owner is entitled to the exclusive use of it. With respect to the part which extends from the levee to the river, the owner may use it provided he does not prevent the use of it by others, as regulated by the article of the Code referred to, and in conformity to the police regulations." This principle is reiterated in *Railroad Co. v. Winthrop*, 5 La. Ann. 36. The record discloses that the banks of the river at this point are above the ordinary state of high water, and that the landing above the bank does not extend to the old road. The space between the road and landing is private property, and not subject to the right claimed. This intervening land is not part of the banks nor a part of the road. Without a servitude of way over this strip, plaintiff has no cause of action. There are no approaches to the landing subject to a right of way.

The Injunction.

The demand of plaintiff has been considered by us without reference to the injunction, to which it was an incident. It was

possible to dismiss the injunction, or suspend its effect, without touching the main demand. The injunction contains two demands,—the principal one, and the conservatory demand. The latter may be dismissed without necessarily carrying with it the dismissal of the former. *Knox v. Coroner*, 13 La. Ann. 88. In the case at bar there was not a dismissal, but an absolute suspension of the order after it had been issued. The injunction did not affect anything. It was null in its effect,—an injunction that did not restrain. In *Beer v. Dirmeyer*, 28 La. Ann. 136, the court granted a rule nisi, and, after hearing depositions on each side, refused to grant the injunction sued for. No rule nisi was issued in the case under consideration, but, immediately after having granted the order of injunction, an order was issued to prevent its enforcement; in effect, operating as if it had been refused in the first instance on a rule nisi. The controlling reason in the cited case applies in the present case. The principal demand remained and was decided. The court refused to grant a suspensive appeal to the plaintiff, and thereby enable him, in so far as related to the injunction, to make it effective pendente lite. It remained suspended as originally ordered. The defendant has no right to the damages allowed to the defendant in reconvention, and in that respect the judgment must be amended. It is therefore ordered, adjudged, and decreed that the judgment herein be amended by rejecting the reconventional demand for \$150, and by striking out that amount allowed to the defendant in the judgment appealed from, and that, as amended, it be affirmed, and that the defendant and appellee pay the costs of appeal.

(46 La. Ann. 1009)

STATE v. WEST. (No. 11,538.)

(Supreme Court of Louisiana. May 7, 1894.)

QUALIFICATION OF JURORS—DISORDERLY HOUSE—PROOF OF COMMON REPUTATION—INSTRUCTIONS.

1. Re-examination of Juror on His *Voir Dire*, not Previously Declared Competent. A juror, having been examined on his *voir dire*, was accepted by the state and by the defendant. The juror, not yet sworn, informed the court of his disqualification, in regard to which he had not been questioned. He was re-examined only as to the disqualification disclosed. It was proved, and the juror was ordered to stand aside. It does not appear that the trial court exceeded the bounds of the discretion with which it is invested, in having ordered this juror to stand aside. Moreover, it is not shown that the defendant exhausted her peremptory challenges. There was therefore no prejudicial error committed, subject to review.

2. Fixed Opinion of a Juror. A juror, having testified on his own *voir dire* that he had reached a conclusion as to the guilt or innocence of the accused, unalterable by any testimony, was excluded from the jury. He had been examined by the district attorney. Counsel for the defendant asked to question the juror, which was refused. It is not shown that the juror had not been sufficiently examined to establish his prejudgment, nor that, in conse-

quence, defendant's peremptory challenges were exhausted.

3. To establish the bawdy character of the house, and its bad reputation, the evidence of the persons frequenting it was admissible.

4. Proof of Reputation, with Other Facts and Circumstances. The bawdy character of the house may be shown by its general reputation, and the bad reputation of the persons frequenting the house, with other evidence leading to that conclusion.

On Rehearing.

The Charge of the Court to the Jury. The trial judge, in his statement in the bill, says that he had instructed the jury on the subject in regard to which special instructions were asked by the defendant. There is no record of the instruction given. The charge is presumed to have been correct, in the absence of any exception, or of a request to instruct the jury in writing. Moreover, common reputation as to the character of the defendant, and of the house which she kept, was admissible. It was left to the jury to determine as to the weight of this and other evidence.

(Syllabus by the Court.)

Appeal from district court, parish of Lafourche; L. P. Caillouet, Judge.

Cora West was convicted of keeping a disorderly house, and appeals. Affirmed.

Clay Knobloch & Son, for appellant. M. J. Cunningham, Atty. Gen., and B. F. Winchester, Dist. Atty., for appellee.

BREAUX, J. The defendant was convicted of keeping a disorderly brothel, and was sentenced to one month's parish prison, and to pay a fine of \$301; in default of paying the fine, to two months additional in the parish jail. From this sentence she appeals. She relies for reversal of the verdict and sentence on a number of bills of exceptions reserved to the ruling of the trial judge.

Examination on Voir Dire of Juror Tendered.

The court's recitals in bill of exceptions No. 1, to the exclusion of the juror, are that the juror had been accepted by the state without having been interrogated as to any opinion about the case. He had been accepted by the defendant, but had not yet been sworn. The unsworn juror at that time informed the court that he had not been asked if he had formed an opinion. The district attorney applied for permission to reopen the examination, to which counsel for the defendant objected, on the ground that it was too late, and urged that the juror should be sworn. The bill of exception does not show that the juror accepted by the state and the defendant had been pronounced competent by the court, and that he had been directed to take the oath. It is the general rule to urge all objections to a juror before he has been sworn. *State v. Diskin*, 34 La. Ann. 920. The re-examination should not be opened, as a general thing, after the juror has been pronounced competent, and had been called to the book to be sworn. But if, prior to pronouncing him competent, the court has good reason not to

be satisfied with his competency, questions may be propounded by the court without thereby committing an error. The court's attention having been called to an oversight, it directed the district attorney to examine the juror upon the point overlooked, and none other. This court must presume that the trial judge properly exercised the discretion with which he is intrusted. *Belt v. People*, 97 Ill. 466; *Hendrick's Case*, 5 Leigh, 709; *Whart. Cr. Law* (7th Ed.) par. 3130.

No Prejudicial Error Proved.

The second, third, and fourth bills of exceptions were taken to the court's rulings, and refusal to permit counsel for the accused to propound questions to a juror on his voir dire. The following is, in substance, the statement of the court, copied in the bills of exceptions: That the juror answered, on his voir dire, that he had formed a fixed and unalterable opinion, which could not be changed by any evidence. He was challenged by the district attorney for cause. The court sustained the challenge, and ordered the juror to stand aside. The request of the counsel for defendant was refused, the court states, for the reason that the juror, on account of the bias shown by him, was incompetent. Counsel for the state and counsel for the accused should have reasonable opportunity to ask the juror such questions as may test his competency. We would feel compelled to remand the case, if the error appeared prejudicial to the accused. The records do not disclose that the accused had exhausted her peremptory challenges. She therefore was not, because of the ruling excluding the juror, compelled to accept an objectionable juror. She had in her control the remedy the peremptory challenge secures. 3 *Whart. Cr. Law* (7th Ed.) par. 3152. Moreover, such error—that is, an error in a ruling rejecting a juror—is not, as a general thing, as prejudicial as an error committed in a ruling selecting a juror. The principle is laid down always, subject to the limitation that prejudicial error in an appealable case is not always subject to review. "Where a cause has been tried by an impartial jury, although the judge, on the application of one of the parties, and against the consent of the other, may have rejected a juror for cause of questionable sufficiency, such objection does not afford a ground of complaint, if justice has been done in the premises." *Thomp. & M. Jur.* § 271.

An Irresponsive Answer.

The sixth bill of exception was taken to the court's ruling permitting the prosecution to ask witness the question: "From the general surroundings and things seen and heard, what kind of a house did he think it was?" The question did not elicit the answer sought. The witness replied negatively. "He did not know whether it [the house] was a

brothel or not," is the answer stated in the bill of exceptions. The purpose of the prosecuting officer in propounding the question was defeated by witness' answer, and there is, in consequence, no issue for decision. The objection is unsupported by the fact, and therefore unfounded.

The Court's Discretion Properly Exercised.

A bill of exception was taken to the ruling of the court permitting the prosecuting officer to ask the sheriff, who was testifying as a witness, to give the names of persons who had spoken to him on the subject at issue. It was legitimate and proper to seek information appertaining to the issues of the case, and obtain the names of those who had spoken to the witness about the house kept—it was charged—by the defendant as a brothel.

Irrelevant Question.

The eighth bill of exception shows the following: That the witness is a lawyer. He testifies that the accused kept a bawdy house. He was asked to name the persons who had spoken to him on the subject, to which he replied that he had spoken about it to the judge, and other officers of the court. The defendant, availing herself of the statement, sought to obtain from the witness an expression of opinion regarding the effect of his own utterances in contributing to the bad reputation charged upon her. The witness declined to answer, on the ground of the unfairness of the question propounded. The trial judge states: "Before objection to answer by the witness, the district attorney suggested that the question was objectionable, but, as the witness was a lawyer, he left it to him to answer or not. Whereupon, the witness appealed to the court, and announced he would not answer the question unless compelled to do so by the court. The court, considering the matter sought to be elicited by the question to be utterly irrelevant, ruled that the witness was not bound to answer." In declining to answer, the witness did not add to or detract from the effect of his testimony. Any answer responsive to the question would have been irrelevant. "We must," says Mr. Wharton in his book on Criminal Evidence (page 472), "again notice the important distinction between questions in chief, whose object is to bring out facts important to the maintenance of public justice, and questions in cross-examination, whose object is merely to harass a witness."

No Apparent Injustice.

Counsel for the defendant also complains of the refusal of the trial judge to grant him time to write the question propounded to the witness, so that there would be no dispute about the nature of the question. The defendant's rights were not prejudiced by the refusal. Had the judge a quo agreed with

defendant's counsel in the statement that the district attorney remained silent until after the witness refused to answer and the court had ruled in the witness' favor, the result would have been the same. A witness may, of his own motion, without the assistance of the district attorney, provoke a ruling of the court protecting him from answering a question not material to the issues involved, and relating to the effect of his own utterances in establishing defendant's reputation.

Bad Reputation, with Other Evidence, Admissible to Establish the Charge.

Bills of exceptions were taken to the court's ruling in admitting testimony to establish the bad reputation of the house of the defendant. It is not shown by the bill of exceptions that the testimony of bad reputation was the only evidence received, and that there was no other testimony admitted to establish the ill fame. Reputation, accompanied with other evidence showing that the house has actually been resorted to for the purpose of prostitution, is admissible, as tending to establish the offense. *State v. Mack*, 41 La. Ann. 1081, 6 South. 808; *Drake v. State* (Neb.) 17 N. W. 117; *Wood, Nula*, p. 40.

The Requested Instruction Properly Refused.

The defendant requested the trial judge to charge that "direct evidence is stronger, and overturns evidence as to general reputation." This is preceded by the statement of defendant's counsel, in the bill of exceptions, that the state examined five witnesses, three of whom testified as to the general reputation of the house, and two of whom testified as to particular facts from personal knowledge that the house was a beer saloon. This statement did not receive the approval of the court a quo, whose recitals in the bill of exceptions are that the evidence of the two witnesses on the point was more in the light of negative than affirmative testimony, and that he had fully charged the jury on the subject-matter, and again told the jury they were the judges of the credibility of witnesses. Credibility is determined by the jury under such instructions as may be given by the court. The defendant was without right to instructions to the jury that would have accentuated the difference between the testimony of two of the witnesses who swore to certain facts, thereby discriminating from the testimony of five other witnesses, who testified as to the ill fame of the house in the community. Moreover, it was not the duty of the court to instruct the jury that evidence of general reputation was subordinate to, and of no importance as compared with, direct evidence. The bill of exceptions does not establish that these witnesses were the only witnesses who testified, and that upon their testimony, exclusively, the case was decided. Principles should be laid down to

guide the jury in weighing testimony, but it is not incumbent upon the court to instruct the jury that testimony of certain witnesses to prove certain facts is of more weight than the testimony offered to prove reputation. The court properly declined to give the instructions tendered.

This completes the review of the proceedings, and we find no ground to set aside the verdict and sentence. Judgment affirmed.

On Rehearing.

(May 25, 1894.)

The defendant, in her application for a rehearing, through her counsel, argues anew the different grounds previously argued. They have been considered and passed upon in our decision. We will, nevertheless, review again two of the points presented. They are:

1. That the trial court erred in not instructing the jury that "direct evidence is stronger, and overturns evidence as to general reputation," as requested. The trial judge, in the bill of exceptions, states that he based his refusal on the fact that he had already previously instructed the jury on the subject-matter. Considering the points presented with reference to the issues as presented by the trial judge, we do not discover that he erred in refusing to give the charge requested. The weight to be given to the statement of facts in the bill of exceptions is well defined in a number of decisions of this court. The trial judge certifies to the facts, and, unless it is shown that they are incorrectly stated, they are considered as correctly narrated. *State v. Broussard*, 39 La. Ann. 671, 2 South. 422.

2. That particular facts constituting the offense must be proved, and "not general reputation," is the other instruction requested. Mr. Wood, in his treatise on the Law of Nuisances, announces the principle or evidence on this point as follows: "Mere reputation is not sufficient, for that is often wholly unreliable, and unworthy of credence; but when accompanied with evidence showing the disolute character of the inmates, and of the persons visiting there, it is admissible as tending to establish the offense." Page 50, § 29. In *Dillon* it is stated that "common reputation as to the character of the defendants, and of the houses which they keep, is admissible." 1 Dill. Mun. Corp. (4th Ed.) p. 452, note 1. In considering this point we did not feel authorized, in the absence of proof, to assume that there was evidence only of bad reputation offered and admitted. That portion of the charge of the trial judge narrated in the bill of exceptions, and the finding of the jury, negative the ground upon which defendant based her application for a new trial on this point. Deficiency of evidence urged by defendant to make out the case (of this we have no proof) offers no ground for reversal on appeal. The case

comes to us as made out on testimony of reputation, accompanied, we must presume, with other evidence establishing guilt. The rehearing is refused.

(46 La. Ann. 1022)

ST. CHARLES ST. R. CO. v. FAIREX. (No. 11,366.)

(Supreme Court of Louisiana. April 9, 1894.)

HOLDER OF JUDICIAL MORTGAGE — LIEN ON OWNER'S INTEREST IN ESTATE—TRANSFER OF INTEREST TO ANOTHER—EFFECT.

1. A person against whose property a judicial mortgage was recorded acquired, as forced heir, an undivided one-third in a succession. In an act of compromise she transferred her undivided one-third interest to the instituted heir, and owner of the remaining two-third interest. The property being immovable, the plaintiff, a judgment creditor, instituted the hypothecary action against the purchaser and third possessor of the undivided one-third. The recorded judgment against the heir affected the mortgageable property thus owned to the amount of the residuum.

2. The property subject to the mortgage, though transferred to the third possessor by the heir, is not free from all claims of the succession if it be shown that it was affected by a mortgage at the time of the transfer, but that the instituted heir bought it as not being subject to any judicial mortgage.

3. It is claimed that the heir, and debtor to the plaintiff, was indebted in a large amount to her late daughter, from whom she inherited. The compromise was made with the third possessor and only coheir upon the basis of the alleged indebtedness of the mother and forced heir, who is plaintiff's debtor. The judicial mortgage creditor is not benefited by the compromise made between the forced heir and the instituted heir, nor should its interest as judicial mortgage creditor be prejudiced thereby.

4. To establish the right of the judicial mortgage creditor, the amounts for which the indebted heir and judicial mortgage debtor is accountable should be deducted from the gross active assets.

5. The residuum accruing to the heir in the immovable property will be affected by the judicial mortgage.

6. Plaintiff can have no better right in the property than his debtor, unless he can show some fraud or collusion by which his rights have been impaired.

7. Quoad the compromise and the transfer of the property, the original judgment claim, if valid, remained on the property, and, during the time, prescription did not affect the judgment.

8. The consideration that entered into the contract of compromise must be proved and the residuum established by proceedings required.

9. To that end the judgment appealed from is annulled, and the case is remanded, to be tried in accordance with the views expressed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by the St. Charles Street-Railroad Company against O. A. Fairex. Judgment for plaintiff, and defendant appeals. Reversed.

Albert Voorhies, for appellant. Harry H. Hall, for appellee.

BREAUX, J. Plaintiff instituted this hypothecary action to enforce the payment of

a judicial mortgage he claims on one undivided third of certain property in the possession of the defendant. Plaintiff's judgments, amounting to \$3,000, were obtained in 1883, and duly recorded in May of that year. In 1881, Mrs. J. B. Schiller, against whom these judgments were obtained, made a partition and partial settlement with her children, to whom she was indebted as tutrix. The acts of partition shows the acquisition of the property on which plaintiff claims a judicial mortgage by Mary E. Schiller, wife of O. A. Faïrex. In 1881, after the partition and partial settlement, Mrs. O. A. Faïrex brought suit against her mother for an account, and, in default of an account, for \$30,000 and interest. Judgment was pronounced in her favor for that amount, being, the judgment recites, the proportion of rents and revenues of the community property held in common by defendant with her husband, John B. Schiller, and due to the plaintiff. In August, 1884, Mrs. Mary E. Schiller bequeathed the undivided two-thirds of her property to O. A. Faïrex,—the disposable portion; and her mother, Mrs. J. B. Schiller, inherited the remaining one-third, as forced heir. The will included two-thirds of the judgment obtained by the testatrix against her mother in 1881. The property, including the judgment, was inventoried in the succession of the testatrix. In 1887, Mrs. J. B. Schiller brought suit to annul the will of her daughter Mrs. O. A. Faïrex, and one of the allegations was that the judgment obtained by her daughter against her was not real, though it existed in fact. In 1888, Mrs. J. B. Schiller consented to a judgment maintaining her daughter's will, and transferred to O. A. Faïrex her undivided one-third interest, as forced heir, in the property on which plaintiff claims a judicial mortgage. Faïrex, the transferee, paid Mrs. J. B. Schiller and her two daughters, Mrs. Henley and Mrs. Rollings, the sum of \$35,000. All three are parties to the act "to compound, compromise, and adjust their differences, upon the terms and in the manner" declared in the act. O. A. Faïrex, as instituted heir of his wife, Mary E. Schiller, in addition canceled and annulled the judgment of \$30,000 obtained by his wife against her mother, Mrs. J. B. Schiller. In the deed it is declared that the judgment is canceled by O. A. Faïrex, "in consideration of said above compromise."

Upon these facts, judgment was rendered in favor of the plaintiff, condemning him to deliver the property or pay the amount. From the judgment the third possessor prosecutes this appeal. Two questions present themselves: (1) Does plaintiff's judgment affect the property of the defendant, or secure a judicial mortgage? (2) Does it precede all claims in rank, and can the property be held, subject to plaintiff's judicial mortgage, without regard to any pre-existing indebtedness of Mrs. J. B. Schiller to the de-

fendant which entered into the act of compromise of 1888 between her and Faïrex?

The Judicial Mortgage.

In answering the first question, our attention is arrested by the leading case of *Voorhies v. De Blanc*, 12 La. Ann. 864, cited by defendant's counsel, in which it was decided that an entire succession, disregarding the elements which enter into its composition, cannot be mortgaged. It is argued in behalf of the defendant that the debtor of plaintiff, Mrs. J. B. Schiller, did not acquire the specific property in which plaintiff claims a mortgage; that the mortgage did not attach, for the reason that no settlement was made, and no partition; that she could not have dominion over the property pending the administration; that the heirs inherited the succession as an entirety to be partitioned. Such being defendant's appreciation of the facts, we are referred by his counsel to several decisions, in line with the decision before mentioned, as applying. It would be going beyond what is called for by the facts in this case to express an opinion regarding the principles announced in the *Voorhies-De Blanc* decision. In the case of *Tureauud v. Gex*, 21 La. Ann. 253, this court said that the mortgage resulting from the recording of a judgment attaches to the heirs' portion of inherited immovable property, and the enforcement of such mortgage is dependent upon the final settlement of the succession. The court adds that some doubt is created by the decision of the majority of the court, but that a careful examination will show that the point was not decided, nor directly presented. From *Smith v. Charles*, 27 La. Ann. 504, we quote: "The recording of a judgment against an heir was held to affect all the mortgageable property thus owned by such heir." We quote from the decision to establish that it has never been held that the heir's portion is not affected by a mortgage against him, the contention being that the enforcement of the mortgage is dependent upon a partition and final settlement of the succession. In the case at bar, the mortgage debtor was in possession of the undivided third of the lots inherited from her daughter, and there was in effect a partition,—a final settlement of the act of compromise,—but it did not remain as intended by the parties. She transferred a third of the property to the coproprietor, the instituted heir. The contention of the purchaser, Faïrex, at the time is that it never passed out of the succession of the testator. This position is not tenable, for he has acknowledged in a notarial act of transfer that Mrs. Schiller was in possession and that she owned the property he acquired from her. The defendant having acknowledged that she had the right to sell, the legal sequence is obvious that the judicial mortgage attached. The power to alienate included the power to mort-

gage. The case is at least one remove from the Voorhies-De Blanc Case, and other decisions in pari materia, in which the issue related to property that had not passed from the succession to each heir in proprio nomine, but remained unsettled, as an entire succession. In the case under consideration, the property has passed to the heir, with the consent of the instituted heir and co-owner, who bought from the debtor, Mrs. J. B. Schiller. The property is, beyond all question, in his possession as owner. Such being the fact, he is without right to have it considered as in the possession of the succession of his late wife, and never to have been in possession of her mother, as owner and heir, from whom he acquired.

As plaintiff's judicial mortgage attached, it devolves upon us to pass upon the second point involved, and suggested by the question relating to the indebtedness of Mrs. Schiller to her daughter, and its effect upon plaintiff's claim. She was, it is contended by defendant, a debtor in a large amount, and, in consequence, not entitled to any portion of the estate. Further, that, after the settlement of the amount due, she would have remained indebted to the succession; that her creditor, the plaintiff, could not acquire any right upon the property before a settlement had been made. In answer to the contention of the defendant, the plaintiff argues that she sold her undivided third interest in the property, to the third possessor, Fairex, and thereby rendered it impossible to make a settlement. The compromise was made between plaintiff's debtor and the third possessor on the basis of an alleged indebtedness of the former to the latter, amounting, they declared, to \$30,000, for revenues and collections and a cash consideration. The judicial mortgage creditor should not thereby gain an advantage, nor should its interest as a mortgage creditor be thereby prejudiced. Plaintiff can have no better right in the property than his debtor, unless he can show some fraud or collusion by which his rights have been impaired. It occurs to us that the incumbrance on the property should be established by reference to the condition existing at the date of the transfer; that the act of compromise and settlement does not extinguish pre-existing rights, to the benefit of the judicial mortgage creditor, unless it contains declaration to that end of such a character that it is absolutely binding forever. If there was an amount due by Mrs. J. B. Schiller, it was an amount for which her interest in the estate of her daughter was accountable. The two claims, that of the succession as a creditor and that of Mrs. Schiller as a forced heir of her daughter, were subject to adjustment and settlement in the process of settlement in the latter's succession. The mortgage of plaintiff could attach only to the residuum of the settlement. The act intended as a compromise effected the settlement of the suc-

cession by a sharing between the parties that Mrs. Schiller, because of her indebtedness to the succession, had no interest in the property, save possibly as to the amount of cash paid to her by the instituted heir, Fairex. If the compromise is not of binding effect, as the claim of third persons, and does not protect the defendant against plaintiff's judicial mortgage, the condition prior to the compromise should be restored. As to that portion of the \$35,000 paid to her as an additional consideration for the compromise, there is an appearance of additional value of Mrs. Schiller's interest in the property inherited by her, over and above her indebtedness. If there was an additional value fixed by defendant, it may be that the mortgage of plaintiff to that extent attached to the property. As the case must be remanded for another trial, we formulate our first impression on this point, that is, regarding the effect of the cash paid as an additional consideration, and leave this particular question open for future determination.

Judgment by Consent.

The plaintiff contends that the judgment of \$30,000 was a consent judgment. We do not think that we are authorized in these proceedings, in which the judgment is not attacked, to pass upon its validity, and decree that it has no binding force. On the face of the papers, it does not appear that it was a consent judgment, and that it was without consideration. It was treated in a different transaction as a judgment having consideration, except in a petition in which the judgment debtor alleged that it was without consideration. The declaration, of itself, does not affect whatever right the judgment creditor had. The rights of both plaintiff and third possessor are reserved, the former to attack and the latter to assert all legal pleas in defense.

Prescription.

The plaintiff, as an additional ground against the judgment of defendant against Mrs. Schiller, pleads the prescription of 10 years. The 10 years had not elapsed at the date of the compromise in 1888. With reference exclusively to prescription *vel non*, we think, the judgment having entered into the compromise entered into to settle the rights of the parties, that it escapes from the effect of the plea, during the suspension that follows the compromise, that, if not settled as intended, it was not subject to the plea. That question, in so far as relates to re-inscription, was passed upon and determined in the case of *Association v. Labranche*, 31 La. Ann. 844. Interpreting article 3409 of the Revised Civil Code, Justice White, for the court, said: "The servitudes and incorporeal rights which the third possessor holds on the property before his possession of it are revived after his relinquishment, or after the sale under execution made upon him."

"Under this unambiguous provision, were Montegut evicted, by the benevolence of the lawmaker would come the restitutio ad integrum. The annulment or rescission of the sale would have the effect of placing the parties in the position they held before the sale, each party being restored to the rights he then had, and abandoning these which had ineffectually been transported to him, and citing Laromblere (volume 2, p. 286) and Solon (volume 1, p. 62) in support. These principles are the outcome of natural justice, and are dictated by the wise motive that courts may not be made the instrument of injustice by lending their aid to enrich one man at the expense of another." Particularly with reference to reinscription, "the court in that case holds we cannot take one provision of the law,—that which dictates reinscription,—and abandon every other. * * * The right being fixed, the reason for inscription ceases. It would indeed be an unequitable system which would allow a creditor whose rights against the proceeds would entitle him to nothing to lie in wait for the unsuspecting owner, and, when the useful time for inscription had passed, take by way of action in nullity that which he could not have claimed by the timely assertion of his rights." It is therefore ordered, adjudged, and decreed that the judgment appealed from be and is hereby annulled, avoided, and reversed. That plaintiff's mortgage, resulting from the recording of the judgment against the forced heir, Mrs. Schiller, attaches to her portion, subject to prior debts. That the amount of the indebtedness of Mrs. J. B. Schiller to the succession of her daughter Mary E. Schiller be ascertained and fixed. That the residuum, if any, be legally established by reference to her indebtedness and by required proceedings. Of the \$35,000 cash, in compromise, of 1888, the amount paid by Falrex to Mrs. J. B. Schiller, and whatever that effect may have on the value of the residuum, is reserved for future decision. That the case be remanded, to be tried in accordance with the views herein expressed. The rights of the parties to amend their pleadings, so as to set forth all their claims and pleas, are reserved. That appellee pay costs of appeal.

On Rehearing.

(May 21, 1894.)

In his application for a rehearing defendant and appellant asks that certain rights be reserved, or, in the alternative, that a rehearing be granted. We cannot conceive that any further reservation should be made, or that a rehearing should be granted. We have decided that plaintiff's recorded judgment against the heir Mrs. J. B. Schiller affected the mortgageable property to the extent of the residuum. We certainly have not prejudged any issue which will be in the way of ascertaining whether or no there is a re-

siduum. Her right and her liabilities as an heir and as a debtor to the daughter's succession must be established. All indebtedness proved and chargeable must be charged. No point passed upon increases or lessens these rights or liabilities. They are absolutely unaffected by our decree. Rehearing refused.

(46 La. Ann. 564)

McCONNELL v. ORY et al. (No. 11,385.)¹
(Supreme Court of Louisiana. April 9, 1894.)

SLANDER OF TITLE—CLAIM OF TITLE BY DEFENDANT—EFFECT—PROMISE TO LOAN MONEY—EFFECT AS ESTOPPEL.

1. In a suit for slander of title, if the defendant sets up title, he changes the character of the action. It becomes a suit to try titles, in which the burden of proof to maintain title is on defendant, as in the petitory action. *Proctor v. Richardson*, 11 La. 187; *Bidwell v. Cavarcoc*, 27 La. Ann. 307; *Dalton v. Wickliffe*, 35 La. Ann. 355; *Packwood v. Dorsey*, 4 La. Ann. 90.

2. The party who promises to lend money required by the applicant for the loan, to redeem his property from a tax sale, will not be permitted after that promise, and the faith it inspires, acted on by the applicant, to redeem from the tax sale, and acquire that property for himself. *Bigelow, Estop.* p. 345.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by James McConnell, Jr., against Benjamin Ory and others. Judgment for defendants, and plaintiff appeals. Reversed.

Frank E. Rainold and Charles F. Claborn, for appellant. E. Evariste Moise and Benjamin Rice Forman, for appellees.

MILLER, J. In this suit plaintiff sues for slander of title, and to annul a tax title to the property involved in the controversy asserted by one of the defendants. The plaintiff claims title by purchase in 1894 from Julia O. Roe, widow of John Green, and she acquired in 1871, the property being described as a portion of ground consisting of five lots numbered 56 to 60, on upper side of State street, in Bloomingdale, the number and measurements of the lots according to the plan of Bloomingdale. Besides this title, the plaintiff alleges, as a ground of recovery, that defendants are estopped from disputing his ownership. The defendant Ory answered, alleging that he had purchased from the state, for account of his codefendant, the property in controversy, the property having been, the answer alleges, forfeited both for state and city taxes, and sold to the city as well as the state for unpaid taxes, the sale from the state relied on by defendants in their answer being by deed dated 16th May, 1892, from the state auditor, for the unpaid taxes of 1881, 1882, and 1883. The other defendant, Dowers, answered, averring the pur-

¹ Rehearing refused May 14, 1894.

chase for his account by the auditor's deed, and asserting in his defense the ownership of the property under that deed. In both answers the estoppel pleaded by plaintiff was denied. After these answers, the defendants excepted on the ground of misjoinder of the demands made in plaintiff's petition, and required plaintiff to elect the cause of action on which he stood. The exception was overruled. Thereafter the defendants pleaded prescription in aid of the tax titles asserted by them, and the forfeitures of the property, prior to plaintiff's purchase, for nonpayment of the taxes, both city and state, assessed against Widow Green, the author of plaintiff's title. The answer of each defendant claimed damages of plaintiff for the matter alleged in the petition as constituting the estoppel urged against defendant. The judgment of the lower court was against the plaintiff, and against defendants on their demands for damages. The case is here only on plaintiff's appeal.

It was unnecessary for plaintiff asserting title from Widow Green to demand the annulling of the tax deed to one of defendants. If plaintiff's title was sustained, the tax title of course failed. The petition substantially presented the issue of plaintiff's ownership, involving the consideration of the tax title. In this view, defendants' exception of misjoinder, even if in time, was properly overruled, and we do not appreciate that any importance is attached to it in this court by the defendants. The action of jactitation does not ordinarily try titles to property. Its object is to quiet possession. It demands of defendant a disclaimer of the slander. If disclaimed, the purpose of the law is attained, and the suit ends. If the slander is admitted, then the defendant is ordered to bring suit to maintain his asserted title, and with that decree the jactitation suit terminates. If, however, the defendant sets up a better title in himself, that issue changes the character of the action. The whole object of the suit being to compel a disclaimer, or that defendant shall sue to establish the ownership he asserts, if defendant in his defense avers title, the court proceeds to determine that issue. It would be idle to order the defendant to institute another suit to establish title, when by his answer he tenders that issue. Nor does it make any difference that the defendant does not pray for judgment recognizing his ownership. It is enough that in the jactitation suit his defense is title. There can, then, be no question that this suit for slander of title has become, by defendants' pleading, a suit to try titles, and although, in our view, not at all important in this controversy, it is equally plain that in the changed character of the action the defendant assumes the burden in respect to proof of the plaintiff in the petitory action. *Proctor v. Richardson*, 11 La. 187; *Bidwell v. Cavaroc*, 27 La. Ann. 307; *Dalton v. Wickliffe*, 35 La. Ann. 355; *Pack-*

wood v. Dorsey, 4 La. Ann. 90. The plaintiff's title is, as stated, derived from Widow Green. The asserted title of the defendant Dowers is based on the tax assessment against her. Plaintiff and defendants claim under a common author. In our view it is unnecessary to consider the questions discussed at the bar in reference to defendants' tax title, as to the sufficiency of the assessment in respect to the description of the property, nor whether notice of the tax sale was given.

The decision of the controversy is, in our opinion, controlled by the estoppel pleaded by plaintiff. The plaintiff's purchase of the five lots in controversy was on the 13th of April, 1892, the price paid was \$400, and, besides, plaintiff assumed all the unpaid taxes. For some of these taxes there had been forfeitures, and a tax sale to the city and a tax sale to the state for the taxes for 1881, 1882, and 1883. Of course, without payment of these taxes and a relinquishment of the tax adjudications to the state and city, the plaintiff's purchase was ineffective. The plaintiff testifies that in this condition, a day or two after his purchase, he applied to the defendant Ory, a part of whose business it is to lend money, for a loan of \$500 to pay these taxes. The plaintiff stated to Ory, substantially, that the money was required to pay the taxes on five lots on State street adjoining Mr. Rickers' house on the Wood side, purchased from Mrs. Green, and the plaintiff adds, in testifying, that he remembered with distinctness the situation of the property was communicated. Ory answered that he would lend the money if the title was good. The plaintiff further testifies he allowed some days to elapse without completing the loan promised, and, of course, without paying the taxes. But, while the plaintiff was thus acting on the reliance that the loan would be forthcoming when he called for it, Ory effected the purchase of the lots from the state for his own account, or rather for his clerk Dowers, in whose name the auditor's deed was made of date 16th May, 1892. We have given careful attention to the issue of fact whether, as testified by plaintiff, the communication stated by him was made to Ory, and that he promised the loan. If this proposition of fact is maintained, we think the legal principle clear that determines the controversy. The plaintiff's testimony is clear and positive. With his mind intent on securing the loan to pay the taxes on which his title depended, it is natural that the communication and Ory's promise should have been impressed on plaintiff's memory. Was there any room for mistake as to the property on which the loan was desired? Mr. Ory testifies he thought the property intended was a part of the 10 lots on State street known as the Bundy lots, claimed by plaintiff under a tax title, and, besides, involved in litigation. Ory knew all about the Bundy

lots, the tax title, and the litigation. He states that he supposed plaintiff might have acquired another besides his tax title. But, if he had supposed the loan was desired on these Bundy lots, it seems natural he would at once have declined the loan, for he testifies he does not loan on tax titles; or, if he had thought plaintiff had acquired another title, it seems singular that, believing, as he testifies, the loan was sought on the Bundy lots, he should not have asked some questions as to the title. Again, he testifies, after the application for the loan on five lots on State street, he asked as to their location. Why the question, if he supposed the five were part of the Bundy lots, with the location of which he was acquainted? There would seem to be nothing in plaintiff's application to borrow on five lots bought on State street, or near Rickers, that would suggest they were part of these Bundy lots, on which, in the then condition known to Ory, no one could expect to borrow, still less anybody who would lend. That Ory could have derived the impression the Bundy lots were to be the subject of the loan is utterly unaccountable, too, if, as the plaintiff testifies, he stated the loan was desired on lots he had purchased a day or two since from Mrs. Green. The examination of Ory's testimony in its entirety conveys the impression his memory of facts and impressions is not accurate. Indeed, at the outset he states he is a busy man, and cannot remember small details. Again, he testifies the only thing of which he is absolutely conscious is that plaintiff did not deliver his title or state the lots he owned, and never mentioned the numbers 56 to 60. He does testify emphatically he had no suspicion that lots 56 to 60 had been bought, and, if he had had that suspicion, he would have stopped all researches that ultimately led him to make the purchase. But he does not controvert in his testimony the plaintiff's statement that the loan was asked for five lots on State street, or that it was communicated that the lots were near or adjoining Rickers, nor that the loan was promised. To our minds the variance, if variance it can be termed, in the testimony of Ory and that of plaintiff is unimportant. The plaintiff adds the circumstance, not stated by Ory, that the name of the author of plaintiff's title (Mrs. Green) was also communicated. On the question of details it is human experience and the rule of law that testimony affirmative in its character prevails over negative testimony. Phil. Ev. 809 et seq.; *Hepburn v. Bank*, 2 La. Ann. 1007. In this view we deem the testimony of plaintiff more reliable. Dowers also testifies, but he does not profess to have heard all that passed, and his testimony does not materially affect the issue. It is our conclusion the communication as detailed by plaintiff was made, and, if not to the full extent he testifies, enough was certainly con-

veyed to Mr. Ory to afford him reasonable cause to know when he paid the taxes and bought, in the name of his clerk, five lots on the upper side of State street, near Rickers, and assessed in the name of Mrs. Green, that he was undertaking to acquire the same property on which he had agreed to loan the plaintiff. Allowance is to be made for Ory's testimony that he had not the least suspicion of the identity of the property. This part of his testimony seems to concede, if he had had the knowledge he disclaims, he would not have made the purchase. He surely knew enough, as we think, to make him pause. If he had paused, all doubt on the point of identity would have been resolved. It often happens that what is said of importance to appreciate and remember leaves no fixed impression. According to his testimony, that was the case with Ory. All that we decide is that plaintiff's communication was of a nature, and in substance and detail sufficient, to convey to Mr. Ory that impression he states he did not derive as to the identity of plaintiff's lots with those Ory bought from the auditor, or at least was enough to suggest the strong probability that, when he bought five State street lots near Rickers for taxes assessed against Mrs. Green, he was buying the same lots on which he agreed to lend the plaintiff. On any question arising on the acts or conduct of a party affecting another's interest, that which the party has reason to know or suspect is equivalent to actual knowledge.

On the faith of the promise of Ory to lend on the five lots plaintiff acted, and had a right to rely. If Ory's purchase is maintained, then, by reason of that reliance, plaintiff loses the property, and the money he paid for it. Ory would be the gainer. Instead of being the lender of the money promised on the mortgage of plaintiff's property, Ory would own that property for the taxes plaintiff had expected to pay with the money Ory had promised plaintiff. The result, so disastrous to plaintiff and advantageous to Ory, would be due entirely to the confidence, utterly disappointed, which plaintiff reposed in Ory's promise. The legal principle readily suggests itself that precludes such a result. It is urged on us that Ory, at the time of plaintiff's application for the loan, was investigating tax sales of property on State street with a view to purchases, and plaintiff's application should not, it is suggested, have the effect of disabling Ory from making these purchases. If he had desired freedom of action in this matter, he should have declined the application. Plaintiff could then have sought the money elsewhere. But surely Ory could not promise the money plaintiff needed to secure his title, and then take steps for his own benefit which, if successful, utterly defeated plaintiff's title. The argument for the defense also lays stress on the delay of plaintiff in calling for the promised loan. Plaintiff was not as prompt as he

might have been. But he, evidently, acting on his reliance that the loan would be forthcoming when called for, did not appreciate the necessity of immediate action. He must have been very prompt to have protected himself, for within a month and a day or two after the promise Ory had taken all necessary steps and secured the tax deed for himself. We do not think Ory's obligation, arising from his promise, is subject to the measure of time suggested to us in this connection. The estoppel arises against the party on whose acts or conduct another has acted or relied in a matter affecting his interest, and he against whom the estoppel is asserted will not be permitted to set up any right or title inconsistent with his acts or conduct, and prejudicial to him who has acted on the faith created by such act or conduct. All the elements of estoppel, we think, are present in this case, forbid the defense of title asserted by defendants, and uphold that of plaintiff. Bigelow, Estop. p. 345 et seq. We think the justice of the case requires plaintiff shall be decreed to be the owner of the property on reimbursing the taxes paid by Ory. It is therefore ordered, adjudged, and decreed that the judgment of the lower court, in so far as it dismisses the plaintiff's suit, be avoided and reversed. The plaintiff is hereby recognized and decreed to be the owner of the five lots of ground on upper side of State street numbered 56 to 60, according to the original plan of Bloomingdale, and acquired by him from Widow Green by act of date the 13th of April, 1892. It is further decreed that defendant Dowers relinquish in favor of plaintiff by authentic act, within 10 days from the filing of the mandate in the lower court, the tax title asserted by him to the property under the auditor's deed of date 16th May, 1892, but the decree is not to be operative unless plaintiff, on the execution and filing in court of the copy of such act of relinquishment, pay to defendants, or deposit in court for them, the amount of all the taxes, city and state, on said property, and the attendant charges of redeeming said property, paid by defendants, with legal interest on the amount so paid by defendants from the date of said payment, the amount of this reimbursement to defendants to be ascertained, if necessary, by proper proceedings in the lower court. And it is further adjudged that defendants pay costs in both courts.

(32 Fla. 655)

CLINCH v. CANOVA et al.

(Supreme Court of Florida. May 29, 1894.)

AGENT—EVIDENCE OF AUTHORITY.

A new trial granted where in an action on the common counts, with a plea of the general issue, the evidence fails to show that the person claimed by the plaintiff to have acted as agent for the defendant was authorized to

bind the latter to pay for goods furnished to parties named in the bill of particulars.

(Syllabus by the Court.)

Appeal from circuit court, Clay county; James M. Baker, Judge.

Action by P. J. Canova & Co. against J. H. M. Clinch. Judgment for plaintiffs, and defendant appeals. Reversed.

A. W. Cockrell & Son, for appellant.

RANEY, C. J. Appellees sued appellant, declaring for goods bargained and sold by the former to the latter, and by the former at the request of the latter, and for money found to be due on account stated. Defendant pleaded the general issue, and there was trial by jury, resulting in a verdict in favor of plaintiffs, and a motion for a new trial having been refused, judgment in the sum of \$151.87 and costs was entered, and appellant appealed.

The amended bill of particulars is as follows:

Mr. J. H. M. Clinch, to P. J. Canova & Co. Dr. 1888.

May 26.	To goods sold to J. P. Moore,	
	per your order.....	\$ 20 00
" "	To goods sold to Brazillo	
	(Italian), per your order...	32 99
" "	Goods sold to Valpato (Ital-	
	ian), per your order.....	22 85
" "	Goods sold to Gealto, per your	
	order	26 43
" "	Goods sold to Graziano (Ital-	
	ian), per your order.....	18 90
" "	Goods sold to Marco, per your	
	order	17 60
" "	Goods sold to Keko, per your	
	order	5 50
" "	Goods sold to Laffaetto, per	
	your order	10 13
		\$153 30

J. S. Wright, a witness for plaintiffs, testified that he was agent for defendant several years, and as such had control of the brickyard and the street railroad owned by him; of the former from some time in 1887 until June, 1888. That his authority was for the purchase of the supplies and material, and general control of the brickyard, and to pay laborers or hands. That he was engaged in brickmaking for the defendant, and that the duty devolved upon him to do whatever was necessary. That he paid nearly all the hands in money, but sometimes paid them with orders on plaintiffs. "The order for \$20, Moore's account," according to his best recollection, was in writing. That he (witness) paid in orders when he had no money.

Plaintiff P. J. Canova testified that the orders from Wright to him for goods for Clinch's men were all verbal; none were in writing. "I have no orders in writing; I have pay rolls,—several of them."

Wright, resuming, testified: That he was not clear about giving the written order in Moore's case,—the item of Moore's debt. That he could not say exactly as to the amount due on account of each man. The aggregate amount is \$153.30. That the ac-

count sued on is just and correct, as shown by the amended bill of particulars. On cross-examination, he said that Clinch was suing him for moneys not accounted for, and that he was suing Clinch.

Plaintiff P. J. Canova then testified: That he was plaintiff. That Wright promised to let him know the amount of these people's accounts. "He would pay me according to his pay roll." That he (witness) kept each person's account separately. J. P. Moore had no account. That witness let Brazillo have \$32.99 worth, and Valpato \$22.35 worth, and that it was still due; and sold to Gealto \$28.43 worth, and it was still due; and sold to Graziano \$18.30 worth, and it is still due; and sold goods to Marco, \$17.60 worth, and to Chico, \$5.50 worth, and to Laffaletto, \$10.30 worth, which amounts were still due. That the account sued on was just and correct, and the whole amount was still due. On cross-examination, he stated that he knew the defendant personally, and had known him a good many years. That defendant did come to him, and have a conversation with him about the account against these men. That witness did not say to him that he (witness) had no account against him. That defendant asked him if Wright was paying off his men at witness' store, and witness replied that to some extent he was. That witness talked to some extent with defendant about the pay rolls, and Wright's action towards him. That witness did tell him that he had no account against him. That witness showed him this account against Wright, as agent for him. This account that witness sued on, witness had been informed by Wright, was correct according to the pay rolls. Here defendant's counsel handed to witness a paper writing headed: "Copy of Acct., from Canova's Books, of Col. J. S. Wright." This account runs from September 29, 1887, to June 23, 1888, amounts to \$511.35, and shows balance of \$158.18 due on it. It is indorsed or certified as follows:

"Green Cove Springs, Fla., July 20, 1888.

"I certify this is a correct copy of the account of Col. Wright as per our books to date.

P. J. Canova & Co., per B.

"Having checked up the account with Mr. Brown, I certify this is a correct copy of the account. D. Page."

Referring to the account, witness said that these accounts were the same as the account sued on, and, except Moore's, were charged upon witness' books. That his books charged these men with these accounts. That the account was drawn correctly from witness' books. Brown was his clerk. The statement of account certified to by P. J. Canova & Co., through Brown, was, in the main, correct. That witness discovered one error in it which he could explain. That he acknowledged to Col. Wright that a balance was in his favor. Thinks balance was \$2.10. With this explanation, the statement was correct.

Defendant testified that he had a conversation with Canova during the latter part of May, 1888. Had heard that Wright was paying off his men at Canova's store, and asked Canova about it, and Canova said it was true; and further said that he paid according to the pay rolls. That defendant asked him for the pay rolls, and he showed them to him; and he told defendant he had no account against him. He had one against Wright, and showed it to witness. Defendant told Canova he must have no account against him. Defendant spoke of the pay rolls several times during this conversation. That, after defendant discharged Wright, the former went to Canova again to get the pay rolls, and Canova told him Wright had taken them away; and, a day or two after, defendant asked Canova again for the pay rolls, and he said Wright had destroyed them; and defendant said to Canova that he regretted it very much, as these pay rolls were very important to both of them. That, some time after this, defendant wrote to Mr. D. Page to get certain evidence from P. J. Canova & Co., and he got the foregoing statement of account. Defendant had before seen the account in Canova's books, and wanted to see it verified by some other person than himself. Witness asked Canova during their conversations if he had any account against witness, and he said he had none. That Canova showed him his book, and it contained no account against witness, but did contain one against Wright, as shown by the statement in evidence.

D. Page, witness for defendant, testified: That he knew the parties to the suit, and that he saw Canova's account book July 20, 1888. That the above statement of account was in witness' handwriting. That he got the items from Canova's journal or ledger. That this is an exact copy of the account, and that he copied it from Canova's books. That Wright's name did not appear as agent, but the account was against Wright himself individually. On cross-examination, he said that he saw a book in Canova's store, and saw some items charged to Wright. It was a journal or ledger. Re-examined: A pay roll of May 26, 1888, was handed to him, and he said: "This order and pay roll is signed by J. S. Wright." That he was familiar with Wright's handwriting. Pay roll and order filed in evidence. It is headed, "J. S. Wright." There are names of persons and an amount opposite each. These amounts aggregate \$99.42, and below this is, "Cash, \$10," and then below this, "Check, \$109.42," and then below this, "\$112.50." This pay roll is indorsed: "Chg. pay roll to me. Or. me \$112.50. 26 May." The names Marco and Keko appear among the names of persons. Defendant then put in evidence 11 checks, drawn, some in January, February, March, April, May, and June, 1888, and December, 1887, by defendant on a bank in Savannah, Ga., in favor of J. S. Wright, and indorsed

by Wright to P. J. Canova & Co., and by P. J. Canova & Co., the witness proving the signature of the named parties.

P. J. Canova, being recalled, testified that these checks had all been accounted for, and that none of them were covered by the account sued on; and that when Page came to his store in July, 1888, to examine the account sued on, witness' book showed the account to be against Wright as agent. The word "agent" has not been added since the account was made on the books.

In our opinion, the verdict is contrary to the evidence. The evidence does not show that Wright was authorized by Clinch to bind him to pay Canova & Co. for goods furnished the parties named in the bill of particulars. *Pencil Co. v. Wolfe*, 80 Fla. 360, 11 South. 488. These parties are not shown to have worked at Clinch's brickyard, or to have been in his employ. Without further discussion of the testimony, or noticing other features of the case, we will reverse the judgment, and remand the cause for a new trial. It will be so ordered.

(102 Ala. 648)

NICROSI v. IRVINE.

(Supreme Court of Alabama. May 1, 1894.)

GARNISHMENT—STOCKHOLDERS — FICTITIOUS PAYMENT OF STOCK SUBSCRIPTIONS.

Stockholders of a corporation, who have paid for their stock in property at an agreed fictitious value, are not liable to garnishment by a judgment creditor of the corporation for the difference between the face value of the stock and the value of the property payment.

Appeal from circuit court, Montgomery county; John R. Tyson, Judge.

Garnishment by John B. Nicrosi against W. M. Irvine on a judgment against the Calera Land Company. From a judgment for the garnishee, plaintiff appeals. Affirmed.

Thos. H. Watts, for appellant. Brickell, Semple & Gunter, for appellee.

MCLELLAN, J. Nicrosi, having a judgment against the Calera Land Company, sued out process of garnishment against W. M. Irvine, alleging that said Irvine was indebted to the defendant in judgment. To put the case in the light most favorable to the plaintiff, the answer of the garnishee disclosed the following facts: Irvine and others, on August 1, 1885, entered into a contract among themselves to jointly buy certain lands, with a view to the organization of a land corporation for the purpose of establishing and building a town on said lands through the sale of lots therein by the corporation to third persons, etc. It was agreed between Irvine and his said associates that each of them should subscribe for the stock of said corporation, to the extent of five times the amount each had contributed towards the purchase of the land, and should

pay in full for such stock by a conveyance of the land to the proposed corporation at a price five times the amount paid for it by them. This agreement was in all respects executed and carried out. The land was purchased. The corporation was organized. Each of the purchasers of the land subscribed for shares in the capital stock equal, at their face or par value, to five times the sum contributed by each to the purchase of the land, and each and all of these subscriptions were, nominally, fully paid by a conveyance of the land to the corporation at a valuation equaling the face value of the stock, and five times greater than the price paid for the land; and each of said parties had issued to him, and received, the shares thus subscribed for, fully paid, in the manner stated, according to the terms of said agreement, and also fully paid as between the subscribers and the corporation, so far as they and the corporation were capable of effecting such a result. Irvine contributed \$500 to the purchase of the land. He accordingly subscribed for 25 shares of the capital stock, of the par value of \$100 per share, or \$2,500. He, with the others associated with him, paid his subscription by uniting with them in the conveyance of the land to the corporation. He has never paid, nor been called on by the corporation to pay, anything further for this stock. The land, at the time of the subscription to and issuance of these shares of stock, was worth only the price paid for it by Irvine and associates. That was its value when it was conveyed to the corporation, and, it may be conceded, has been its value ever since that time. So that, in point of fact, Irvine paid only \$500, or property worth only \$500, for \$2,500 in the capital stock of the corporation. The corporation thus formed, and whose stock Irvine thus subscribed for and received, in the sum of \$2,500, in consideration or on payment of \$500, only, was the Calera Land Company, the defendant in the judgment upon which this garnishment is pending. On the theory that these facts showed that Irvine, the garnishee, was indebted to the defendant corporation, for unpaid subscription to its capital, in a sum equal to the difference between the money paid, or the value of the property delivered by him on his subscription, and the amount of the stock subscribed by, issued to, and received by him, and upon the further theory that this was a demand of the defendant against the garnishee which could be subjected in this proceeding, the plaintiff moved for judgment against the garnishee on his answer. The court denied the motion, declined to enter judgment, and discharged the garnishee. The present appeal presents this action of the trial court for review.

It is thoroughly well established law that in the absence of fraud on the part of the debtor, or fraudulent collusion between him and the garnishee, only such money demands can be subjected by process of garnishment

to the satisfaction of the plaintiff's judgment as the defendant in judgment could, in his own name and right, recover in an action of debt or indebitatus assumpsit. 1 Brick. Dig. p. 175, §§ 313, 314; 3 Brick. Dig. pp. 524, 525, §§ 6, 7, 8, 9; Bank v. Miller, 77 Ala. 168; Teague v. Le Grand, 85 Ala. 493, 5 South. 287; Archer v. Bank, 88 Ala. 249, 7 South. 53; Craft v. Summersell, 93 Ala. 430, 9 South. 593. The only exception to this rule is that referred to above as resting on the fraud and collusion of the defendant and garnishee. Fraud, within the meaning of this exception, is that conduct on the part of a judgment debtor which is actuated by an intent, actual or constructive, to hinder, delay, and defraud creditors, and whereby he disables himself to sue his debtor, though the debt is not in fact satisfied. A familiar illustration is shown in an assignment by the debtor of a chose in action for his own benefit to a third person, with a covinous purpose. In such case the judgment debtor could not maintain an action of debt or indebitatus assumpsit against the garnishee, for he has estopped himself by the assignment; yet the chose being fraudulently held by the assignee for his benefit, and the debt being in reality due to him, though he cannot recover it in his own name, his creditor may subject it by garnishment to the payment of a judgment against him. Price v. Masterson, 85 Ala. 483; Alexander v. Pollock & Co., 72 Ala. 137. This exception to the general rule has no place in the case at bar, for there is no ground for the insistence that the corporation failed in the first instance to secure a right of action against Irvine through any covinous purpose with respect to creditors, or any other character of fraud; and it is clear that if the defendant corporation ever had a right of recovery in debt or indebitatus assumpsit against Irvine in respect of the difference between the face value of the stock subscribed by and issued to him and the value of the property he conveyed in consideration thereof, it has that right of action now, and its demand thus enforceable may in this proceeding be subjected to plaintiff's judgment. So that the sole question is whether, on the facts we have conceded to exist, Irvine could be coerced, by an action ex contractu, at law, in the name of the Calera Land Company and in its right, to pay to said company said difference in values amounting to \$2,000. We think not. With full knowledge by all parties of all the facts, the corporation agreed to issue and deliver 25 shares of its capital stock, of the nominal value of \$2,500. Irvine agreed to take, and did take, said 25 shares. The company agreed to receive, as full payment for these shares, a conveyance by Irvine of specific property. Irvine agreed to convey said property, and nothing else, nor to pay aught else, in full payment. He did convey it. The corporation received it. Each party yielded and received all, and

precisely what, each had agreed to yield and receive. Every obligation imported by the contract, as between the contracting parties themselves, has been discharged. The contract, as between them, has been fully executed and performed. If it is to be treated as valid at law, the corporation could no more insist upon additional payment by Irvine than Irvine could compel the issuance and delivery to him of additional shares of its stock. If, by reason of constitutional and statutory provisions, the contract is to be considered as void at law, the case would stand upon the naked fact that the parties, not constrained thereto by any binding obligation, had exchanged certain property (shares of stock) on the one hand, and land on the other; and while the stock might be void, in the hands of Irvine, and his conveyance voidable, for the want of a consideration, it is not possible to conceive that he would yet be under a legal contractual obligation to deliver other property, or pay money which was not even contemplated by the void contract,—the only contract ever attempted or intended to be made between the parties. The capital of a corporation is regarded as a trust fund for its creditors; and upon the theory that the difference between the face value of shares in such capital and the value of property which has been conveyed to the corporation for such shares at an overvaluation belongs to, and constitutes in part, such trust fund, a court of chancery will, at the instance of creditors, conserve the integrity of the fund by decreeing the payment of such difference by the subscriber. Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 South. 129. But this right in the creditors is purely an equitable one, and not enforceable at all at law, and enforceable in equity on the independent standing of creditors in relation to the capital stock, and not through any supposed legal or equitable right the corporation itself has to demand payment of such difference for its own benefit in any form, for it has no such right.

There are some intimations and expressions in two or three cases decided by this court which are not in harmony with the foregoing views and our conclusion that garnishment is not plaintiff's remedy in this case, because the judgment debtor could not have maintained debt or indebitatus assumpsit against the garnishee. Thus, in the case of Parsons v. Joseph, 92 Ala. 403, 407, 8 South. 788, it is said: "It may be that stockholders who, knowingly and intentionally, have subscribed and paid for stock with property upon a fictitious valuation, are liable, as stockholders who have not paid up in full for their stock, within the meaning of the statute, to creditors who have not precluded themselves from maintaining the suit." And in Joseph v. Davis, 10 South. 830, it is said: "This court * * * has recently decided that a subscription for stock, payable in

property at a fictitious valuation, and which could not be enforced against the subscriber by the corporation in its own interest, because violative of article 14, § 6, of the constitution, and section 1662 of the Code, is not void as against a creditor of the corporation. *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 9 South. 129; *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788." These expressions, in the first place, were dicta, in each of the cases in which they were employed. Moreover, in the *Parsons Case*, the expression was not affirmative at all, but a mere suggestion or quare; and, in the *Joseph-Davis Case*, it was only intended, by the language we have quoted, to show that such subscriptions to stock were not void, and not that they imported a legal liability, enforceable, in respect of the overvaluation of property, at the suit of the corporation against the subscriber. And this is demonstrated by the fact that the court cited the *Elyton Land Co. Case* as fully sustaining the proposition intended to be announced, and that case goes only in support of the doctrine that creditors of the corporation, on the theory that the subscribed capital is a trust fund, may proceed in equity against stockholders who have attempted payment of their subscriptions in property at a fictitious valuation. The trial court properly discharged the garnishee, and its judgment is affirmed.

(102 Ala. 620)

BROCKWAY v. GADSDEN MINERAL LAND CO.

(Supreme Court of Alabama. April 12, 1894.)

NOTE PAYABLE TO CORPORATION — CALL BY DIRECTORS—VALIDITY—DEMAND—EVIDENCE.

1. Where the shareholders of a corporation executed their notes, payable to the company, "subject to the call of the board of directors," a call for the money due on the notes of those shareholders only who had sold their stock is void.

2. Where a note is payable to a corporation at a particular place on demand, subject to call, a cause of action does not accrue thereon until demand has been made.

3. In an action on a note given by a shareholder of a corporation to the company, payable on demand, and subject to call, the proceedings of a meeting of its board of directors, held outside of the state, in which the president was instructed to collect money due on notes from parties who had sold their stock, are inadmissible, when there is no evidence that defendant had sold his stock, and a compliance with Laws 1888-89, p. 76, regulating the holding of such meetings outside of the state, has not been shown.

4. Where a note is payable to a corporation on demand, subject to call, a cause of action does not accrue thereon until the call has been made.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by the Gadsden Mineral Land Company against W. G. Brockway. From a judgment for defendant, plaintiff appeals. Reversed.

On the trial of the cause, as is shown by the bill of exceptions, the plaintiff introduced in evidence the note sued on, a copy of which is found in the opinion. The plaintiff introduced in evidence a copy of the minute entry of a meeting of the stockholders of the Gadsden Mineral Land Company, at which meeting there was a resolution passed instructing the president, "to call the money due on notes of members who had sold their stock." The defendant objected to the introduction of this minute entry of the proceedings of the stockholders, on the ground that it was illegal and irrelevant. The court overruled the objection, and the defendant excepted. The plaintiff also introduced in evidence a copy of the minute entry on the books of said company of a meeting of the board of directors of the Gadsden Mineral Land Company, held at Chattanooga, Tenn., April 5, 1889. At this meeting "the president was instructed to call money due on notes from parties sold out." The defendant objected to the introduction of the copy of these proceedings in evidence, on the grounds: First, that it was illegal and irrelevant; second, the directors could not hold a meeting outside of the state; third, it was not shown that the prerequisites for a valid meeting outside of the state were observed; and fourth, because the meeting was illegal. The plaintiffs also introduced in evidence a copy of the minute entry on the books of said company of a meeting of the directors of the Gadsden Mineral Land Company, held November 9, 1887, at which meeting the president was instructed to call for the payment of \$50 from each of the stockholders' notes. The defendant objected to the introduction of these proceedings of the stockholders at said meeting in evidence, and duly excepted to the court's overruling his objection. The cause was tried by the court without the intervention of a jury.

Dortch & Martin, for appellant. Jas. L. Tanner, for appellee.

HARALSON, J. The record in this case is very imperfectly made up. No errors are assigned on the rulings on the pleadings, and the course the trial took indicates that it was on the general issue, and the want of consideration. It was by and before the presiding judge without a jury. It was admitted that the plaintiff company was incorporated, and no objection was made to the introduction of the note sued on. The note reads as follows: "Gadsden, Ala., June 6, 1887. On demand, I promise to pay to the order of the Gadsden Mineral Land Company, subject to a call by the board of directors, five hundred and fifty dollars, at their office at Gadsden, Ala., value received," which note was signed by the defendant, and on which there was an indorsement of the payment of \$50, as of January 18, 1888. The complaint, after describing the note properly,

contains the averment, that "after a call made by the board of directors of plaintiff's corporation, plaintiff then demanded at plaintiff's office in Gadsden, Ala., payment of said note, which was refused, and which amount the defendant still refuses to pay." The rule generally is, that a note payable on demand is due forthwith, and no demand is necessary before bringing suit on it against the maker. *Owen v. Henderson*, 7 Ala. 641; *Bank v. McDonnell*, 83 Ala. 595, 4 South. 346; *Massie v. Byrd*, 87 Ala. 681, 6 South. 145; 5 Am. & Eng. Enc. Law, §528z. And when money is to be paid, on the happening of a contingency or uncertain event, no cause of action accrues, until the contingency happens, or the event takes place; as when the terms of subscription to the capital stock of a corporation bind the stockholders, as in this case, to pay on demand, at a particular place, subject to a call by the board of directors, a cause of action does not accrue, until a call is made by the company. *Glenn v. Semple*, 80 Ala. 162; *Massie v. Byrd*, supra; 2 Pars. Notes & B. 639-644. Where a note is made payable at a particular place, it is unnecessary, in order to fix the liability of the maker, to present it at the place of payment, and in a suit on the note to aver such presentation. *Sims v. Bank*, 73 Ala. 248; *Connerly v. Insurance Co.*, 66 Ala. 433; *Clark v. Moses*, 50 Ala. 326; *Montgomery v. Elliott*, 6 Ala. 701. The complaint in this case, however, alleges that the call was made by the board of directors of the plaintiff corporation, and demand for payment was then made at plaintiff's office in Gadsden. It was incumbent on the plaintiff, therefore, before he was entitled to recover, to prove both the call and the demand of payment as alleged. 2 Am. & Eng. Enc. Law, 399; *Wright v. Paine*, 62 Ala. 340; *Conn v. Gano*, 1 Ohio, 483. It also seems to be settled on good principle, that a call cannot be made upon a part only of the subscribers to the stock of a corporation, and that it must be made on all alike, or it will be void. But if some have contributed more than others, it would be the right and duty of the directors to make calls upon other shareholders, in such amounts as to equalize the contributions of all. *Cook, Stock & S.* § 114; 1 Mor. Priv. Corp. § 154. The facts of this case disclose that the shareholders, in order to pay certain liabilities against the corporation, were required to execute their notes payable to the company on demand, subject to the call of the board of directors; that the directors afterwards instructed the president of the company, to call for payment of the notes of such stockholders as had sold their stock. So far as appears, there was no call ever made on all the stockholders who had given notes, to pay them; nor that any demand had ever been made on defendant, before this suit was brought, to pay his note, nor, even, that he had ever sold his stock. The call was void to begin with, but if not, the demand to pay

was never made on him. The proof fails to sustain the averments of the complaint.

The first and fifth assignments of error question the correctness of the finding and judgment of the trial court, and are well taken.

The second is based on the alleged erroneous ruling of the court on the admission in evidence, against defendant's objection, of the proceedings of a meeting of the stockholders of the company held in Gadsden, which contain a resolution by which the president was "instructed to call the money due on notes of parties who had sold their stock." The objection to this evidence should have been sustained. A call which did not include all the subscribers, was illegal, and, besides, as has been stated, there was no evidence that defendant had sold his stock.

The proceedings of the meeting of November 9, 1887, were introduced against the objection of defendant, which is assigned as error. This evidence seems to be entirely irrelevant, though we are unable to discover that it did any damage. All that was done at the meeting, so far as appears, was to elect a board of directors and to pass a resolution instructing the president "to call for a payment of \$50 on each of the stockholders' notes held by the company for the purpose of paying taxes" and other liabilities, which sum, so far as defendant is concerned, seems to have been paid and credited on the note, as appears from the note and the complaint.

The other and last assignment of error relates to the introduction in evidence of the proceedings of a meeting of the board of directors held in Chattanooga, Tenn., on the 5th of April, 1889, at which meeting the "president was instructed to collect money due on notes from parties sold out." The evidence was inadmissible for the reason that the call, even if made at a meeting of the directors lawfully held, was on a part, and not on all the stockholders alike, to pay their notes; and there was, again, no evidence that defendant had sold his stock, and the meeting was held outside of the state of Alabama. Such a meeting could be lawful, only, when the act of incorporation authorized it, or, afterwards, by a vote of the directors or stockholders it was so directed, when in their opinion it was deemed to their interest to do so; provided, that all the stockholders who were residents of the state of Alabama, consented thereto in writing, and provided further, that the corporation kept an office, agent and place of business within this state, and within 30 days after any meeting of stockholders or directors, it deposited with such agent a certified copy of the proceedings at any such meeting, which certified copy shall, as it is provided, be received in evidence in all courts in this state in lieu of the original, and shall, at all times, be subject to inspection by any person lawfully entitled to demand inspection thereof. Acts 1888-89, p. 76. The requirements of

this act, to legalize that meeting, and to make its proceedings admissible in evidence in a court of this state, were not shown, and the evidence should have been excluded. On the evidence, the court erred in rendering judgment for plaintiff. It should have been for the defendant. To prevent any possible injury we remand the cause. Reversed and remanded.

(102 Ala. 189)

DRYMAN v. STATE.

(Supreme Court of Alabama. April 11, 1894.)

ASSAULT WITH INTENT TO RAPE—INSTRUCTIONS—CHARACTER.

1. On trial for an assault with intent to ravish, an instruction, asked by defendant, that a man may embrace a woman if, from her appearance, he honestly believes that she will not object, is improper.

2. An instruction, asked by defendant, that when he took the stand in his own behalf the state might assail his character, is improper.

3. An instruction, asked by defendant, that the fact, if it be a fact, that he created trouble in the prosecutrix's family, should not prejudice him, is improper.

4. An instruction that embracing a woman against her will is not an assault if she indicates that it is agreeable to her is improper.

5. An instruction that it is not for the jury to say whether defendant did wrong or not; that they are only to consider the wrong charged in the indictment,—is improper.

6. An instruction, asked by defendant, that the jury may consider the character of the prosecutrix for chastity, if bad, to generate a doubt of his guilt, is improper.

7. An instruction that defendant's character is assumed to be good until clearly shown to be otherwise is improper.

8. An instruction for the state that defendant's interest in the result of the verdict may be considered as affecting his testimony is proper.

Appeal from circuit court, Jackson county; John B. Tally, Judge.

Jasper Dryman in this case was indicted and tried for an assault with intent to forcibly ravish Martha E. Glasscock, and was convicted of a simple assault, and fined \$25. Affirmed.

The testimony for the state tended to show that on the day the prosecutrix was said to have been assaulted defendant was passing by her house, and, after talking to a little boy at her front gate, he asked for some water; that she was sitting on the front porch, and told him to come and get the water; that after he drank the water he walked along the porch to where she was sitting, and walked into the room, at the door of which she was sitting, and asked her to come in the room to him; that the prosecutrix refused, and continued knitting; that after a while she wanted some thread, which was just inside of the door, and as she went to get it the defendant grabbed her with both hands, whereupon she told the defendant "to turn her loose quick;" that about that time some men passed by in a wagon, and defendant released her; that as he went off the defendant made some threats against her, and seemed to be very mad; that the

prosecutrix did not scream out, but that as soon as she could lock up her house after defendant left she went to where her nephew was working, a short way off, and told him of what had happened. The testimony for the defendant was in conflict with that for the state, and tended to show that the prosecutrix was a woman unchaste, and her reputation for virtue was bad. The defendant, in his own behalf, testified that he had had his arms about the prosecutrix several times; that she had embraced and kissed him several different times, and had told him of several men with whom she had been intimate; that on the occasion referred to he did not undertake to ravish the prosecutrix, but that, when passing her house, she asked him to come in, and when he went in she threw her arms around his neck, and kissed him, and stood talking to him in a very improper position; and that when he left he said to her that he was going to tell her husband what a good time they had had together; and that the next thing he knew about it was that he was arrested for an assault with intent to ravish her. Upon the introduction of all the evidence the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "A man may embrace a woman without her consent, and still not be guilty of an assault. He is not bound to say, 'Madam, I want to hug you,' and have her say to him, 'I agree or consent, sir, that you may hug me.' This sort of formality is not required. If her conduct at the time is such as to create the reasonable belief in the mind of the man that she is willing to submit to his embrace, then he has the right to act on such appearances; and if he does so under the honest belief that he is doing nothing objectionable to her, he thereby commits no assault." (2) "When Jasper Dryman went up on the witness stand and testified as a witness in his own behalf, this made it legal and permissible for the state to assail his character by calling on his neighbors, and asking them on the witness stand to testify as to his character." (3) "The defendant is charged with an assault with intent to rape, and this offense either was or was not committed. If it was not, then the fact, if it be a fact, that the defendant did create trouble in the family of Glasscock, and have improper conduct with Glasscock's wife, cannot be looked to to prejudice defendant." (4) "If a man puts his hands on a woman in lustful desire, against her will, still this is no assault if she had indicated by her words or conduct that such embrace was agreeable to her, or her conduct was such as to induce a reasonable man to believe that she was consenting, and was so understood by him,—then this would not be an assault." (5) "It is not for the jury to say whether the defendant did wrong or not; the only wrong they are concerned about is the one charged in the indictment." (6) "It is competent for

the defendant to prove the character of Mrs. Glasscock; and if she appears from the evidence to be under a character bad for chastity, this is competent for the jury to look to, to generate a doubt of his guilt, if they so regard it." (7) "The law does not impute to Jasper Dryman a bad character. It assumes his character to be good until the evidence clearly shows it to be otherwise." At the request of the state the court gave the following charge, and to the giving of this charge the defendant duly excepted: "Although the defendant is himself a competent witness, yet, in the consideration of his testimony, you would be authorized to consider the interest he has in the result of your verdict."

J. E. Brown, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. The only exceptions reserved arise upon the rulings of the court on the charges refused and given. The defendant requested seven charges, each of which was refused. We consider them separately.

No. 1 is argumentative, and was properly refused on that account. It was further faulty in the postulate that a man charged as defendant was had the right, under the circumstances hypothesized, to embrace the woman. If, under any circumstances, he might be justified in so doing, we can scarcely hold he has any rights in the premises.

No. 2 was an improper request. While it is true the credibility of a defendant testifying in his own behalf may be impeached in the same manner as that of any other witness, it is not incumbent on the state to impeach him, or else be put in the attitude, as the charge implies, of tacitly admitting that the jury should give full credence to his testimony, although it may be in conflict with other evidence in the cause.

No. 3 is argumentative. It singles out and lays stress on a particular phase of the evidence, and also ignores the lesser degree of the crime included in the indictment.

No. 4 is contradictory and confusing. It is a striking solecism to say, if a woman, by her words and conduct, indicates to a man that his embraces will be agreeable to her, and he responds to the invitation, that such an embrace can be against her will.

No. 5 is also contradictory, and calculated to confuse. While the wrong the jury was concerned about was the one charged in the indictment, it was true that it was for them to say, at least, whether defendant did wrong or not,—a proposition the charge denies.

No. 6 is subject to the vice of singling out the evidence tending to show the want of chastity in the prosecutrix, disconnected with the other evidence in the case, as being sufficient to generate a doubt of the guilt of the defendant. *Pate v. State*, 94 Ala. 14, 10 South. 665; *Johnson v. State*, 94 Ala. 35, 10 South. 667.

No. 7 is as erroneous as can be. The law makes no presumptions as to reputation. In the absence of all proof on the subject, character is not to be taken as either good or bad, and the jury are not authorized to assume that it is the one or the other, and allow the assumption to incline them to a conviction or an acquittal. *Danner v. State*, 54 Ala. 127; *Little v. State*, 58 Ala. 265.

There was no reversible error in charge 1 given at the instance of the state. We find no error in the record, and the judgment of the court below is affirmed. Affirmed.

(102 Ala. 695)

EPPELSON v. RICE, Judge.

(Supreme Court of Alabama. April 12, 1894.)

SPECIAL JUDGE—APPOINTMENT—PROHIBITION.

1. Code, § 802, provides that the register in chancery shall appoint a special judge in cases where the probate judge is disqualified by relationship; or, if the register is disqualified, the circuit court shall make the appointment. A probate judge, disqualified to try an election contest, and supposing the register was also incompetent, certified his incompetency to the circuit court, who appointed a special judge, and afterwards again certified his incompetency to the register, who appointed the same person. *Held*, that all the acts of the special judge are presumed to have been done under his legal appointment.

2. The regularity of such proceedings cannot be raised on petition for writ of prohibition.

Appeal from city court of Decatur; W. H. Simpson, Judge.

Application by Joseph D. Epperson for writ of prohibition addressed to Green P. Rice, special judge. From a judgment refusing the application, petitioner appeals. Affirmed.

Joseph D. Epperson filed a petition, addressed to the city court of Decatur, praying for a writ of prohibition, or other appropriate process, addressed to Green P. Rice, presiding as special judge of probate in the matter of a contested election for the office of treasurer of Morgan county, and commanding the said Rice to refrain from further assuming jurisdiction of said contest, restraining him from taking any steps in the said case, and from making any order or rendering judgment therein. The judge of the city court refused the prayer of the petition, and dismissed the same. Petitioner appeals. Affirmed.

Wert & Speake and E. W. Godbey, for appellant. J. B. Moore and Roueboc & Nathan, for appellee.

HEAD, J. There seems to us no merit in this appeal. It is not questioned that the probate judge was incompetent to try the proposed contest by reason of relationship to one of the parties, and the only question is whether Green P. Rice was lawfully appointed as special judge to try it. Section 802 of the Code provides, in such cases, that the judge of probate must certify his incompetency to the register in chancery of the

county, or, if the register is incompetent, to the judge of the circuit or chancellor of the division, and such register, judge, or chancellor must, upon such certificate, appoint a disinterested person, practicing in the county, learned in the law, to act as special judge of probate; and such special judge, in relation to such matter or proceeding, shall have the jurisdiction and authority, and discharge the duties, of judge of probate; and the orders and decrees made or rendered by him shall be entered on the records of the court, and shall have the force and effect, and shall be subject to revision on appeal, or by other revisory remedy, of orders and decrees of the court of probate, or of the judge thereof. It will be observed the provision applies as well to special proceedings before the probate judge, as such, as before the court of probate. In the present case it was at first supposed that the register was also incompetent by reason of relationship, and the judge of probate certified his own incompetency to the circuit judge, who thereupon appointed Green P. Rice to sit as special judge in the cause. Afterwards, that proving to be an error, or the register's incompetency being doubtful, the judge of probate, within ample time, certified his own incompetency to the register, who thereupon appointed the same person,—Green P. Rice,—who acted under both appointments. Clearly, one or the other of these appointments was legal, and the acts of the special judge will be referred to the legal appointment.

Questions touching the regularity of the proceeding cannot properly be raised on petition for the writ of prohibition. That writ is to prohibit usurpation of power. The special judge having, by a lawful appointment, acquired jurisdiction in the premises, his errors and irregularities, if any he committed, should be corrected in some other way, and not by prohibiting the exercise of his jurisdiction. The principle is so obvious that it is unnecessary to say more. Affirmed.

(108 Ala. 122)

BROWN v. FIRST NAT. BANK OF TUSCALOOSA.

(Supreme Court of Alabama. May 1, 1894.)

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS—ESTOPPEL.

The maker of a note payable at Tuscaloosa Fence Factory is estopped in a suit thereon by an innocent purchaser for value to deny the existence of such a place.

Appeal from circuit court, Tuscaloosa county; S. H. Sprott, Judge.

This was an action brought by the appellee, the First National Bank of Tuscaloosa, against J. Wick Brown; and counted on a promissory note. The facts of the case are sufficiently stated in the opinion. The defendant offered to introduce evidence tending to show that there was no such place as

the Tuscaloosa Fence Factory. The plaintiff objected to the introduction of this testimony, the court sustained the objection, and the defendant duly excepted. Upon the hearing of all the evidence, the court at the request of the plaintiff, gave the general affirmative charge in its behalf, and to the giving of this charge the defendant duly excepted. There was judgment for the plaintiff, and defendant appeals. Affirmed.

Hargrove & Vande Graaff, for appellant.
Frank S. Moody, for appellee.

HARALSON, J. The note sued on in this case reads as follows: "Tuscaloosa, Alabama, April 28, 1891. Six months after date, I promise to pay to the order of W. B. Pollett & Co., the sum of one hundred and twenty-five dollars, value received, with interest from the 28th day of April, 1891, and do hereby expressly waive all exemption rights under the constitution and laws of the state of Alabama. Payable at Tuscaloosa Fence Factory. J. Wick Brown." The defenses set up were want and failure of consideration, fraud in procuring the execution of the note, and that at the time of its execution there was not, "and at no other time before nor since it was executed, was there, nor has there been, such a place or factory, as the Tuscaloosa Fence Factory." The replications to the pleas setting up these defenses—demurrers to which were overruled, and on which issue was joined—set up in substance, that the plaintiff, the appellee here, purchased the note sued on, in the usual course of business, for a valuable consideration, in good faith, before maturity, and without notice of any defense to said note, or of any defect or informality therein; that the defendant executed the note sued on, and stated therein, that it was payable at the Tuscaloosa Fence Factory, and the defendant cannot be heard to say, as against the plaintiff, that there is not now, nor was there at the time said note was signed, nor since, such a place as the Tuscaloosa Fence Factory, and that defendant is estopped by the recitals in the exhibit to his pleas, from denying that there was or is such a place.

It is a principle of general recognition, that a purchaser of commercial paper in the usual course of business, before its maturity, for a valuable consideration, having no notice of defenses that existed between the original parties, or have subsequently arisen, is a "bona fide holder for value," and, as such, takes the instrument free from defenses which were available between the original parties. *Rand. Com. Paper*, § 14; 2 *Daniel, Neg. Inst.* 769a. This court has held to this doctrine with an unwavering hand. We have gone to the extent of holding, that such a purchaser is under no legal obligation to inquire of the maker whether there was any defense or any defect in the note (*Wildsmith v. Tracy*, 80 Ala. 281); that in

his hands, the instrument is discharged of all legal and equitable defenses to which it may have been subject before it came to him (*Insurance Co. v. Quinn*, 73 Ala. 560); that the holder of such paper, transferring it before dishonor, for value, to a bona fide purchaser, though he may have obtained it feloniously or fraudulently, can confer a title greater than he had, freed from all infirmity, and which will prevail over that of the true owner (*Blackman v. Lehman, Durr & Co.*, 63 Ala. 550); that when fraud or illegality in putting it in circulation is shown, if the purchaser prove that he acquired it in a manner to make him a bona fide holder for value, he will be protected (*Mayor, etc., v. Wharf Co.*, Id. 612). Such paper is, as Mr. Daniel says, like the currency of the country, a circulating credit, and before maturity, the genuineness and solvency of the parties are alone to be considered in determining its value, and it has been fitly termed, "a courier without luggage." 1 Daniel, Neg. Inst. § 1. It has been elsewhere also well said, that negotiable paper carries on its face its own history, so that nothing can be alleged against it, while it continues in circulation undishonored, as against an innocent purchaser, other than what is there apparent. "The policy of the law, in reference to commercial paper, requires that it shall tell its own story, and have effect in the hands of innocent holders for value, according to what appears on it." *Schneider v. Schiffman*, 20 Mo. 571. Akin to the doctrine just asserted, is that other, which estops a party from denying that which he has declared in a note, bond or plea, to the detriment of another, who trusted the statement. It is not of importance, as has been said, whether the declaration or admission is made innocently or fraudulently, whether in point of fact it is true or false; it is the fact, that another has been induced to act on it, and must suffer injury, if its truth is gainsaid, that renders it conclusive. *Prickett v. Sibert*, 75 Ala. 319; 1 Brick. Dig. p. 796, § 10. When one of two innocent persons must suffer from the tortious acts of a third, he must bear the loss who enabled the third party, or the aggressor, to cause it. *Person v. Thornton*, 86 Ala. 308, 5 South. 470; *Hill v. Nelms*, 86 Ala. 442, 5 South. 796; *Turner v. Flinn*, 72 Ala. 532; *Auerbach v. Pritchett*, 58 Ala. 451; *Brooks v. Martin*, 43 Ala. 360; 1 Daniel, Neg. Inst. § 559.

It would seem from what has been said, that the demurrers to plaintiff's replications were rightly overruled, and that there was no error in giving the general charge for the plaintiff. The point is urged, however, —the decision of which admits, or excludes the other defenses set up,—that it was competent for the defendant to show by parol proof, that there was, in fact, no such place as the Tuscaloosa Fence Factory, the one referred to in the note as its place of payment. The precise question has been twice before the Indiana court, the first time, in

the case of *Hall v. Harris*, 16 Ind. 180, where it was held that a note made payable "at the Piqua Branch Bank of Ohio," shows on its face that it was made in Ohio, and that the maker was estopped by his note, to deny the existence, at its date, of the State Bank of Ohio. The second time, it arose in the case of *Parkison v. Finch*, 45 Ind. 122, where the court say: "The real question for our decision is, whether a person who signs a note purporting to be negotiable and payable in a bank of this state, is thereby estopped in an action brought by a bona fide purchaser for value and before maturity, from asserting and proving that there was no such bank as the one described in the note. It is provided by the sixth section of an act concerning promissory notes, bills of exchange, etc. * * * (appearing as section 5506 of the Code of that state), 'that, notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees and endorsers thereof may recover, as in case of such bills.' We think it is obvious from the plain and unambiguous language of the statute, and from the numerous decisions of this court placing a construction upon the above section, that the common law privileges of negotiable notes are confined, in this state, to such notes as are drawn payable at or in a bank in this state, and that this presupposes that the bank in or at which the paper is payable, shall have an actual existence, at the time the note is executed." By section 5503 of the Code of that state, it is provided, in respect to negotiable instruments, that "whatever defense or sets-off the maker of any such instrument had, before notice of assignment against an assignor, or against the original payee, he shall have also against the assignees." In *Gildden v. Henry*, 104 Ind. 279, 1 N. E. 369, it is said, that "the sole purpose of the section [5506] was to put a limitation upon section 5503, and provide for commercial paper that might circulate free from defenses, in favor of the maker. This is accomplished by the provision, that if the note be payable at a bank in this state, it shall be negotiable as an inland bill of exchange." It is obvious, then, without section 5506 of their Code, that what is generally termed, "bona fide holders for value," of such paper in that state, acquired no privileges against defenses which the maker had against the assignor or original payee thereof, and that section 5506 protected such purchasers, against section 5503, when the instruments were payable at a bank in that state. If payable elsewhere, this privilege was not accorded. Our Code on the same subject provides (section 1756): "Promissory notes payable in money at a bank or private banking house, or a certain place of payment therein designated, and bills of exchange are governed by the commercial law," and these are not subject to payments, set-offs, and discounts, had or possessed against the same, previous to no-

tice of the assignment or transfer. Code, §§ 1765, 2684. The difference between the statutes in the two states is striking. There, paper to be available against secret defenses in the hands of bona fide purchasers, must be payable at one class of places, of all the others,—that of banks in the state; whereas, here, to give it such protection, it may be made payable at any certain, designated place in the state, whether in the towns or cities or country, and these are without number. If there were reasons, for holding as the Indiana court did, that the existence of the bank could generally be ascertained, and if it can not be, the purchaser takes the paper at his peril,—which doctrine we do not approve,—they fall here, where there is no limit to the places at which such paper may be made payable.

We rest the case, however, on the broad principle that the acts of the maker and payees of the note vitalized and gave it credit, invited and induced the plaintiff to purchase it, and it is true conservatism and sound policy, promotive of right and equity, to seal their lips against contradiction and denial of that which they must be taken to have affirmed, to the injury of the plaintiff who trusted the affirmation. *Bibb v. Hall* (Ala.) 14 South. 103; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658; *Central A. M. Ass'n v. Alabama G. L. Ins. Co.*, 70 Ala. 120; *Bank v. Dunkin*, 54 Ala. 471, and authorities above. The evidence, without any conflict, established the truth of plaintiff's replications, and also an absence of anything indicating to plaintiff that there was any irregularity or fraud in the transaction of the giving of the note, or that there were any defenses, on the part of the maker to it. We find no error in the record, and the judgment of the court below is affirmed.

(102 Ala. 676)

JONES v. MANIER et al.

(Supreme Court of Alabama. April 12, 1894.)

REVIEW—RECORD ON APPEAL.

A judgment against a garnishee, based on his answer, will not be disturbed on appeal for errors appearing from the answer, or because a judgment was rendered in the same cause at a previous term, where such judgment and answer are not made part of the record by a bill of exceptions.

Appeal from circuit court, Pickens county; Samuel H. Sprott, Judge.

Action by J. M. Manier & Son against Winston Jones, garnishee. From a judgment for plaintiffs, defendant appealed.

M. L. Stansel, for appellant. E. D. Willett and Johnston & Curry, for appellees.

COLEMAN, J. In June, 1889, Manier & Son sued out process of garnishment upon a judgment previously recovered by them against L. P. Coleman and A. H. Coleman, and Winston Jones was summoned as gar-

nishee. The garnishment case was continued for several terms. At the spring term, 1892, the garnishee was discharged as to the defendant L. P. Coleman. The judgment then proceeds as follows: "And it having been shown to the court that the said garnishee has filed his answer, in which he says he is indebted to defendant A. H. Coleman in the sum of \$108.21, it is considered, and it is the judgment of the court, that the said plaintiffs, James M. Manier & Son, recover of the said garnishee, Winston Jones, on his answer as aforesaid, the sum of \$108.21, for which execution may issue; and it is further ordered that the garnishee be required to answer orally at the next term of this court, and cause continued." It will be seen that the garnishee was not discharged, but was required to answer further. This judgment of the court was not appealed from. At the fall term, 1892, the following judgment was rendered in the same cause: "Comes the plaintiffs by attorney, and it appearing to the court that the said garnishee has filed his answer, in which he says that he is indebted to the defendant A. H. Coleman in the sum of one hundred and forty-six 25/100 dollars, it is therefore considered, and it is the judgment of the court, that the said plaintiffs do have and recover of the said garnishee, Winston Jones, on his answer as aforesaid, the sum of one hundred and forty-six and 25/100 dollars, for which let execution issue." The present appeal is prosecuted from this last judgment. There are but two assignments of error, and we do not feel called upon to consider any others: The first is that there was "a splitting of the cause of action, a previous judgment having been rendered against him." The second is: "The court erred in rendering the judgment without notice to M. M. Coleman, the garnishor disclosed in his answer, as required by statute," etc.

We have stated that the present appeal is prosecuted alone from the last judgment, rendered at the fall term, 1892. There is no bill of exceptions in the record, and no exception reserved to any ruling of the court. An answer of a garnishee is not a part of the record proper, and cannot be considered on appeal unless made a part of the record by bill of exceptions. This was expressly ruled in the case of *Bostwick v. Beach*, 18 Ala. 80, and in numerous others. We do not say the answer of a garnishee could not be so identified by a decree or judgment recital as to make such answer a part of the record, but that question is not before us. *Bland v. Bowie*, 53 Ala. 152.

Neither is the judgment at a previous term any proper part of the judgment appealed from. The questions presented by the assignments of error are such as could be raised by bill of exceptions only. We would not be understood as holding that separate judgments cannot be rendered, as in the present case, against a garnishee. If a gar-

nishee answers at one term of the court that he is indebted to the defendant debtor in a certain sum, and has claims from which something may yet be realized, a judgment may be rendered against him for the amount admitted to be due; and certainly, if he makes no objection, the cause may be continued for further answer. If, at a subsequent term, he admits further indebtedness, or further money in hand, the former judgment cannot be a bar to a subsequent judgment, and especially if not pleaded. There is an irregularity in the judgment appealed from, in not specifying the amount of the judgment against the debtor, amendable, perhaps, *nunc pro tunc*, in the trial court; but, as no assignment of error has been made on the ground of such irregularity we will not consider it. See the following authorities: *Whorley v. Railroad Co.*, 72 Ala. 20; *Chambers v. Yarnell*, 37 Ala. 400; *Faulks v. Heard*, 31 Ala. 516.

Affirmed.

(102 Ala. 156)

MCCORMACK v. STATE.

(Supreme Court of Alabama. May 1, 1894.)

ASSAULT WITH INTENT TO KILL — EVIDENCE—INSTRUCTIONS — INFANCY OF DEFENDANT — SELF-DEFENSE.

1. On trial for assault with intent to kill, it was proper to refuse offers to show, as evidence of prosecutor's malice, that after the assault one of his relatives tried to have a warrant for defendant issued by a justice of the peace, and, on the latter's refusal to issue it, had one issued by the county judge, the prosecutor not having authorized such action.

2. The assault being alleged to have been made by a pupil on his teacher, while the latter was attempting to enforce order in his school, it was not error to charge that the existence of good government in a school largely depended upon good order and discipline being maintained by the master.

3. On trial for assault with intent to murder, where the person assaulted was the intended victim, the same measure of proof is necessary as in case of murder, except that death need not be proved.

4. The question whether a child between the ages of 12 and 14 years is capable of committing an assault with intent to murder is for the jury.

5. An instruction, at the instance of the state, that, to make out a case of justifiable self-defense, the evidence must show that defendant did not provoke or encourage the difficulty, is reversible error.

Appeal from circuit court, Limestone county; H. C. Speake, Judge.

George McCormack was indicted for assault with intent to murder, and was convicted of an assault with a knife, and appeals. Reversed.

The evidence for the state, as is shown by the bill of exceptions, tended to show that the defendant, a boy between 12 and 13 years of age, was going to school to the prosecutor, H. F. Moore; that upon being reprimanded for misbehavior in the school-room by his teacher, he refused to obey, whereupon H. F. Moore, the teacher, slapped

him; that the defendant struck at the said Moore with his knife, which was open in his hand and cut him; that thereupon the said Moore and the defendant had a scuffle; that said Moore got the boy down on the floor, but did not hit him with his fist, or bump his head on the floor; that the defendant had previously said to one or two others that he would cut the said Moore, if he whipped him; and that on one occasion he tried to provoke the said Moore to strike him. The evidence for the state further tended to show that "the defendant was a bright boy for his age, and of more than ordinary intelligence." The evidence for the defendant tended to show that at the time of the alleged difficulty he was a little over 12 years of age, and was very small for his age, weighing only 50 or 60 pounds; that he had always borne a good character, and that he was not above the average or normal mental capacity of boys of his age; that "what he said about cutting the prosecutor was in answer to officious parties, who told him he ought to be whipped by the prosecutor, was the idle, meaningless gabble of a small boy, and was of no significance;" that on the occasion of the alleged offense the defendant had not misbehaved, but was beating time to music, and disturbing nobody; that the prosecutor, without previous intimation, struck him on the head with his fist, and on being told by the defendant not to do that again, because he had a headache, he knocked the defendant backwards from the bench, and fell on him on the floor, where a scuffle ensued, the prosecutor bumping the defendant's head against the floor, and that in the scuffle the prosecutor was cut; that while on the floor the defendant was asked, Did he intend to cut the prosecutor, to which question the defendant replied that he did not. The bill of exceptions recites: "As evidence of the malice of the prosecutor towards the defendant, the defendant proposed to show that, the next morning after the difficulty, one Randall Mitchell, a kinsman of the prosecutor, with whom he lived, went five (5) miles after a justice of the peace, to come to see the prosecutor about getting out a warrant for the defendant; that the justice came, talked with the prosecutor, and declined to issue the warrant. And witness Mitchell further testified that prosecutor knew nothing about his going to the justice, and did not ask him to go. On motion of the state, this evidence was excluded by the court, to which ruling of the court the defendant then duly excepted." As further evidence of the prosecutor's malice towards the defendant, the defendant proposed to show that one Randall Mitchell, a kinsman of the prosecutor, with whom he lived, a few days after the justice thus visited the prosecutor, went (10) ten miles, to Athens, to get the county judge to issue a warrant for the defendant. Witness further stated that prosecutor knew nothing about his coming

to see Judge Horton, nor did he come at the instance of prosecutor. The court, in its general charge to the jury, among other things, instructed them as follows: "That, in order to determine whether the defendant was guilty of assault with intent to murder, you will look to see whether, if death had ensued, it would have been murder in the first or second degree." To the giving of this portion of the general charge the defendant duly excepted, and also separately excepted to the court's refusal to give each of the following charges requested by him: (1) "If you believe from the evidence that the defendant is under fourteen (14) years of age, and has only average or ordinary mental capacity, then you must find the defendant not guilty of assault with intent to murder." (2) "In considering the mental capacity of the defendant, if you find he threatened the prosecutor, you will look at his age, intelligence, and opportunities, and, if you conclude he had only average or ordinary mental capacity of one of his age, you will acquit him." (3) "The question here is not whether this alleged offense would have been murder if death had ensued. All the argument of the state's attorney on the question was unfounded."

R. A. McClellan, for appellant. Wm. L. Martin, Atty. Gen., for the State.

BRICKELL, C. J. 1. The general rule as to the relevancy of evidence is that circumstances and facts which do not directly tend to the proof or disproof of the matter in issue are not admissible. If facts or circumstances which are incapable of affording any reasonable presumption in regard to the material inquiry involved in the issue were admitted, trials would be protracted indefinitely; and, that which is of more importance, the attention of the triors of the facts would be diverted from the real issues, and the verdicts rendered could as well be imputed to the evidence which did not relate, as to that which did relate, to these issues. *State v. Wisdom*, 8 Port. (Ala.) 511; *Governor v. Campbell*, 17 Ala. 566. It is apparent the evidence proposed to be introduced had no relation to the assault with which the defendant was charged, no connection with it, and could not afford any reasonable presumption or inference of his guilt or innocence, and, we cannot doubt, was properly excluded.

2. The observation of the court to the jury, in the course of the general charge, that "the existence and stability of good government in schools largely depended upon authority, good order, and discipline being maintained by the schoolmaster," was the expression of a truism suggested by the facts of the case, and the relation of the assailant and the assailed at the time and place of the assault charged. We can perceive no just objection to it. There is in it no indication of an opinion as to the facts of the

case; no invasion of the province of the jury. It is often very necessary, to assist the jury in an application of the law to the facts of the case, that the court should state generally the rights, duties, and relation of the parties; and when this is done without any indication of the opinion of the court as to the evidence, or as to the verdict which should be rendered, we cannot conceive of injury resulting to either party.

3. The essential element of the statutory offense of an assault with the intent to murder—that which converts it into a felony—is the intent to take the life of the person assailed. Unless, if the intent had been consummated, the offense would have been murder in the one or the other of its degrees, there can be no conviction of the felony. When there is evidence of the assault upon the particular person named in the indictment, the determination of guilt or innocence of the felony necessitated the inquiry whether, if death had ensued, the offense would have been murder. 1 Whart. Cr. Law (9th Ed.) § 641; *Lawrence v. State*, 84 Ala. 424, 5 South. 33; *Meredith v. State*, 60 Ala. 441. There are cases in which a killing would be murder, and yet the intent to take the life of the person slain would not exist. An example is given by Chilton, J., in *Moore v. State*, 18 Ala. 532: "As if one, from a housetop, recklessly threw down a billet of wood upon the sidewalk, where persons are constantly passing, and it fell upon a person passing by, and kills him, this would be by the common law, murder; but if, instead of killing him, it inflicts only a slight injury, the party could not be convicted of an assault with intent to murder." And a felonious attempt to kill one person, with malice aforethought, which results in the death of another, would be murder, while a wound inflicted on such other or third person would not constitute the statutory offense of an assault with intent to murder. In these and similar cases, the inquiry is not involved, whether, if death had ensued, the offense would have been murder, in either of its degrees; and an instruction to the jury similar to that which was given in this case would be erroneous. *Moore v. State*, supra. But when the person assailed is the intended object and victim of the assault; when the inquiry is whether there was the intent to murder him,—the same rules obtain, and the same measure of proof is necessary, as in cases of murder, less the single fact, that, to constitute murder, the wound must have proved fatal.

4. The evidence tends to show that, at the time of the alleged assault, Moore, the person assailed, was the teacher of a school, of which the defendant, then between the ages of 12 and 14, was a pupil. The question was raised in the court below whether the defendant was of sufficient mental development to be, in law, capable of committing the offense charged. Two instructions were

requested, intended to raise the question, which are substantially the same, adapted to meet each phase of the case,—the felony, and the misdemeanor involved in it. The instructions were that if the defendant was under 14 years of age, and had only average or ordinary mental capacity, he was entitled to an acquittal. The rule of the common law is that an infant between the age of 7 and 14 years is *prima facie* incapable of committing a felony. The presumption may be repelled by clear evidence of capacity, and the presumption decreases with the increase of years; for, as is observed by Mr. Bishop, "There is a vast difference between a child a day under fourteen, and one a day over seven." *Godfrey v. State*, 31 Ala. 323; *Martin v. State*, 90 Ala. 602, 8 South. 858. To an infant between the ages of 7 and 14, the maxim, "*Malitia supplet aetatum*" (malice supplies the want of age), applies. "Malice" is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse. *Broom, Leg. Max.* (8th Ed.) 316. The inquiry is, not whether the accused is of the average capacity of infants of his years, or above or below it. That he is the one or the other is doubtless a fact which the jury ought to consider in determining whether he had the knowledge and discretion requisite to legal accountability. It is the strength of the understanding and judgment of the delinquent which is in issue, and which the jury are to consider. The presumption of immunity proceeds, we suppose, on the theory that the infant is of the average capacity of one of his years; and the inquiry for the jury is whether it is clearly shown that in the particular transaction, intelligently, he intended the doing of a wrongful act. If this be clearly shown the presumption is repelled, and legal accountability attaches. The instructions requested on this subject were properly refused.

5. At the instance of the state, the court instructed the jury that, "to make out a case of justifiable self-defense, the evidence must show that the defendant did not provoke or encourage the difficulty." As we interpret this instruction, it asserts that, to make the plea of self-defense available, there must be affirmative proof that the defendant "did not provoke or encourage the difficulty." A corollary would be that, if there was no evidence as to who provoked the difficulty, the plea of self-defense is not available. The burden of proving that the defendant was the aggressor, or that he provoked or encouraged the difficulty, rests upon the state; and if, in reference to the fact, there be no testimony, or if the testimony be not sufficient to satisfy the jury beyond a reasonable doubt, then the plea of self-defense, if otherwise made good, is not affected by the absence of this rebutting proof. *McDaniel v. State*, 76 Ala. 1; *Cleveland v. State*, 86 Ala. 1, 5 South. 426; *Wilkins v. State*, 98 Ala. 1,

13 South. 312. There was error in the giving of this instruction. Reversed and remanded.

(108 Ala. 109)

BIRMINGHAM NAT. BANK v. BRADLEY.

(Supreme Court of Alabama. May 1, 1894.)

NEGOTIABLE INSTRUMENTS—CHECKS—LIABILITY OF INDORSER.

1. The payee of a forged check who indorses it, and receives full value therefor, guarantees its genuineness; and as to him the indorsee is under no obligation to discover that it is forged, and may recover back the money so paid.

2. Where a bank to which a forged check has been forwarded for collection credits the person sending it with the amount thereof, without actually remitting the money, it may, on discovering the forgery, charge back such amount to such person.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by the Birmingham National Bank against John G. Bradley to recover money paid by plaintiff to defendant on a forged check. From a judgment for defendant, plaintiff appeals. Reversed.

On account of the prolixity of the pleadings, there will only be set out in this statement those on which issue was joined, and those to which the rulings of the circuit court were adverse to the appellant. The complaint contained six counts. As amended, the first and second counts were as follows: "(1) The plaintiff claims of the defendant the sum of \$4,000, with interest from the 23d of February, 1892, due by defendant to plaintiff on a check or draft, in words and figures as follows: 'Duplicate unpaid. No. 156,597. The Gate City National Bank of Atlanta. 2/23/1892. Pay to the order of John G. Bradley four thousand dollars. A. W. Hill, V. P. To National Park Bank, New York,'—indorsed by John G. Bradley. Plaintiff avers that on, to wit, the 24th day of February, 1892, defendant indorsed said draft or check to plaintiff, and received from plaintiff the sum of \$4,000 in cash therefor. Plaintiff avers that said draft or check had been altered or raised after the issue thereof, and before the indorsement thereof by defendant to plaintiff, without the knowledge or consent of the Gate City National Bank of Atlanta, from \$2 to \$4,000; and after the issue thereof, and before indorsement thereof by defendant to plaintiff, and without the knowledge or consent of the Gate City National Bank of Atlanta, the name James Fix, originally named as payee in said draft, was changed to the name John G. Bradley, and also the figures \$4,000 were punched or cut in said draft or check; and plaintiff avers that it paid said sum of \$4,000 on said draft to defendant in ignorance of said alterations or changes in said draft or check. Plaintiff avers that it immediately forwarded said check or draft to the drawee, the National

Park Bank, for collection, and said National Park Bank, drawee, and said Gate City National Bank of Atlanta, the drawer of said draft or check, have refused to pay the same to plaintiff and disclaimed all liability thereon. Plaintiff further avers that it informed defendant of said alteration or raising in said draft or check as soon as it was informed of the fact. (2) Plaintiff claims of defendant the further sum of \$4,000, with interest from, to wit, the 23d day of February, 1892, due by defendant to plaintiff on a certain draft or check, in words and figures as follows: 'Duplicate unpaid. No. 156,957. The Gate City National Bank of Atlanta. 2/23/1892. Pay to order of John G. Bradley, \$4,000.00 (four thousand — dollars). A. W. Hill, V. P. To National Park Bank, New York.' Plaintiff avers that on, to wit, the 24th day of February, 1892, defendant indorsed said check or draft to plaintiff, and received the sum of \$4,000 in cash from plaintiff therefor; and plaintiff avers that said draft had been altered or raised after the issue thereof, and before the indorsement thereof by defendant to plaintiff, and without the knowledge or consent of said Gate City National Bank of Atlanta, from \$2 to \$4,000; and after issue thereof, and before the indorsement thereof by defendant to plaintiff, and without the knowledge and consent of the Gate City National Bank of Atlanta, the name James Fix, originally named as payee in said draft, was changed to the name John G. Bradley, and also the figures \$4,000 were punched or cut in said draft or check; and plaintiff paid said sum of \$4,000 to defendant on said draft or check in ignorance of said alterations or changes. Plaintiff avers that it immediately forwarded said check or draft to the National Park Bank, indorsed by plaintiff for collection, and said National Park Bank credited said draft or check to plaintiff; but, finding out immediately afterwards that said check or draft had been altered or changed, said National Park Bank charged the same against plaintiff, and deducted the same from certain funds of plaintiff in the custody of said National Park Bank. Plaintiff further avers that, immediately on being informed of said raising or alteration in said draft or check, it notified defendant. Plaintiff further avers that said National Park Bank, the drawee, and said Gate City National Bank of Atlanta, the drawer, refused to pay said check or draft, and disclaimed all liability thereon." The third, fourth, fifth, and sixth counts of the complaint were the common counts for money had and received, money paid at the request of the defendant, money loaned by the plaintiff to the defendant, and on stated account. To the third, fourth, fifth, and sixth counts of the complaint the defendant pleaded the general issue. The court sustained the plaintiff's demurrers to the fourth, fifth, sixth, seventh, ninth, tenth,

twelfth, and thirteenth pleas of the defendant. The eleventh plea of the defendant was withdrawn. The first and second pleas of the defendant to the complaint, and to each count separately and severally, were the general issue. The third plea was as follows: "That the sum or sums of money therein claimed to be due plaintiff have been paid to plaintiff in full before the commencement of this suit." The eighth plea was as follows: "Comes the defendant, and, for further answer to said complaint, says that said check had been paid to the Birmingham National Bank before the institution of this suit." To the third and eighth pleas the plaintiff demurred, on the ground that said pleas do not allege that payment was made by defendant or any one authorized to make such payment. This demurrer was overruled, whereupon the plaintiff filed its replications to the third and eighth pleas as follows: "(1) That he joins issue on said pleas; (2) that said alleged payment consisted in a credit given plaintiff by said National Park Bank for the amount of said check on receipt thereof. Plaintiff avers that said draft or check was raised or altered as set out in first and second counts of complaint, and that, as soon as said National Park Bank was informed that said check or draft had been altered or raised, it charged the same back to the account of said Birmingham National Bank, and returned it to the Birmingham National Bank. (3) For further replication to said third and eighth pleas, plaintiff says: They aver the same facts as in the second replication, and that, with full knowledge of said facts, defendant ratified the same, and promised said Birmingham National Bank to repay to it the sum of four thousand dollars paid out on said check or draft. (4) For further replication, plaintiff further says: They aver the same facts in the second replication, and say that, with full knowledge of such facts, said defendant ratified said action of said Birmingham National Bank and said National Park Bank, and promised said National Park Bank to repay to it said sum of four thousand (\$4,000) dollars paid out to him on said check or draft, and, by reason thereof, said Birmingham National Bank retained said check or draft, returned as aforesaid by the Birmingham National Bank to said defendant. By reason of the said action in ratifying of charge and retention of said draft, defendant is estopped from setting up said alleged payment." The defendant demurred to these respective replications, which demurrers were overruled, and thereupon the defendant filed the following rejoinder: "(1) That the National Park Bank of New York, after paying said check and passing it to the credit of the Birmingham National Bank on its books, charged it off without the consent of the Birmingham National Bank, and that said action on the part of the National Park

Bank did not rescind or cancel the payment already made. (2) That the act of the National Park Bank in canceling and rescinding on its books the credit given the Birmingham National Bank when said Park Bank received daily notices of the number and amounts of the drafts drawn on it by the Gate City National Bank, where they amounted to more than one thousand dollars, and without notice on the day of payment that the four thousand dollar check or draft described in the complaint had been issued, said National Park Bank negligently paid said check or draft, and telegraphed to the Birmingham National Bank that said check had been paid; (3) that the defendant has been greatly damaged by the negligence of the National Park Bank in notifying defendant through the Birmingham National Bank that said check had been paid, when said National Park Bank had not received the usual notice from the Gate City National Bank of the issuance of said check by it, and that thereby the National Park Bank is estopped from denying the payment of said check to the Birmingham National Bank." The plaintiff demurred to each of these rejoinders of the defendant to the replications of defendant to the third and eighth pleas, and its demurrer to the first and third rejoinders was sustained. The plaintiff demurred to the second rejoinder to the replication of plaintiff to the third and eighth pleas, upon the following grounds: (1) Because it is not alleged that said defendant suffered any injury or damage by reason of alleged negligence; (2) because it is not alleged that either said defendant or the Birmingham National Bank suffered any damage or injury by reason of the alleged negligence of said National Park Bank; (3) because it is not alleged that damage or injury was suffered by said defendant by said alleged negligence; (4) because it is not alleged what injury or damage defendant or the Birmingham National Bank suffered by reason of said alleged negligence; (5) because it is not alleged that the alteration could be discovered by bare inspection of said instrument; (6) because the facts alleged do not constitute negligence in not discovering alteration from bare inspection of instrument; (7) because said plea does not allege negligence in said National Park Bank, (8) because said plea does not state facts showing any negligence in said National Park Bank." This demurrer was overruled. Upon issues so formed, the trial was had.

In its general charge to the jury, the court, among other things, instructed the jury as follows: "It is a general principle of law that if a draft or bill of exchange is issued in one form, payable for a certain amount, to a certain person mentioned therein as payee, and that bill of exchange is altered in a material part, it is a destruction of the instrument except as to those persons who

waive that right. Now, if the bill of exchange was altered as claimed by the plaintiff, and the National Park Bank of New York had no notice of the alteration, if they were not informed that the bill of exchange had been altered, and they placed it to the credit of the Birmingham National Bank, that could not amount to a waiver on their part of their right to claim that the bill of exchange had been destroyed by the alteration; but if they did have notice that it had been altered or changed, as claimed by the plaintiff, and with that knowledge placed it to the credit of the Birmingham National Bank, then that would amount to a waiver on their part of the destruction of the instrument, which would otherwise follow from its alteration or change." The plaintiff duly excepted to this portion of the court's general charge, and also excepted to the following additional portion of the court's general charge: "Now, it is claimed by the defendant in this case that there was a custom on the part of the Gate City National Bank to forward each day to the National Park Bank a list of all drafts drawn on it for a thousand dollars and upward. Now, if you believe that there was such a custom on the part of the Gate City National Bank, and that on this particular day, or on the day the draft was drawn, no notice was given by the Gate City National Bank to the National Park Bank that it had drawn the draft of \$4,000 on the National Park Bank, payable to John G. Bradley, and that the National Park Bank, when that draft was presented to it by the Birmingham National Bank, placed it to the credit of the Birmingham National Bank without having received such notice, then it is a question of fact to determine whether that carried knowledge home to the National Park Bank that no such draft as the one presented by the Birmingham National Bank had been issued by the Gate City National Bank on the day this draft purports, on its face, to have been issued." Among the written charges asked by the plaintiff, and refused by the court, and to the refusal to give which the plaintiff separately excepted, was the following: (1) "I charge you, gentlemen of the jury, that the only question in this case is whether said check or draft number 156,597, drawn by the Gate City National Bank of Atlanta, Georgia, on the 23d day of February, 1892, upon the National Park Bank, was altered or raised from two (\$2) dollars to four thousand (\$4,000) dollars, and the name of the payee altered or changed from James Fix to John G. Bradley, after the issuance thereof by said Gate City National Bank, without the knowledge and consent of said Gate City National Bank, and was in all other respects genuine; and, if they believe from the evidence it was so altered or raised, then they must find for the plaintiff." It is not

deemed necessary to set out the remainder of the 54 charges which were asked by the plaintiff, and to the court's refusal to give each of which the plaintiff separately excepted.

Mountjoy & Tomlinson, for appellants. Garrett & Underwood, Lee C. Bradley, Dan. S. Green, and B. M. Allen, for appellee.

COLEMAN, J. This was an action brought by the plaintiff bank to recover money paid to the defendant Bradley upon a check. We think the pleadings unnecessarily prolix, and tended to hide the real issue involved in the case. The facts upon which plaintiff relied for a recovery may be summarized as follows: On the 23d of February, 1892, the Gate City National Bank of Atlanta, Ga., drew a check payable to the order of James Fix for the sum of \$2 on the National Park Bank of New York. After this check was issued, without the knowledge or consent of the drawer, the name of the payee was changed to John Bradley, the defendant, and the amount raised from \$2 to \$4,000. One Gelham carried the check to Birmingham, where Bradley resided, who was well known to the plaintiff bank, and who was considered reliable and responsible by the bank. Bradley indorsed the check to the plaintiff bank, and received from it the full amount of \$4,000 in cash. The plaintiff bank forwarded the check immediately to the drawee bank in New York, indorsed "For collection." The check reached New York on the 27th of February, and on the same day the drawee telegraphed to the plaintiff that the check was paid, which information was immediately communicated to Bradley. On the 29th of February, Bradley, having his suspicions aroused, had the plaintiff telegraph to the drawee bank to examine closely the check. In consequence of this telegram, the National Park Bank on the same day telegraphed to the Gate City Bank, the drawer, from which it learned that the check had been altered as above stated. Thereupon, on the next day, March 1st, the National Park Bank, the drawee, and to which the check had been forwarded for collection, telegraphed to the plaintiff bank as follows: "The four thousand dollar Gate City National Bank check has been altered from two dollars. We charge it back, and return to you to-day." The contents of this telegram were at once made known to Bradley. There was no question as to the genuineness of the signature of the drawer. This is plaintiff's case.

The case for the defense is substantially as follows: First. That there had been no alteration of the check, but that it was originally drawn in his favor for \$4,000. Second. That if the check was raised from \$2 to \$4,000, and his name substituted for the original payee, he was deceived and im-

posed upon by Gelham, and induced to receive the check believing it to be genuine, and, without fault on his part, received the money for it from the plaintiff; that he applied about \$500 to the payment of a debt due himself from Gelham; that he retained about \$800, at Gelham's request, for another creditor of Gelham, and the balance was paid over to Gelham; that the drawee, the National Park Bank, had been negligent in not detecting the forgery within a reasonable time, and informing the defendant of the forgery; that, in consequence of this neglect of the National Park Bank, the defendant had been injured, in this: that Gelham was in the city of Birmingham on the 27th of February, on which day, if the defendant had been duly notified of the forgery, he would have arrested Gelham, and recovered back the money. And third, that the check was paid by the National Park Bank to the plaintiff bank, and therefore the plaintiff bank has no cause of action against the defendant.

The principles of law which govern this case are well settled. Bradley was the payee of the check. When he indorsed it to the plaintiff bank, and received the money on it, he warranted to the indorsee bank the genuineness of the check, both as to the drawer's signature as well as the amount expressed in the check. As to him there is no obligation upon the plaintiff bank to know or to discover that the drawer's signature was forged or the amount raised. The drawee bank is held to a knowledge of the signature of the drawer, but the payee indorser is held to a knowledge of all other facts. The discounting bank and the drawee bank, in such a case, have the right to rely upon the indorsement of the payee, and as to him are not required to exercise any diligence to discover the fact that the check had been raised. These facts are conclusively presumed to be within the knowledge of the payee. Under such circumstances, the money paid can be recovered back in assumpsit, unless, possibly, from some subsequent arrangement or cause, the right is lost. Certainly, the fact that the payee, who received the money as payee and ostensible owner, has disposed of it according to his own will, cannot in any way affect this right. The authorities cited by appellee to the proposition that if a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back, are not applicable to the case at bar. Bradley was the payee, and, by his indorsement, obtained the money. He parted with nothing to get possession of the check. Its genuineness is conclusive as to him, and as indorser he guaranteed it to be genuine for the amount expressed in the check. *Carpenter v. Bank*, 123 Mass. 66; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632; *White v. Bank*, 64 N. Y. 316; *Bank v. Loomis*, 85 N. Y. 207.

The check was forwarded by the plaintiff to the National Park Bank for collection. The amount of the check was credited to the plaintiff on the day it was received, and the plaintiff notified that it was paid. As soon as the forgery was discovered, which was within three days after its reception, the National Park Bank charged the amount back to plaintiff, and returned the check. If the money in fact had been remitted to plaintiff, we do not doubt, under the facts disclosed in the record, the National Park Bank could have recovered the money in assumpsit. The check was forwarded for collection. Funds of the drawer on deposit with the drawee were applied to its payment by crediting the amount to the forwarding bank; and, if the check had been altered, the credit was without legal authority from the drawer, and under a mistake of facts, for which, as between the drawee bank, if the money had been remitted, or the forwarding bank, which had paid the money, and the payee (indorser), the latter would be responsible in an action for money had and received. *Young v. Lehman, Durr & Co.*, 63 Ala. 519; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632; *United States Nat. Bank v. National Park Bank* (N. Y. App.) 29 N. E. 1028. The payee of a forged check, who indorses it and receives the money, acquires no title as against the party or the owner of the money. It would seem unnecessary to cite additional authorities to this proposition. *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632; *United States Nat. Bank v. National Park Bank* (N. Y. App.) 29 N. E. 1028.

The respective rights of the drawer and drawee, and their corresponding duties and liabilities to each other, and private rules existing between them for their mutual protection, do not arise in this case. Not having remitted the money, but simply having credited the amount to the plaintiff, the drawee bank had the right to charge it back. The undisputed proof establishes the fact that the demand has not been paid to the plaintiff by the defendant, Bradley. The case cited by appellee, *Clews v. Bank*, 114 N. Y. 70, 20 N. E. 852, is not applicable. In the authority cited, *Clews*, before purchasing the certified check, inquired of the certifying bank if the certificate of the check was good, and, being assured that "the bill was correct in every particular," parted with valuable consideration for it. The check had been raised. The suit was maintained, not upon the ground that the certifying bank had been negligent, but upon the contract of certification. If Bradley had been so assured by the drawee bank that the check was correct in every particular, and upon this assurance had parted with value to obtain the check, the case would be more in point. The relative obligations of the parties in the case at bar are the reverse. The drawee bank was assured by Bradley's indorsement

and by the plaintiff bank that the amount expressed in the check was the real amount for which it was given. We have held that the plaintiff owed the defendant no duty to discover the fraud and forgery, and the evidence is without contradiction that both the plaintiff and the National Park Bank acted with all due diligence after the discovery of the alleged fraud and forgery. Under the facts of the record before us, there is but one open question, and that is whether the check was in fact altered after it was issued by the Gate City Bank, and before it was indorsed by the defendant, Bradley. The statement of the principles of law applying to the case will enable the parties to shape the issues properly on another trial. Reversed and remanded.

(102 Ala. 539)

LEE et al. v. WIMBERLY.

(Supreme Court of Alabama. April 10, 1894.)
PLEADING AND PROOF—VARIANCE—PARTNERSHIP
—DEATH OF PARTNER—MECHANIC'S LIEN.

1. In an action to enforce a material man's lien, where the complaint alleges a sale to the contractor and owner, and the evidence shows a sale to the contractor only, there is a fatal variance.

2. One who acts as a clerk for a firm and receives a part of the profits as salary, is not a member thereof.

3. Where a member of a firm dies, and his widow and the survivor continue the business under the old name, a new partnership is thereby formed, though they intend to continue the old firm, and the accounts of the old firm vest exclusively in the survivor for the settlement of the firm business; and the transferee of an account, part of which is due the old, and part the new, firm, cannot recover thereon without pleading and proving the part due the old, and the part due the new, firm, and that they were separately transferred to him.

Appeal from circuit court, Butler county; John P. Hubbard, Judge.

H. T. Wimberly brought this suit on an account which he alleges the Greenville Brick & Building Company transferred to him before its commencement. The suit is against the Greenville Hotel & Improvement Company, a corporation, and Robert A. Lee, R. S. Lee, J. G. Bozeman, and J. H. Perdue, alleged partners, doing business under the alleged firm name of the Greenville Hotel Contractors & Builders. Its purpose is to recover a judgment against said Robert A. Lee, R. S. Lee, J. G. Bozeman, and J. H. Perdue, as such alleged partners, and have a material man's lien declared against the hotel building and lot, which is alleged to be the property of the Greenville Hotel & Improvement Company. In the court below, there was a judgment in favor of the Greenville Hotel & Improvement Company, and there was a personal judgment for the amount claimed in favor of appellee, H. T. Wimberly, against appellants Robert A. Lee, J. H. Perdue, J. G. Bozeman, and R. S. Lee, and from this personal judgment they appeal. Reversed and remanded.

The complaint contains two counts, which are as follows: "The plaintiff claims of the defendants the sum of six hundred and thirty-five 15/100 dollars (\$635.15), due on, to wit, February 1, 1892, for brick sold to the defendants by the Greenville Brick and Building Company from, to wit, July 22, 1891, to February 1, 1892, which, with interest thereon, is still due and unpaid, and is the property of plaintiff." "The plaintiff further claims of the defendants the sum of six hundred and thirty-five and 15/100 dollars (\$635.15), for brick and other material furnished by the Greenville Brick and Building Company from, to wit, July 22, 1891, to February 1, 1892, for the purpose of erecting an hotel building on corner of Hickory and Commerce streets, in the city of Greenville, Alabama; that the said brick furnished by said Greenville Brick and Building Company was used for the purpose of erecting said hotel building; and that said sum of six hundred and thirty-five and 15/100 dollars (\$635.15) is for the said material furnished; and that on the 18th day of February, 1892, the plaintiff gave notice to the defendant that said material had been furnished to them for the purpose of erecting said hotel building; and that the sum of six hundred and thirty-five 15/100 dollars (\$635.15) was still due and unpaid therefor; and that the plaintiff looked to his lien upon the said hotel building and on the land on which the same is situated, to the extent of his ownership of all the right, title, and interest owned therein by said defendants; and that ten days after said notice plaintiff would file his lien aforesaid. And plaintiff further avers that on the 4th day of March, 1892, the plaintiff did file his lien in the office of the judge of probate of Butler county, Alabama, by leaving with the said judge of probate a statement of the said amount due for said material furnished, as hereinbefore stated, and a description of the said material furnished as hereinbefore stated, and a description of the said property on which said lien is claimed, and the name of the Greenville Hotel and Improvement Company, as owner thereof, and the Greenville Contractors and Builders, as the contractors therefor. Wherefore the plaintiff sues to recover a judgment for said sum of six hundred and thirty-five and 15/100 dollars (\$635.15), and the interest thereon, and an attorney's fee of \$25, and all costs in this behalf expended, and for the establishment and satisfaction of a material man's lien in favor of plaintiff, and for the condemnation of any unpaid balance that may be due the said Jas. H. Perdue, Robt. S. Lee, J. G. Bozeman, and Robt. A. Lee, as contractors by the Greenville Hotel and Improvement Company, and for the condemnation and order of sale of said hotel building and lot hereinbefore described. That said sum of six hundred and thirty-five and 15/100 dollars (\$635.15) is still due and unpaid, and

is the property of plaintiff. Plaintiff acknowledges a credit of one hundred and twenty-five dollars on above claim." The defendants interposed several demurrers to each of the counts of the complaint, but, as the transcript shows no ruling upon these demurrers, it is not necessary to set them out.

On the trial of the case, as is shown by the bill of exceptions, the evidence introduced tended to show the following facts: The Greenville Hotel & Improvement Company, a corporation, entered into a written contract with J. H. Perdue, R. S. Lee, and J. G. Bozeman, who were mechanics and builders, by which such mechanics and builders should furnish the material and the labor and erect for said corporation at Greenville, Ala., an hotel according to certain plans and specifications. Said mechanics and builders, J. H. Perdue, R. S. Lee, and J. G. Bozeman, executed their bond with security for the faithful performance of their said contract. After R. S. Lee, J. G. Bozeman, and J. H. Perdue had executed their said contract for the building of the said hotel, they hired said Robert A. Lee as their secretary or clerk to write their letters, answer communications in regard to building material, and it was agreed that, in case the said contractors made a profit, he, the said Robert A. Lee, would have for his wages as clerk one-fourth of the net profits; but, if the contractors did not make anything, he was not to charge the contractors anything. Robert A. Lee was never a partner of or with the contractors. He was not one of the contractors. J. H. Perdue, R. S. Lee, and J. G. Bozeman were the only persons with whom the said hotel corporation contracted for the building of the said hotel. That Robert A. Lee never told any person that he was a partner. On the contrary, William M. McGehee, the manager of the affairs and business of the Greenville Brick & Building Company, before and at the time the brick in controversy were sold and delivered, resided in the same town of Greenville with the said Robert A. Lee, where the hotel was being built; and the said McGehee was socially and personally known to Robert A. Lee, and knew that said Robert A. Lee was not a partner in any of the hotel contractors' transactions. The said William M. McGehee and one John A. Owens and one Bartow Wimberly were doing business as makers of brick, using as a firm name Greenville Brick & Building Company, and as such subscribed \$300, payable in brick, to the capital stock of the Greenville Hotel & Improvement Company. The said Bartow Wimberly signed the book of subscription for the Greenville Brick & Building Company's subscription for the sum of \$300, payable in brick. The Greenville Hotel Contractors & Builders, J. H. Perdue, R. S. Lee, and J. G. Bozeman, in July, 1891, made a contract with the Greenville Brick & Building Company that the

latter should furnish the former the brick for the hotel. The said Bartow Wimberly shortly thereafter purchased the interest of said John A. Owens in the Greenville Brick & Building Company, and after this purchase the said McGehee and the said Bartow Wimberly went on in the brick business just as they were going on before Owens sold to Wimberly. In August or September, 1891, Bartow Wimberly died, leaving a widow and minor children. The said McGehee and Bartow Wimberly's widow did not agree to do business under the firm name of the Greenville Brick & Building Company; but, without any agreement or contract of partnership with said Wimberly's widow, said McGehee continued using the old firm name of Greenville Brick & Building Company, and under such name delivered to the Greenville Hotel Contractors & Builders the last brick for the hotel on November 18, 1891. The only way that the claim which is the foundation of this suit was ever transferred to appellee, H. T. Wimberly, was that said William M. McGehee made out the account due for the brick, and stated the amount of brick delivered by the Greenville Brick & Building Company, and then wrote at the bottom of the account an order to the contractors to pay H. T. Wimberly (plaintiff) all of the account less \$100, and sent the same to Robert A. Lee, by a drayman or somebody. This order was never seen by or delivered to Robert A. Lee, or either of the contractors, or to H. T. Wimberly. Neither Robert A. Lee nor the contractors ever heard of such an order until the trial of this case. On the 18th of February, 1892, William M. McGehee filed a material man's lien in favor of the Greenville Brick & Building Company, and H. T. Wimberly gave a like notice as transferee, and M. W. Wimberly made oath and filed a material man's lien for H. T. Wimberly. The foundation of each notice and lien was the account which is the foundation of this suit. In the one, McGehee claims this account to be the property of the Greenville Brick & Building Company, and he swore that it was the property of the said Greenville Brick & Building Company. H. T. Wimberly never accepted the transfer of this account, which is the foundation of this suit, in payment, nor as collateral for any sum the Greenville Brick & Building Company owed him. The cross-examination of said McGehee is sufficiently set out in the opinion. Defendants pleaded (a) the general issue; (b) payment; (c) set-off,—and also put in issue by sworn pleas (1) the plaintiff's ownership of the cause of action, which is the foundation of this suit; (2) whether Robert A. Lee was a partner with J. H. Perdue, J. G. Bozeman, and R. S. Lee; (3) whether Robert A. Lee was liable in this suit; (4) that each and every allegation of the complaint is untrue. The plaintiff offered in evidence, against the objection and exception of

the defendants, the judgment recovered in the circuit court of Butler county by James H. Perdue, J. G. Bozeman, and R. S. Lee against the Greenville Hotel & Improvement Company, and the transfer of this judgment to R. A. Lee by the plaintiffs in said cause. The defendants offered to prove, by the record of the circuit court, that there had been several judgments recovered against the Greenville Hotel & Improvement Company, fastening material men's liens thereon; but the court sustained the plaintiff's objection to the offer to introduce the evidence of such judgments, and the defendants separately excepted to each of said rulings of the court.

The defendants separately excepted to each of the following portions of the court's general charge to the jury: "(1) A transfer is where one person passes his right in a chose in action to another. (2) If the Brick & Building Company sold brick to the contractors and builders, and the Brick & Building Company passed this interest in that contract and to the money to be received under that contract to the plaintiff, then he has such an interest as enables him to sue. (3) If plaintiff had this transferred to him in payment and discharge of the liability that the brick company was due to him or to secure any liability, it would be such a transfer as would enable him to maintain the suit. (4) If you find the partnership liable, then the question of controversy is as to whether R. A. Lee constituted a member of the alleged defendant partnership. If he did, then he is liable. If he did not, then he is not liable. Now, was he a member of that firm? That brings you to consider the evidence in connection with what in law constituted a man in partnership. It is a question of fact that the jury must decide. (5) Now, what is a copartnership? There are different tests that you apply. Some may be insufficient, and they may be sufficient, to establish in the minds of the jury the position that a partnership existed or did not exist. A partnership is where two or more persons mutually enter into an undertaking by which they are to share in the profits or losses of the enterprise. Their interest may be unequal, and whether they participated in the losses, or whether they participated in the profits, or one of them only, is an incident in evidence which bears upon the question as to what was the relation existing between them." "(9) If you find that R. A. Lee was a copartner, he is liable along with the other partners, if you find against them. If he is not a partner, judgment should only be against the other three interested, because a plaintiff may sue four persons as partners, and, if it should turn out that one is not a partner, it does not defeat the plaintiff's right to recover against the others who are partners." The court, at the request of the plaintiff in writing, instructed the jury as follows: "(B) The court charges the jury that if they are

reasonably satisfied from the evidence that R. A. Lee held himself out to the Greenville Brick & Building Company, the transferrers of the plaintiff, as a partner, or jointly interested in the undertaking of the building of the Greenville Hotel by R. S. Lee, J. H. Perdue, and J. G. Bozeman, as contractors, and thus induced the plaintiff's transferrers to contract with the Greenville Hotel Contractors and Builders to furnish brick to be used in building the Greenville Hotel, and that the brick thus furnished were actually used in and about the construction of the Greenville Hotel, then the said R. A. Lee would be liable as a partner to plaintiff, and plaintiff would be entitled to recover, if he, within ninety days after this last brick were furnished, the plaintiff, filed his claim and lien with the judge of probate of Butler county, according to the statute in this behalf. (2) Participation in net profits of an enterprise is an evidence of partnership." The defendants separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following written charges, among others, to the jury: "(1) That if the Greenville Brick & Building Company gave an order to pay the amount claimed to be due by this suit to H. T. Wimberly, and sent such order by a drayman or other person to R. A. Lee, such order so sent would not be an assignment of the claim such as would enable plaintiff to maintain suit. (2) If the Greenville Brick & Building Company gave an order to R. A. Lee to pay the claim in controversy to H. T. Wimberly, and afterwards gave notice and filed a lien on such claim, that the giving of such notice and filing of such lien was a revocation of such order, and the plaintiff would have no right to maintain this suit, so far as any right may accrue from such order."

J. C. Richardson, for appellants. C. E. Hamilton and Gamble & Powell, for appellee.

HEAD, J. It was the plaintiff's purpose to sue and obtain judgment against James H. Perdue, Robert S. Lee, J. G. Bozeman, and Robert A. Lee, as partners, under the name of Greenville Hotel Contractors & Builders, for material sold them by a partnership called the Greenville Brick & Building Company, to be and actually used in the construction of an hotel in Greenville, which they had contracted to build for a corporation known as Greenville Hotel & Improvement Company (the plaintiff claiming to be the transferee of the claim), and to establish and enforce a material man's lien on the building for the payment of such judgment; but the pleader made the mistake of declaring against all the parties, both the contractors and owner of the building, as joint purchasers of and debtors for the material sold, thereby creating a fatal variance

between the allegations and the proof. The contractors who bought the goods were the only debtors. The owner of the building was under no personal liability to the material men. Its only liability consisted in the charge or lien upon its building, and upon any unpaid balance it owed the contractors, which, under the law, might be created and established for the security of the price of the material furnished. The law permits and requires, in order to bind him, that the owner be made a party defendant to the suit; but he must be brought in upon appropriate allegations showing his true relation to the subject-matter. It cannot be properly alleged that he was a joint purchaser of the goods with the contractors, who were, in fact, the only purchasers. In the first count of the complaint this mistake appears in express terms. The second count does not, in express words, declare who the purchasers were, or who the owner of the building; but, construing the pleading most strongly against the pleader, the legal effect of the count is that the goods were sold to all the defendants. The recital, as shown by the count, in the declaration of a lien alleged to have been filed in the office of the judge of probate, that the Greenville Hotel & Improvement Company was owner of the building, and the Greenville Hotel Contractors & Builders the contractors therefor, is not an allegation that such was the fact, or which relieves the complaint of the vice pointed out. The result is that the plaintiff could not lawfully recover because of the variance. The rulings of the court, on this feature of the case, were erroneous. Another defect fatal to a recovery, as the case is now presented, is the allegation that the defendant Robert A. Lee was a joint debtor with the others, when all the evidence shows without conflict that he was not such. He was the mere clerk or secretary of the contractors, employed by them to perform certain services, for a stipulated compensation; and this relation was expressly disclosed in written transactions had by him, for his principals, with the sellers of the goods, one of which was the very contract itself for the sale and purchase of the goods in question. Besides, it is shown, without dispute, that McGehee, one of the sellers, actually knew when the goods were sold that Lee was not a member of the partnership. The evidence discloses no act of his which did not appertain to his office of secretary, or from which it could be said he was misleading the public by holding himself out as a partner; and, if he had done such an act, the plaintiff could take nothing thereby, because the sellers did not act on it, knowing, as they did, that he was only an employee. The fact that his compensation was to be measured by the profits of the enterprise, if any, did not constitute him a partner. The nature of the contract shows beyond question there was no intention to constitute him a

member of the partnership. *Taylor v. Bush*, 75 Ala. 432. There was nothing upon this question to submit to the jury, and the errors of the court in this regard will be apparent from what we have said. That these variances are fatal to a recovery, we refer to *Walker v. Insurance Co.*, 31 Ala. 529; *Jones v. Engelhardt*, 78 Ala. 505; *Jackson v. Bush*, 82 Ala. 396, 1 South. 175. The case of *Walker v. Insurance Co.*, supra, construes section 2609 of the Code of 1886. We cannot assent to the views and conclusion of the court on this point in *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950.

The alleged transfer of the claim in suit to the plaintiff was denied by sworn plea, under the rule. This put upon plaintiff the burden of proving that he was the party really interested in the demand. The defendants insist that there is no evidence tending to show such a transfer prior to the bringing of this suit. The record leaves this question not free from difficulty. The claim was contracted at sundry times from July 22, 1891, to November 18, 1891. The brick and building company, sellers, at first consisted of William M. McGehee, Bartow Wimberly, and J. A. Owens. Owens, after the account began, sold his interest in the firm to Bartow Wimberly. Bartow Wimberly died in August or September, 1891. Thereafter McGehee and the widow of Bartow Wimberly carried on a like business, under the same firm name. What portion of the claim in suit was contracted before the death of Wimberly, and what after, does not appear. Nor does it appear that the firm, prior to his death, bound itself to furnish any specified quantity of material (brick). They did engage to furnish so many brick, at specified prices, but the contract, which was in writing, went further, and stipulated that it was to hold good only so long as sellers' brick were accepted. Hence it was not binding on buyers, and therefore did not bind sellers, for the want of mutuality. The death of Wimberly dissolved the partnership, which, of course, terminated the possibility of further sales on the partnership account. The business subsequently carried on by McGehee and the widow involved the creation of a new partnership between them, as distinct from the old as if formed of entirely different individuals, and conducted under a different name; and the sales they thereafter made were just as distinct from those made by the old firm. They bore no relation to or connection with each other. The old account vested exclusively in McGehee, as surviving partner, for the purposes of liquidation and settlement of the partnership business. As surviving partner, he had authority to transfer it for the payment or security of a partnership liability. So, also, as a member of the new firm, he was authorized to transfer its account for any legitimate purpose of that partnership. But, if he transferred both,

the transferee could only take them as (what they were) distinct, independent claims; and, in an action by him to enforce them, he should declare on them as such. He cannot properly treat them as a single demand, and sue upon them as such, though both may be joined in the same action. It is not essential to the transfer of a contract, express or implied, for the payment of money, passing the beneficial interest therein to the transferee, so as to authorize him, under the statute, to sue thereon in his own name, that it be made in writing. It may be made in any way which shows a clear intention to assign, and either by words or acts. 5 *Lawson, Rights, Rem. & Pr. § 2655*; *Insurance Co. v. Tunstall*, 72 Ala. 142. There must appear not only conduct on the part of the assignor evincing an intention to assign, but there must be an acceptance of the assignment, by the assignee, in order to its completion. 72 Ala. 142, supra. The authorities seem to hold that an order given by the creditor to the debtor to pay the sum due to a third person is revocable by the creditor at any time before payment or acceptance by the debtor, and until then does not operate as an assignment of the claim. *Lawson, Rights, Rem. & Pr. § 2656*; *Coleman v. Hatcher*, 77 Ala. 217; *Sterrett v. Miles*, 87 Ala. 472, 6 South. 356. It is very clear, also, that if such order is not delivered to the payee therein, or any one by him authorized to receive it, and is not accepted by the debtor, there is no argument to support the proposition that an assignment was thereby effected.

These are some general principles applicable to the evidence in this case. The plaintiff's evidence, offered in support of the alleged transfer, shows that, in what was done, both claims—that in favor of the old partnership, and in favor of the new—were treated as one. They are declared on as one. No information is given of the amount of either separately; hence, confusion and trouble. Was there a valid transfer of either, or both as one, before suit brought? The evidence on this subject consists in the testimony of W. M. McGehee, supplemented by certain acts touching the perfection of a material man's lien, which will be noted for whatever influence they may exert. His testimony is as follows, on direct examination: "That he transferred this claim, the subject of this suit, to H. T. Wimberly, and that thereafter he had a settlement with R. A. Lee, a secretary of the contractors and builders, as to the amount due the brick and building company for brick; that the amount so ascertained to be due was \$496.63, with interest thereon since November 18, 1891, after all the credits were given." Again, he says further on "that, since he delivered the transfer of this claim to the plaintiff, he had demanded payment from the builders and contractors for these brick; that the claim was transferred to plaintiff

when the brick was sold to the contractors." It will be remembered the brick were sold at different times from July to November 18th. The following cross-examination of the witness occurred: "Q. Did you have a conversation with R. A. Lee to-day? A. Yes, sir. Q. Didn't you tell him in that conversation that you had never transferred this claim to H. T. Wimberly? A. I told him that I hadn't transferred it in writing. Q. You never transferred it in writing? A. No, sir. Q. Did the time of transferring this cause of action to H. T. Wimberly occur before or after the death of Bartow Wimberly? A. Afterwards. Q. Did you sign the name of the Brick & Building Co., or did you sign your name and Mrs. Wimberly as surviving partners of the Brick & Building Co., to the transfer? A. I signed my name as secretary. Q. Did you, or did you not? A. I done it one of the two ways. Q. Secretary of what? A. Of the surviving partners. Q. Did Mrs. Wimberly ever appoint you as secretary of the surviving partners of the Brick & Building Co.? A. No, sir. Q. Then, you simply signed your name to it? A. As secretary. Q. What was you secretary of? A. We were surviving partners on the death of Mr. Wimberly. Mrs. Wimberly never made me secretary. Q. Have you ever seen H. T. Wimberly with regard to this transfer? A. No, sir. Q. Did H. T. Wimberly ever accept this transfer from you in payment of, or as collateral for, any amount the Brick & Building Co. owed him? A. No. Q. Didn't you tell R. A. Lee that Mack Wimberly, as agent for plaintiff, refused to accept this account sued on as a credit until it was paid? A. I did at one time. Q. When was that? A. Some time ago. Q. Has not it been since this suit was brought? A. I don't think it was. Q. Don't you know it was? A. I told him that at one time. I don't recollect when. Q. Do you tell this jury that before this suit was begun, and before this lien was filed, that plaintiff, Wimberly, accepted this \$496 that the Brick & Building Co. owed to H. T. Wimberly? A. No, sir? Q. When did he accept it as a payment on the \$496,—since this suit was brought or before? A. Since this suit was brought. It was the day we adjusted the claim. Q. Did he give you credit for \$496? A. Yes, sir. Q. Did he give it before this suit was brought? A. No, sir. Q. Was it since this suit was brought? A. Yes. Q. Haven't you been to Mr. Lee several times since this suit was brought to try to get him to adjust this matter, and try to get him to pay it to you? A. Yes. Q. And didn't you tell him, when you were trying to get him to pay it, that if he didn't pay it to H. T. Wimberly, that the Brick & Building Co. would still be owing Wimberly? A. I did. I have told Lee that. Q. Since March? When the lien was filed? A. Yes, sir. Q. Did you hire the lawyers to bring this suit, and not H. T. Wim-

berly? A. Yes, sir. Q. Did H. T. Wimberly authorize you to hire lawyers to bring this suit on his claim you had transferred to him? A. No, sir. Q. If you fail in this suit, won't you still be indebted to H. T. Wimberly for the \$496? A. I will. Q. Was there any agreement that he (plaintiff) would take this claim and discharge you? A. No, sir." Further on, the bill of exceptions contains this recital: "The witness McGehee further testified that the only way that the claim in suit was ever transferred to plaintiff was that he made out the account due for brick, and stated the amount of brick delivered by the Brick & Building Co., and then wrote at the bottom of the account an order to the contractors to pay H. T. Wimberly all this amount, less \$100, and sent the order to R. A. Lee, by a drayman or somebody; that Lee never said anything about receiving the order." The evidence further shows that on February 8, 1892, C. E. Hamilton served the Greenville Hotel & Improvement Company with a copy of a notice, with the name of "H. T. Wimberly, per C. E. Hamilton, Atty.," subscribed thereto, notifying that company of the purpose of the "undersigned" to file a lien on the hotel buildings for this demand, and stating therein: "Whereas, said brick and building company transferred said claims for said brick furnished." Immediately following this notice there is copied in the transcript, without a remark or statement in reference to it, a notice to the president of the hotel company that the brick and building company would file a lien on the hotel building for amount due the latter company for the brick furnished from July 22, 1891, to February 1, 1892. No reference is made to any transfer of the claim. It is signed, "Greenville Brick & Building Co., per C. E. Hamilton, Atty." On the same day (February 8, 1892) C. E. Hamilton served on the hotel company a notice (leaving the amount of the claim blank) that the Greenville Brick & Building Company would rely upon their lien on the building. On the 4th March, 1892, C. E. Hamilton filed in the probate court a declaration of a lien on the building for this account, in favor of plaintiff. It is subscribed "H. T. Wimberly," and sworn to by M. W. Wimberly. It recites that the claim was transferred to H. T. Wimberly by said Greenville Brick & Building Company. On the same day (March 4th) Hamilton also filed a declaration of lien on the building in favor of the brick and building company. It is subscribed, "Greenville B. & Building Co., by W. M. McGehee," and is sworn to by McGehee. Hamilton testified that McGehee swore to both these liens in his presence, and as per his advice as an attorney; but in this it appears he was mistaken, as the plaintiff's declaration was sworn to by M. W. Wimberly. It is indicated in McGehee's testimony that he employed Hamilton to file what he termed "his lien," which

we take to be the lien above mentioned, in favor of the brick and building company. It is nowhere intimated by what authority Hamilton did any of the other acts by him done, or by what authority M. W. Wimberly acted in swearing to the plaintiff's declaration. Nor does it appear that Hamilton was then a practicing attorney at law. R. A. Lee testified for defendants that no drayman or other person ever delivered to him any order from McGehee or the brick and building company to pay the demand, or any part thereof, to plaintiff, and that he never heard of the alleged transfer to plaintiff until this suit was brought. The foregoing comprises substantially all the record shows touching the alleged transfer. It presents much contradiction and inconsistency. Upon due consideration, we are of opinion that we cannot properly pronounce upon its legal effect. We have stated the general principles of law in which the jury should be instructed, and will leave that body to solve the question, in the light of those principles, whether there was a valid transfer of the claims in question, or either of them, to the plaintiff before this suit was brought, either in payment or as collateral security for a debt owing the plaintiff, so consummated as to pass the beneficial interest in the demand to the plaintiff. We deem this the better course, also, in view of the fact that the judgment must be reversed for other causes, and that the case will probably be tried again on different pleadings, and upon a more definite and consistent presentation of the facts.

The verdict and judgment were in favor of the defendants upon the issue in respect of the lien sought to be established. We therefore do not notice the assignments of error on that subject. The record fails to show any ruling of the court on the demurrers to the complaint. We cannot consider them. The judge's bench note, copied by the clerk in the transcript, is no part of the record. It cannot be considered. If the pleadings and evidence had justified the enforcement of a material man's lien on the building, no question of set-off in favor of the owner could have properly arisen. Being a party defendant only for the purpose of protecting its property in the building, it could interpose no set-off against the plaintiff's demand. The judgment obtained by the contractors against the owner, which was transferred to R. A. Lee, had no relevancy to any issue in the cause, except to show that there existed an unpaid balance due by the owner to the contractor upon which the plaintiff was seeking to fasten a lien, as well as to aid in establishing a lien on the building. In such cases we think such an adjudication between the contractor and owner competent evidence; and it would not be competent for the defendants to prove that there were other lien holders. All such liens stand on an equal foot-

ing. If the owner's liability is insufficient to cover all, they must be paid pro rata, but that adjustment cannot be had in a suit to establish the lien. Code, § 3040. What we have said will serve as a sufficient guide on another trial, without further noticing, in detail, the several exceptions reserved. Reversed and remanded.

(102 Ala. 671)

Ex parte RICE.

(Supreme Court of Alabama. May 1, 1894.)

CHANGE OF VENUE—STIPULATION—RECORDS.

1. When a cause is by consent entered of record, transferred from a city court to the circuit court, which has concurrent jurisdiction, and the parties appear in the circuit court for two terms, without objection, and continuances are granted, such transfer is binding, though the statute provides another manner for procuring such transfer.

2. A recital in the record of a court imports absolute verity, and all parties thereto are estopped from denying its truth.

Mattie J. Rice, as administratrix of D. S. Rice, deceased, filed a petition in the supreme court asking the court to grant a rule nisi, directed to the Hon. John R. Tyson, judge of the second judicial circuit of the state, commanding him to show cause, if any he had, why a peremptory writ of mandamus should not issue from the supreme court requiring him to dismiss and strike from the docket of said circuit court of Montgomery county the cause of M. Kahn, surviving partner, against Mattie J. Rice, as administratrix of the estate of D. S. Rice, deceased. Denied.

The grounds of this petition, as alleged therein, were that Schloss & Kahn brought suit in the city court of Montgomery, in which the petitioner, as administratrix of D. S. Rice, deceased, was the sole defendant; that a judgment was rendered in said city court of Montgomery, March 7, 1889, which judgment was reversed on appeal to the supreme court, and the cause was remanded to the city court for further proceedings therein; that, at the October term, 1889, of the said city court, another trial was had, which resulted in a mistrial; that, upon the death of L. Schloss, the city court ordered that the cause should proceed in the name of M. Kahn, surviving partner; that it was claimed by the plaintiff in this case that at the January term, 1892, of the city court of Montgomery, the cause of M. Kahn, as surviving partner, against Mattie J. Rice, administratrix, etc., was transferred to the circuit court of Montgomery county, and that this was done by the consent of the parties to said cause. It was further alleged in said petition that there was no written agreement ever entered into or filed in said cause for the transfer thereof to the circuit court, "but that the judge of the said city court of Montgomery, having first obtained the verbal consent of the parties to said cause that the case might be transferred to the circuit court

of Montgomery county, under the statute regulating such transfers, * * * did ex mero motu make an order attempting to transfer said cause from the city court of Montgomery to the circuit court of Montgomery county when neither petitioner nor her counsel were present in court at the time; but the petitioner states that no verbal consent was ever given that the statute regulating the transfer in such cases from the one court to the other should not be fully complied with." It was then alleged in said petition that the statute referred to as regulating a transfer of a case from the one court to the other, approved March 1, 1881, was never complied with, in that no agreement in writing for a transfer of said cause was ever filed with the clerk of the said city court of Montgomery; that said clerk never made any certified transcript of any orders, minute, and docket entries in said cause, and never delivered any such transcript to the clerk of the said circuit court of Montgomery county; nor have the costs of said cause in the city court ever been paid; "nor have any of the requirements of the said statute regulating such transfers ever been complied with in this case, except that the original papers in said cause were placed in the hands of the clerk of said circuit court of Montgomery by the clerk of said city court of Montgomery after the attempted order of transfer, as hereinabove particularly set out;" and that at the January term, 1893, of the said circuit court the petitioner moved to strike the said cause from the docket of said circuit court, on the ground that said circuit court had never acquired jurisdiction thereof. In answer to the rule nisi which was served upon him, the Hon. John R. Tyson, judge of the second judicial circuit, responded that he admitted the truthfulness of all the allegations of the petition as to the bringing of the suit and the obtaining of judgment, the reversal of the same by the supreme court, and a mistrial upon the second trial of the case. He further answered that he had no knowledge as to whether there was a written agreement ever entered into or filed in the said cause for a removal of the same from the city court, nor any of the facts alleged in the petition in reference thereto. His answer further averred that it appeared from the records of the said city court that at the February term, 1892, of the said court, on February 3, 1892, an order was made and entered upon the records of the said city court in said cause as follows: "This day came the parties by their attorneys, and by consent this cause is transferred to the circuit court;" that said cause was entered upon the trial dockets of said circuit court at the June term, 1892, and that on July 18, 1892, an "order in said cause was made upon the dockets of the said circuit court, 'Continued by defendant.'" The respondent further answered that at the January term,

1893, it appeared that the parties to said cause, and M. Kahn as surviving partner, against Mattie J. Rice, administratrix, etc., appeared by their attorney, and on the application of said Mattie J. Rice, as administratrix, the defendant in said cause, an order was made by the said circuit court, on January 20, 1893, as follows: "Continued by defendant on account of her sickness. This continuance granted on condition that defendant go to trial at next term." It was further alleged in the answer of the respondent that at the June term, 1893, of said court, a motion was made by the plaintiff to strike said cause from the docket, and that this motion was overruled. The mandamus asked for in the petition is denied.

A. A. Willey and Geo. F. Moore, for petitioner. Arrington & Graham and Tompkins & Troy, for respondent.

BRICKELL, C. J. It is conceded that the mode prescribed by the statute (Acts 1880-81, p. 268), in which a cause may be transferred from the city court of Montgomery to the circuit court of the county, was not pursued. It was not contemplated or intended by the parties to observe the mode of procedure directed in the statute. A transfer by consent, expressed in open court, and entered on the minutes of the city court, was the mode they preferred and adopted, and of its efficacy we see no reason for doubt. The city and circuit courts are of concurrent, coequal jurisdiction of the subject-matter of the suit, and sit within the same territorial jurisdiction. It is competent for parties, at any and all times, with the consent of the court exercising jurisdiction, whether the mode prescribed by statute is observed or not, to change the venue in civil causes, by consent expressed in open court and entered of record. *Pierson v. Finney*, 37 Ill. 29; *Insurance Co. v. Johnson*, 46 Ind. 315; *Burnley v. Cook*, 65 Am. Dec. 79; *Gager v. Gordon*, 29 Ala. 341. If there be error or irregularity in the mode in which the change is effected, the maxim "consensus tollit errorem" applies. The parties induced the city court to part with its jurisdiction, transferring the venue for the trial to another court of plenary jurisdiction. By their own conduct they affirmed the existence of all facts essential to the jurisdiction of the latter court, and, upon the affirmation, the court could not but act judicially. *Railway Co. v. Ramsey*, 22 Wall. 322. Consent cannot confer jurisdiction, it is true; but it is jurisdiction of the subject-matter, which is derived from the law, which parties may not by consent confer. When jurisdiction of the subject-matter is conferred by law, jurisdiction of the person may be acquired by the acts or consent of the parties. There is a wide difference between conferring jurisdiction by consent and consenting to something within the power of the court deemed

promotive of the convenience of the parties. The parties appeared in the city court, and, by their consent, an order was entered transferring the cause to the circuit court. Thereafter, without objection, for two successive terms the parties appeared in the circuit court, and at each term there was a continuance of the cause by the relator. If there had been error or irregularity in the transfer, and of it the relator intended to take advantage, objection should have been made at the earliest opportunity. It is a fixed rule of all courts, that a party having cause to set aside any process or proceeding of this character, and he neglects to assert it within a reasonable time, having knowledge of the facts, the objection is waived. *Broom, Leg. Max.* 135.

The recital of the record of the city court that the cause was by consent transferred to the circuit court, and the recitals of the record of the circuit court of the appearance of the parties, and of the continuance of the cause, are incapable of contradiction by parol evidence. They import absolute verity, and all parties to them are estopped from denying their truth. See *Deslonde v. Darrington's Heirs*, 29 Ala. 92; *Whart. Ev.* §§ 980-982. *Mandamus* denied.

(102 Ala. 655)

ALFRED SHRIMPSON & SONS, Limited, v.
BRICE et al.

(Supreme Court of Alabama. April 12, 1894.)
SALE—ACTION FOR PRICE—EVIDENCE—INSTRUCTIONS—PRINCIPAL AND AGENT.

1. On an issue whether defendants bought certain pins from plaintiff, evidence as to defendants' financial rating, and as to the amount of pins suitable for their trade, is incompetent.

2. Evidence that the special advertising of defendants' name and place of business placed upon the papers of pins rendered them unsalable to other merchants is also incompetent.

3. In an action for the price of goods, where the complaint does not count upon the order therefor as the foundation of a suit, but such order is admitted collaterally to sustain the cause of action, its genuineness may be disputed without a sworn plea.

4. The production of the envelope in which plaintiff testified the order was received, with its postmark at defendants' post office, the admission of defendants' clerk that the address was in his handwriting, and the order itself, are matters for the consideration of the jury in determining the genuineness of the order.

5. The mere fact that persons, in ordering goods, ordered a larger amount than they intended to, does not relieve them of liability therefor where the order is filled as written.

6. The action not being on the order, the court properly refused to charge that the burden of proof was on defendants to show that the order for the goods, purporting to be signed by defendants, was not genuine.

7. Where a person authorized his clerk to sign his name to an order, so that it would purport to have been signed by himself, he is bound to the same extent as if he had in fact signed it.

Appeal from circuit court, Blount county; John B. Tally, Judge.

Assumpsit by Alfred Shrimpton & Sons, Limited, against Brice & Donehoo to recover

an amount alleged to be due plaintiff for pins sold by plaintiff to defendants upon their order. From a judgment for defendants, plaintiff appeals. Reversed.

Issue was joined on the plea of the general issue. On the trial of the case, as is shown by the bill of exceptions, the plaintiff introduced in evidence an itemized statement of the account, which was verified by the affidavit of the secretary of the plaintiff. Upon the introduction of James A. Brice, one of the defendants, as a witness, he was shown the statement of the account, which was introduced in evidence, and was asked: "Is that account correct?" The plaintiff objected to this question, on the grounds that no affidavit had been filed in the case by the defendants denying the correctness of the account, and that it called for a conclusion of the witness. The court overruled these objections, and plaintiff duly excepted. The witness answered that said account was not correct, and that the defendants had never made such an account with the plaintiff. This witness further testified, on cross-examination, that some time in the spring of 1891, while the defendants were engaged in carrying on a general mercantile business at Murphree's Valley, they received through the mail, addressed to them, a letter from the plaintiff, soliciting their purchase of the pins manufactured by the plaintiff, and that inclosed in this letter was a sample of said pins, and a blank order on the plaintiff for any quantity of pins desired; that at that time defendants had clerking for them one Perry Bynum; that he (Brice) instructed the said Bynum to make an order on the plaintiffs for some pins, and that, in obedience to said instruction, the said Bynum filled out one of the blank orders, and inclosed such order in an envelope directed to the plaintiff. This witness further testified that he had no recollection of receiving from the plaintiff a letter acknowledging the receipt of their order for the pins, and in this respect he was corroborated by the testimony of Donehoo and his clerk Bynum. It was further shown by the testimony of this witness that on one occasion, when one Amberson was hauling some freight for the defendants from Attalla, a shipping point on the Alabama Great Southern Railroad, used by the defendants, to their place of business at Murphree's, Ala., Amberson hauled the pins, which had been shipped by the plaintiff to the defendants, and the defendants refused to receive the same. On examination in rebuttal of this witness, he was asked by his attorney to "state what you said to Mr. Bynum in reference to making an order on plaintiff for some pins." The plaintiff objected to this question, on the grounds that it called for immaterial and irrelevant testimony, and "that secret instructions to the agent from the principal are inadmissible as against third persons dealing with the

principal in good faith." The court overruled this objection, and the plaintiff duly excepted. In answer to this question, the witness answered: "I told Mr. Bynum to order from the plaintiff five great gross of pins;" and he further stated, positively, that he never instructed Bynum to make an order on plaintiff "for five great gross papers of pins." Against the objection and exception of the plaintiff, this witness was allowed to testify further, in rebuttal, that, when Amberson was hauling freight for defendants from Attalla, he (Brice) wrote a note to the depot agent at Attalla, as follows: "Please let J. D. Amberson have all our freight, except a lot of pins from Alfred Shrimpton & Sons, of New York. [Signed] Brice & Donehoo." There was no evidence showing that this notice was ever handed to the agent at Attalla, or that he had any notice or knowledge of it. Upon the further examination of Brice, he was asked by the defendants the following question: "How many pins do the firm of Brice & Donehoo usually sell in a year?" The plaintiff objected to this question, on the ground that it called for immaterial and irrelevant evidence, but the court overruled the objection, and to this action of the court the plaintiff duly excepted. The defendants were allowed to give evidence tending to show their financial rating, the amount of their annual business, and whether or not the amount of pins alleged to have been purchased by them from the plaintiff was a reasonable purchase of pins for their trade and business. To all of this evidence the plaintiff objected, and moved the court to exclude it from the jury, on the ground that it was irrelevant and immaterial to the issues raised by the pleadings in the cause. The court overruled this motion and objection by the plaintiff, and permitted the testimony to go to the jury, and to this ruling the plaintiff duly excepted. Upon the examination of Perry Bynum as a witness, his testimony tended to show that, while clerking for the firm of Brice & Donehoo in their store at Murphree's Valley, Ala., the Mr. Brice of said firm "handed to him an envelope, addressed to plaintiff, and a blank order, or printed blank for order, on plaintiff for pins, * * * and told him to order from the plaintiff five great gross of pins;" that he (Bynum) signed the name of Brice & Donehoo to the order, and mailed the same to the plaintiff. Upon this witness being shown the order for the pins which was received by the plaintiff, he testified that it did not look like the order which he had signed, but he would not be positive that it was not the same one made by him. By the deposition of A. A. Wright, which was read in evidence in behalf of plaintiff, it was shown that said A. A. Wright was the president of the plaintiff, and had the management of the affairs of the plaintiff's business in the United States; that, in the early part

of 1891, he caused to be mailed to the defendants a letter soliciting an order from them for the pins manufactured by the plaintiff, and that in said letter there was inclosed a blank form for an order, and a sample copy of the pins; that on April 11, 1891, the plaintiff received a letter from Brice & Donehoo, written on the blank form of order sent them by the plaintiff, as follows: "Alfred Shrimpton & Sons, Limited. Pin Department. 278 Church Street, New York City. Please put up for us 5 great gross papers of pins, 360 pins in a paper, with our advertisement printed at the head of each paper, and between the rows, in following sizes, 'Assorted'." Then follow the directions for the advertisement on the papers of pins. This order was signed "Brice & Donehoo." The deposition of the said A. A. Wright further tended to show that, after obtaining from its mercantile agency a report of the defendants which was satisfactory, he wrote a letter to Brice & Donehoo on April 21, 1891, acknowledging the receipt of their order, and stating that he had sent it to the factory to be filled. This letter was introduced in evidence. It was further shown by the testimony of this witness that plaintiff shipped the pins to Brice & Donehoo, but that no part of the indebtedness from the defendants to the plaintiff had ever been paid or discharged.

The eleventh direct interrogatory propounded by plaintiff to witness A. A. Wright was as follows: "Please make a full and elaborate statement of any other fact or facts within your knowledge that would be of benefit to plaintiff in this suit." To this interrogatory the witness answered: "I would state that the pins prepared and shipped by us to Brice & Donehoo, in compliance with their order, are almost worthless to any one but them, on account of the special printing which each and every paper contains. We could not resell them, as no merchant will handle goods with another's advertisement on them." On motion of the defendants, the court excluded from the jury this answer, and to this action of the court the plaintiff duly excepted. The second interrogatory propounded by the defendants to the witnesses A. A. Wright and D. E. Wright, who was the secretary of the plaintiff, was as follows: "Did you make any investigation of the financial condition of Brice & Donehoo before sending off or accepting their order? If so, how did you make this investigation, and what did you ascertain? Did you learn the kind of business in which they were engaged, and to what extent? If so, what was the result of your investigation? Is it common to ship a country merchant as many pins as you shipped Brice & Donehoo?" The plaintiff objected to this cross interrogatory, because it calls for immaterial, illegal, and irrelevant testimony; but the court overruled this objection and the plaintiff duly excepted. The third interrogatory

propounded to these two witnesses was as follows: "What is the usual amount of pins ordered by country merchants, carrying a stock of four, five, to ten thousand dollars, dealing in general merchandise?" To this cross interrogatory the plaintiff objected on the same grounds, and duly excepted to the court's overruling this objection. The fourth and fifth interrogatories propounded to said witnesses were as follows: "Cross Interrogatory 4. Is it not a fact that you never received an order at any time from any country retail merchant for the amount of pins shipped to defendants? Did you at any time ever ship as many pins to any retail country merchant as shipped by plaintiff to defendants, and have no trouble with the order? Cross Interrogatory 5. What is the amount of pins usually ordered by retail country merchants, who carry a stock of general merchandise of four, five, to ten thousand dollars? Is it not a fact that an order of as many pins as plaintiff shipped defendants would be a very unusual order for a party or firm to make who is engaged in a country retail trade with a stock of general merchandise of from four, five, to ten thousand dollars?" To each of these cross interrogatories the plaintiff separately excepted, because each called for immaterial, illegal, and irrelevant evidence. The court overruled each objection, and the plaintiff separately excepted to each ruling of the court. The plaintiff moved to exclude the answers to each of these cross interrogatories from the jury, and separately excepted to the court's overruling each of these motions.

The bill of exceptions recites that, "after the closing of the evidence, and before the argument of counsel was commenced, the court announced that he limited the argument of counsel in the cause to thirty minutes on a side. The counsel for plaintiff objected to being limited in the argument of the cause to judge and the jury to so short a time, and the court overruled the objection, and enforced the limit, and to this action of the court plaintiff duly excepted." The court, in its general charge to the jury, instructed them, among other things, as follows: "If you believe from the evidence that the defendants, in making their order, made a mistake in the amount of pins, and ordered more than they intended to order, and that the plaintiff knew that such mistake was made, and, notwithstanding such mistake and knowledge, filled the order and shipped the pins, there was not such a coming together of minds as would constitute a contract, and the defendants were not bound to receive the pins, and, if they refused to receive them, and did not receive them, they are not liable to pay for them." To the giving of this part of the general charge the plaintiff duly excepted, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(1) If the jury believe the evidence, their verdict must be in

favor of the plaintiff. (2) If the jury believe the order purporting to be signed by Brice & Donehoo is genuine, their verdict must be for the plaintiff. (3) The burden of proof is upon the part of the defendants to show that the order purporting to be signed by Brice & Donehoo is not genuine. (4) If the jury believe from all the evidence in the case that the order was made, the plaintiff is entitled to recover the debt, and interest thereon. (5) If the principals, by their declarations or conduct, authorized the opinion that they had given more extensive powers to their agent than were in fact given, they would not be permitted to avail themselves of the information. (6) If a principal clothes his agent with authority calculated to induce others to believe that the agent has full power to act, the principal must be bound thereby; otherwise, third persons, acting in good faith, might be injured. (7) If the jury believe from the evidence that Bynum had authority to make the order on plaintiff for pins, although he made a mistake in the amount of the pins, the defendants would be liable. (8) If the jury believe from the evidence that the contract attached as an exhibit to the deposition is genuine, and was signed by Brice & Donehoo, or by their authority, plaintiff is entitled to recover. (9) If the jury believe from the evidence that the letter received by Brice & Donehoo, in which was inclosed a blank order and a sample paper of pins, also contained a soliciting letter from plaintiff like that exhibited in evidence, this was a proposition by plaintiff to sell, and the order to purchase, if any was made by defendants, was an acceptance of that proposition."

Emery O. Hall, for appellant. Inzer & Ward and Inzer & Montgomery, for appellees.

COLEMAN, J. The appellant sued in assumpsit to recover the value of a quantity of pins claimed to have been sold and delivered to the defendants, who were merchants doing business at Murphree's Valley, Ala. The complaint counts in the common form for goods, wares, and merchandise sold and delivered, and also upon a stated account. The trial was had upon a plea of the general issue. The account introduced by plaintiff showed an indebtedness for "4 great gross and 135½ papers pins, at 3½ cents per paper. \$520.10." The evidence showed that a Mr. Bynum was a clerk for the defendants, and that Attalla was the depot at which defendants received their goods, and the place to which the pins were shipped. The defendant Brice, being on the stand as a witness for himself, was permitted to testify that he "told Mr. Bynum to order five great gross of pins." An order for five great gross papers of pins was shown him, signed "Brice & Donehoo," and he testified that he "did not recollect that he saw

the order or directed Mr. Bynum to sign the order shown him." We are of opinion the court erred in permitting the question and answer. What was stated to Mr. Bynum was mere hearsay. Such evidence was calculated to impress the jury that it was corroborative evidence. The court erred in permitting the defendants to introduce in evidence a note written by the defendants to the agent at Attalla, in regard to the pins; also, in admitting evidence "as to how many pins the firm of Brice & Donehoo usually sold in a year," and "as to their financial rating and annual business," and whether the "amount of pins alleged to have been purchased was a reasonable purchase for their trade." The issue in this case was whether they purchased the pins or not, and this issue could not be properly determined by the consideration of questions affecting the policy or wisdom of the purchase, or the financial rating of the defendants, or the amount of goods suitable for the trade of the defendants. What is here said applies also to the action of the court in overruling objections to cross interrogatories propounded by defendants to the witness A. A. Wright and D. E. Wright, the object of which was to elicit similar testimony. The objections were well taken, and should have been sustained.

The court did not err in excluding the plaintiff's answer to the eleventh direct interrogatory to A. A. Wright. Whether the special advertising of defendants' name and place of business placed upon the papers of pins rendered them unsalable to other merchants sheds no light upon the issue before the jury. There was no error in excluding that part of the answer of the witness D. E. Wright to the fifth interrogatory to which an exception was reserved. The court did not err in receiving the testimony of the witness Donehoo "that, in his judgment, the signature to the order was not in the handwriting of either Brice or Donehoo." Neither of the counts of the complaint counts upon the order for the pins as the foundation of the suit, as provided in section 2770 of the Code. It was admissible in evidence collaterally to sustain the cause of action as laid. When thus offered in evidence, the genuineness of the instrument may be disputed without a sworn plea. *Garrett v. Garrett*, 64 Ala. 263. Under the evidence of the witness Wright, the production of the envelope in which he testified the order was received, with its postmarks at Murphree's Valley; the admission of Bynum that the address was in his handwriting; and the order itself,—in connection with the evidence of Donehoo that the red lines "resembled Brice's handwriting," and other circumstances,—were matters for the consideration of the jury in determining the genuineness of the order.

We cannot say the court abused its discretion in limiting counsel to 30 minutes

on each side for argument, but we suggest that, in the exercise of the use of its discretionary power in this respect, it is the better practice to allow ample time for a full discussion of the facts of the case.

The court erred in that part of the oral charge to which an exception was reserved. If the defendants in fact ordered five great gross papers of pins, through a mistake on their part as to how many pins were included in the order, such a mistake cannot be visited upon the plaintiff, who filled the order as written. Excluding the illegal evidence admitted, and there is not a scintilla of proof tending to show that plaintiff had any notice or knowledge that there was any mistake in the order. Under the evidence in this case, charges Nos. 2 and 8, requested by plaintiff, should have been given. Charge 3 was properly refused. The suit was not upon the order. The burden rested upon the plaintiff to prove it was genuine. The fourth charge omits the predicate, if the "order was made by the defendants or their agent." This was a prerequisite to plaintiff's right to recover, and was a disputed fact.

The principles of law asserted, and intended to be asserted, in charges 5, 6, and 7, will be considered together. The general rule is that a person dealing with an agent does so at his peril, and is bound to know the extent of the agent's authority, but this rule is not construed to relieve a principal from liability for an act of his agent, acting within the scope of his authority, even though the act done be against instruction, of which third parties had no notice; nor can secret instructions affect the right of third parties dealing in good faith with an agent. 1 Am. & Eng. Enc. Law, 350; *Insurance Co. v. Young*, 58 Ala. 478; *Whilden v. Bank*, 64 Ala. 1, 33; *Railroad Co. v. Hill*, 76 Ala. 303; *Brewing Co. v. Caffee*, 93 Ala. 132, 9 South. 573. We are of opinion the facts of the case and the testimony of the parties call for the application of different principles from those which apply when a party knowingly deals with an agent. The evidence shows that the transaction began by the plaintiff sending out from New York a printed circular to defendants, which was received by them, containing blank orders for pins, and a space for the insertion of such advertisements as the purchaser might desire, to be placed upon the papers of pins purchased. This printed circular began as follows: "Please put up for us — great gross papers of pins, 360 pins in a paper, with our advertisement printed at the head of each paper and between the rows," etc. The only blank in the printed order, to be filled by the purchaser, was for the number of "great gross papers of pins," and such advertisement as was desired by the purchaser. The blank in the present case was filled with the figure "5." It is not denied that defendants authorized their clerk to make

an order on one of these printed forms, and that the order was for "5." Their contention is that they instructed their clerk to make the order for "5 great gross of pins," instead of "5 great gross papers of pins." The order was not signed, "Brice & Donehoo, by Bynum," or otherwise, to indicate that it was the act of an agent, but it was signed "Brice & Donehoo." There is no evidence in the record that plaintiff had any notice that it was dealing with an agent or knew that defendants had a clerk or agent connected with their business. The only evidence on this point is that plaintiff mailed to Brice & Donehoo a printed form for an order for the pins, and the printed form came back filled out to their address, from Murphree's Valley, signed "Brice & Donehoo." It is not pretended by defendants that their clerk Bynum did not have authority to sign the firm name in the manner it was signed to the order, neither was their objection to the order on the ground that it was signed Brice & Donehoo. We think it sound in law and morals that if the defendants authorized the clerk to sign the name of Brice & Donehoo to the order, so that it would purport to have been signed by a member of the firm, and not by an agent, the firm are bound to the same extent as if in fact it had been signed by the firm. Under this principle, if the order was signed by the firm, or by an agent of the firm, with authority to sign it, and there was a mistake in the quantity of pins ordered, the plaintiff not being advised of such mistake, the consequences must fall upon the defendants, and not upon the plaintiff. This is the principle of law which should govern under this phase of the evidence. For the errors noted, the case must be reversed. Reversed and remanded.

(108 Ala. 121)

HOWARD HARRISON IRON CO. v. TILLMAN.

(Supreme Court of Alabama. May 2, 1894.)
GARNISHMENT—JUDGMENT—SUFFICIENCY OF EVIDENCE.

A payment by the cashier of a garnishee to the judgment debtor, out of money owing by the garnishee to such debtor's employer, at the latter's request, of wages due the debtor, does not justify judgment against the garnishee.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by R. J. Tillman against Jule Nicholson, in which there was a judgment for plaintiff, and the Howard Harrison Iron Company was summoned as garnishee. From a judgment against it, the garnishee appeals. Reversed.

Thomas M. Owen, for appellant. Lawrence Y. Lipscomb, for appellee.

HEAD, J. The judgment against the garnishee (appellant) was clearly erroneous. It

answered, denying indebtedness. Plaintiff contested the answer, and an issue was made up, and tried by the court without a jury. The evidence is without a shadow of conflict that the garnishee was not in any manner whatever indebted to the defendant, Nicholson, and had no goods, money, or effects, belonging to him, in its possession. One Johnson, the employer of Nicholson, and other hands, procured C. W. Harrison, as an act of accommodation, to make out his pay roll for him, and pay off his hands. Harrison was at that time cashier of the garnishee. The garnishee owed Johnson a sum of money, and when the time came for Harrison, as cashier, to pay it, Johnson made the request to him, as above stated, to make out his pay roll, and pay off his hands for him, out of the money coming to him (Johnson). Harrison did as requested, and handed to Nicholson and the other hands the sums owing them, respectively, by Johnson. We suppose, from the argument of appellee's counsel, that the court acted upon the idea that the money paid Nicholson was a sum of money in the hands of the garnishee, belonging to Nicholson, by reason of the request of Johnson to Harrison to pay Nicholson the amount for him, which it was thereafter the duty of garnishee to retain to answer the garnishment. Most clearly, such was not true. The money did not become Nicholson's until it was paid to him. Johnson, not the garnishee, was Nicholson's debtor. He, by and through Harrison, paid the debt. In legal effect, the payment, so far as concerned the garnishee, was a payment to Johnson of a sum due and owing to him. It was a payment to Johnson's order, which was the same as payment to him. Upon no principle can the judgment be upheld. If it had been otherwise properly rendered, the amount of the judgment is incorrect. The plaintiff's judgment against Nicholson was for \$5.60 and costs, August 12, 1891. The judgment rendered by the circuit court against the garnishee was for \$15.10 and all costs. The judgment of the circuit court is reversed, and a judgment will be here rendered discharging the garnishee. Reversed and rendered.

(46 La. Ann. 1146)

NEW ORLEANS GASLIGHT CO. v. CITY OF NEW ORLEANS et al. (No. 11,490.)

(Supreme Court of Louisiana. May 21, 1894.)

TAXATION IN CITY—REVISION OF ASSESSMENTS—DUTY OF COMMITTEE—HEARING OF ASSESSORS—DECISION OF COUNCIL.

1. Act No. 106 of 1890, § 26, requires, in matters both of reduction and increase in assessments by the committee on revision of assessments, that the "board of assessors" should be heard before that committee reaches any determination in the premises. A formal notice, such as is given to the individual taxpayer, should, in each case of proposed alteration, be served upon that board, calling upon it to show cause why the alteration should not be made. It is the duty of the board to present a writ-

ten answer in each case, giving its views in respect to the same explicitly and in detail. It is the duty of the committee to receive and file these answers, and after taking each into consideration, in connection with such other facts relative to the subject-matter as may be before it, to reach a separate conclusion in each case, and annex these answers to its report, and forward them, as part of the same, to the common council.

2. The committee on revision should keep a record of all its proceedings, and the evidence upon which it acted. The work of the committee is only by way of inquiry and investigation. Its action is not final. Its recommendations are submitted for approval or rejection by the council. It is the action of the council, and not the committee, which determines what should be done with the special assessments designated. The council is expected to bring to bear both knowledge and judgment in its conclusions, and not merely register those of the committee; and this cannot be done unless the latter communicates to it its reasons, and the evidence upon which it acted. The report of the committee, both as to increase and reduction of assessments, should have attached to it the affidavits of a majority of the committee "that the valuations fixed by it are the valuations provided by law."

3. In reporting back, at a date not later than the 18th of April, as required by law, to the assessors, the report of the committee on revision, the action of the council on that report must be simultaneously reported.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by the New Orleans Gaslight Company against the city of New Orleans and others to obtain a cancellation of an increase in an assessment. Judgment for defendants, and plaintiff appeals. Reversed.

Charles F. Buck, for appellant. George W. Flynn, Asst. City Atty., and E. A. O'Sullivan, City Atty, for appellees.

NICHOLLS, C. J. Plaintiffs allege: That in due time they made return, for purposes of state and municipal taxation, of their property, and that the assessment of all their property—real and personal—and franchises was made and completed, in regular and due course of law, as provided by the statutes, by the board of assessors, at a total valuation of \$2,244,440. That, while they considered this very high, they did not protest, but accepted and acquiesced therein. That on the 6th April, 1893, the corporation was notified, through their president, to appear before a committee of the city council, styling itself the "Committee on Budget and Revision of Assessments," on the 8th of April, 1893, at 11 o'clock a. m., pretending to act under the provisions of section 26 of the revenue act of 1890 (being Act No. 106 of that year), then and there to show cause why an increase should not be placed upon the assessment of their personal property over and above that made by the board of assessors. That they had no notice or information of any specific character as to the particular property upon which that committee proposed or intended to make an increase of assessment; but, through their

president, they answered said notice in person, appearing before the committee on the date, and at the time mentioned, when he was informed that it was intended to increase the assessment placed upon the "franchise," so called, of the corporation, by the sum of \$100,000. That their president protested in the meeting of the committee against any increase, and after discussion he retired; but the action of the committee was not announced, nor was the corporation informed or notified what, if any, action the committee would finally take. That for the reasons above stated, and the informal manner in which the committee proceeded, they had no opportunity to file any formal or written protest before it; but, in view of the provisions of said section 26, which require that the revision committee shall report its action to the city council for approval or rejection, they addressed a formal written protest to the mayor and common council, in anticipation of a report that said committee might make, against any contemplated increase. That they had no other means or opportunity than this to protest. That at a meeting of the city council held on the 17th of April, being the same meeting at which the corporation's protest was presented, the committee on revision made a report containing simply the result of its conclusions on a large number of assessments under consideration, and stating the amounts to which it had increased various assessments, without any other reason or explanation for its action, among which was an increase of \$100,000 on the franchise of the corporation. That the city council did not heed the protest, but approved the increase, and the same stands now assessed against them as a basis for state and municipal taxes for the year 1893. That the increase upon the valuation of the franchise, in excess of its just and true value, which had been previously fixed by the board of assessors, is absolutely wanton and arbitrary, ascertained and adopted upon no rule or principle of computation, and unjust and oppressive, for the reason that in making said increase on said franchise the committee followed no fixed or general rule, but acted arbitrarily in reference to each and every corporation enjoying franchises of money value, reducing some, and only increasing the present plaintiff corporation, without basis or other rule of action than the arbitrary will of the committee. That as a matter of fact said increase is excessive in value, and should be reduced to the amount originally fixed by the board of assessors upon the movable property and franchise,—to the sum of \$1,796,650. That the attempted increase is illegal, null, and void because the conditions provided by the law under which the power of the committee on revision or of the city council arises did not exist. That under section 26 of the revenue act, under which the committee acted, it had power to

increase only assessments imperfectly or improperly made. That there was no notice, allegation, or pretence that the said assessment was imperfectly or improperly made. That in fact the valuation of the board of assessors was fixed after full hearing in regular form, in compliance with all the requisites of the law. That the said attempted increase was null and void for the reason that the committee did not comply with the requirements of section 28 of Act No. 106 of 1890, particularly in this: (1) There was no hearing or conference between the committee and the board of assessors in reference to any contemplated increase by the committee, whereas the law expressly provides that the board of assessors shall be heard before any increase in valuation can be made and reported by the committee. (2) The action of the committee of revision, as well as that of the common council, at its meeting on the 17th April, 1893, at which the report of the committee was received and approved, was absolutely null and void, because the said committee, or the members constituting the same, had not qualified as required by law for the purposes of acting as a committee of revision of assessments, and particularly because the report of the committee did not contain the affidavit of the committee, or any members of the committee, or of a majority of the committee. That the failure on the part of the committee to attach their special affidavit to the report made to the council, as required by the twenty-sixth section of Act No. 106, and upon which report the council was required to act, either by way of approval or rejection, rendered the action taken absolutely null and void, and the increase referred to invalid, and of no effect. Plaintiffs therefore allege that the increase of \$100,000 on the franchise or franchises should be canceled for the reason that the same is excessive, inequitable, and unjust, on its merits; and, secondly, that in any event the proceedings on the part of the committee of revision and of the city council, purporting to effect said increase, is null and void, for the reason above set forth, and should be so decreed. Plaintiffs declare that they have paid the taxes of 1893 upon the assessment originally made by the board of assessors, reserving the right to make the present contest over the increase made. The prayer of the petition is that the board of assessors, the state tax collector of the first district, and the city of New Orleans be cited, and that there be judgment ordering the cancellation of the increase upon the assessment of the franchise attempted to be made through the committee of revision and the city council, and decreeing the same, in any event, to be null and void, for failure of compliance with the requirements of the law in the premises. The city of New Orleans, after pleading the general issue, further answering, said that it acted under the provisions of law in increasing

plaintiffs' assessment, because the assessment made by the board of assessors was insufficient in amount, which fact was within the knowledge of the committee on budget and assessment, and in making the supplemental assessment all the forms of law were complied with. It prayed for judgment declaring the supplemental assessment to be valid, and dismissing plaintiffs' demand. The other defendant, for answer, filed a general denial. Judgment was rendered in the district court rejecting plaintiffs' demand, and the plaintiffs have appealed.

The twenty-sixth section of Act No. 106 of 1890, referred to in the pleadings, is as follows: "All tax payers in the parish of Orleans shall have the right to appear before a standing committee on assessments of the city council of New Orleans, between the 21st of March and the 10th day of April, inclusive, of the year in which the assessments are made, and in the parishes before the board of reviewers, as provided for in this act, during the session of said board, and be heard concerning the description of the property listed and the valuation of the same as assessed; and they shall have the right of testing the correctness of their assessments, before courts of justice in any procedure which the constitution and laws may permit; but the action to test such correctness shall be instituted on or before the first day of November of the year in which the assessment is made. In all suits for the reduction of assessments the state tax collectors of the respective parishes shall be made parties. The said committee on assessment shall meet on the 21st day of March, or if a holiday, then on the next succeeding day not a legal holiday, of each year, in the city of New Orleans, to consider, and examine into the applications of those owners of assessed property, who believe the assessors' valuation to be in excess of and beyond the actual cash value of the property assessed. Said committee shall determine upon said applications, but their duties are confined entirely to the question of valuation and description, and report their action at once to the city council for approval or rejection; said report to contain the affidavit of a majority of the committee that the valuations so fixed are the valuations provided by law; and decision by the council shall be final, unless set aside in accordance with article 203 of the constitution. The said committee on assessments shall be and are hereby empowered to increase any assessment imperfectly or improperly made; provided, that before said increase is made the tax payer be served with notice to appear before said committee within three days and show why such increased assessment should not be made. In passing upon any application for reduction in valuation, and before determining upon an increase in valuation, the board of assessors must be heard in reference thereto, and they are ex-

pected to be present at all sessions of the committee. No application to be considered by the said committee unless said application has been first made to the board and refused. In all cases the action of said committee to be finally reported back from the council to the assessors not later than the 18th of April, or the revision to be null and void."

On the 6th of April, 1893, the committee on assessment served on the plaintiffs a notice to the following effect: "You are hereby notified, pursuant to the provisions of Act No. 106 of the General Assembly of 1890 (section 26), that the committee propose to increase the assessment now placed by the board of assessors on your personal property situated in the 5th assessment district, and to show cause on the 8th day of April, 1893, at 11 a. m., why the said increase should not be made. * * * No notice of this proposed action appears to have been given to the board of assessors. On the 11th of the same month the plaintiffs addressed the following communication to the mayor and common council of the city: "Gentlemen: About ten days ago the president of the New Orleans Gaslight Company was served with a notice, purporting to come from the committee on revision of assessments, to appear before it, and show cause why the assessment upon the property of the New Orleans Gaslight Co. should not be increased. I appeared before the committee, protesting against any increase, and expressing my willingness to accept as final the assessment made by the board of assessors, although even that was higher than it should be. I have not been officially advised of any action on the part of the committee, but learn that the committee had undertaken to increase the assessment on franchise \$100,000, and that its report is before your honorable body for approval or rejection, as per section 26 of Act No. 106 of 1890. I deem it my duty, both by reason of my conviction of the wrong contemplated by this increase of assessment, and for the purpose of reserving the legal rights of the New Orleans Gaslight Co., to contest the same before the courts, to solemnly and earnestly protest against the assessment, and ask its rejection by your honorable body. The section 26, above referred to, gives your committee and yourself the power to increase an assessment 'imperfectly or improperly made.' It was not contended that there was an imperfect or improper assessment, and no investigation was had, developing any facts justifying the increase attempted by your committee. The same is purely arbitrary, and without foundation of fact to stand upon. And your petitioner further represents that it is utterly null and void and illegal, as not coming within the power of your honorable body, through your committee, under the text of the law, and for other reasons which will be duly urged if this protest is unheeded, and

petitioner compelled to resort to the courts of law." The communication was submitted to the city council by the mayor at its session of April 18th, and immediately referred by it to the committee on revision of assessments. No further notice or action upon it seems to have been taken by the council. The council had in the meantime held a session on the 11th of April, at which the "committee of revision of assessments" made a report containing changes made by it in the matter of 95 assessments. The report, having been received, was recommitted to the committee, under the rules. On the 18th of April the council, at its session of that date, took up the report of the committee, and the same was, as a whole, adopted without discussion, a motion to take up and consider the various items of the report separately having been lost. The chair then instructed the clerk of the council to deliver the report of the committee on revision of assessments, taking therefor the receipt of the secretary of the board of assessors, which was done, as the minutes of that day contain a copy of the receipt for the same by Fendel Horn, signing as secretary of the board of assessors. The board of assessors had held a session itself on the 18th, but had adjourned after having authorized and directed Mr. Fendel Horn to receive the report from the council.

Our knowledge of what took place at the various sessions of the committee on revision of assessments is of the most meager kind, and derived entirely from the testimony taken on the trial of this case; the committee evidently considering itself not called upon to keep any record of its proceedings, or to assign any reasons in making its report to the common council, as to the evidence upon which it acted, or the grounds upon which it proceeded. We think it very clear that the board of assessors was never officially notified that the committee proposed to increase or alter the assessment of the plaintiffs' property, and called upon to show cause why this should not be done, and that the only action taken in the matter, so far as the state assessors were concerned, was through informal, desultory conversations with the president of that board, or some of its members. The statute of 1890 requires, both in matters of reduction and of increase of assessment, that the board of assessors should be "heard in reference thereto" before the revision committee reaches any determination in the premises. We are of the opinion that a formal notice, such as is given to the individual taxpayer, should, in each case of proposed alteration, be given to the board of assessors, and that it is the duty of that board, in each case, to make a reply in writing giving, explicitly and in detail, its views in regard to the alteration, and the reasons and grounds upon which these views are based; that it is the duty of the revision committee to receive and file the answer,

and after taking it in consideration, in connection with such other facts relative to the subject-matter as may be brought before it, to annex it to its report, and forward it to the common council, as part of the same. Knowledge by the board of assessors, brought to it through the mere presence of either all or some of its members at sessions of the committee, is something other and different from the knowledge of the board, conveyed to it through formal notice. The presence of the board at the meetings is suggested by the law as a thing proper to be done, but it is not exacted; while notice is a matter of obligation, as is the duty of the board to reply to the notice. We think the revision committee greatly erred in supposing it was under no obligation to keep a record of its proceedings, and of the evidence upon which it acted. It is very true the statute does not, in terms, order it so to do, but the obligation to do this results from the nature of the duty it was performing. Any action which the committee might take would not be final. Its work was purely by way of investigation and inquiry. Its recommendation had to be submitted for rejection or approval to the council, and it was the conclusions reached by the council, not those of the committee, which determined whether particular assessments should be changed or not. The common council was not to be a mere automaton in this matter, and called upon only to authenticate what the committee had done, but it was expected itself to bring to bear both knowledge and judgment in the premises. It is impossible for it to do so where the committee fails to communicate to it any of the reasons and any of the evidence upon which its recommendations rest, and only forwards to the main body conclusions of its own, and not facts. We think the report which the committee filed should have been accompanied by the affidavits of a majority of the committee to the fact "that the valuations fixed by it are the valuations provided by law." We see no reason why a distinction should be made in this respect between a report calling for reductions of assessment and those calling for an increase. If the oath taken by the members of the committee, as members of the council, was deemed a sufficient guaranty for the fidelity of their official action, as committeemen, in the case of increase, as suggested by defendants, it certainly should be neither less nor more so in the matter of reductions. The general assembly has thought proper to require an additional oath, probably so as to impress them with their special and direct responsibility for the matters placed in their charge. We think it intended this affidavit should be made by the committeemen whether their report was to reduce or to increase assessments. Though the general assembly did not find occasion to repeat or reiterate these requirements, it is clearly and easily inferable from the text

and context, when construed together, that such was the legislative purpose and intent. Only one single report is spoken of by the statute, and to this single report the affidavit is ordered to be attached. We took this same view in *State v. Lochte*, 45 La. Ann. —, 14 South. 215, where an argument very similar to that which is now urged by defendants was pressed upon us. In the absence of the affidavit and of the declaration, certified to by a majority, "that the values as fixed by the committee were those provided by law," and in the absence of any evidence or reasons, the committee was free to change arbitrarily, of its own will, or through favoritism, dislike, or prejudice, such assessments as it might select for that purpose. In the case at bar the common council, without any basis whatsoever, except the bare report itself of the committee, fortified neither by affidavit, certificate, declaration, reasons, or testimony, took up, and adopted as a whole, without investigation or examination, so far as their proceedings show, 95 alterations of assessment made by the committee, most of them reductions. Such a condition of things was not contemplated by the general assembly. In examining the proceedings of the council of the 18th of April, we notice that the paper delivered to the secretary of the board of assessors by the clerk of the council was simply the report of the committee on revision of assessments. When the statute required the action of that committee to be reported back from the council to the assessors not later than the 18th of April, it contemplated that the action of the council on that report should be reported back, as well as the report itself. The report, per se, as we have said, has no official force. The committee on revision of assessments of the common council, and the common council itself, have, in their course and action, departed so widely from that pointed out by law as that under which they were to act that that action cannot be sustained or maintained. We do not mean to intimate that an increase of plaintiffs' assessment could not properly and justly have been made, and to the extent which it was made, by the committee and the council, or that either acted oppressively or arbitrarily; but both were called to act under limited powers, and under express limitations and instructions. Where the powers conferred by statute have not been exercised under the circumstances and requirements of the statute, the acts done fall, for want of authority, even though they would have been sustained, as right, had legal conditions as to action been complied with.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the action of the committee on budget and revision of assessments, increasing the

assessment for the year 1893 upon the franchise of the plaintiff corporation, and the action of the common council of the city of New Orleans in adopting the said action of the said committee, contained in its report to said council, be, and the same are, declared null and void, for failure by both the said committee and the common council to comply with the requirements of the law in respect to the revision of assessments, and it is further ordered that the board of assessors cancel on the books of records the said attempted increase of assessment upon the plaintiffs' franchise.

(46 La. Ann. 262)

Succession of HERNANDEZ. (No. 11,420.) (Supreme Court of Louisiana. May 14, 1894.)

DIVORCE FOR ADULTERY — PROHIBITION OF MARRIAGE OF OFFENDERS — EXTRATERRITORIAL EFFECT—NONRESIDENTS.

1. The prohibition of article 161 of the Code, to the effect that, in case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.

2. The prohibition of the statute of New York to the effect that no second or other subsequent marriage shall be contracted by any person, during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extraterritorial effect, being a penal statute; and it cannot be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and state of New York,—the contracting parties announcing their intention to be to thereafter reside in Louisiana, and afterwards actually residing there.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

In the matter of the succession of Joseph Hernandez. Contest between Augusta L. Church, the alleged surviving widow of deceased, and the legal heirs of deceased by a former marriage. Judgment for said widow, and the heirs appeal. Modified.

Gilmore & Baldwin and Albert Voorhies, for appellant Fournier minors. Albert Voorhies, for appellant Charles Hernandez. Frank N. Butler, for appellant Mrs. Valentine Hernandez. E. D. Le Breton and Henry Chiapella, for appellant Walter Hernandez. Henry Denis and Henry P. Dart, for appellee widow of Joseph Hernandez.

WATKINS, J. Originally, this suit had, for its object, recovery by Augusta L. Church, the alleged surviving widow of the deceased, of the money and movable effects of which she was donee by testamentary bequest. But the legal heirs of the deceased by a former marriage incorporated other issues in their answer, and a reconventional demand;

and same were made the subject of a subsequent direct attack on the claims and pretensions of the plaintiff, which she, in turn, put at issue by answer. On these pleadings and issues there was a general judgment against the heirs, and in favor of the original plaintiff and donee, and the heirs have appealed.

1. The will of the deceased is of the following tenor, viz.: "New Orleans, December 27th, 1890. This is my olographic will. I give and bequeath to my wife, Augusta L. Church, all the movable effects contained in our house, corner Bordeaux and St. Charles avenue, with the exception of the family paintings, which I give to my son Charles,—he to divide them with his brother and sister. I also give and bequeath to my wife the sum of ten thousand dollars. The balance of my estate I bequeath to my children, share and share alike. I appoint as my executors my wife and my son Charles; they to have full charge of my estate, without giving any bonds. [Signed] J. Hernandez." The grounds on which the heirs attack the testamentary bequest in favor of the plaintiff are best stated in the language of their answer and reconventional demand, and in that of their petition attacking plaintiff's capacity to receive by will, and the legality of her title to a community half interest in the property left at the demise of the decedent. The following is an extract from their answer, viz.: "That a final judgment was rendered and signed on the 4th of October, 1881, or about that time, in the suit entitled Joseph Hernandez v. Rosema D'Aunoy, his wife, No. 70 of the docket of the 24th judicial district court for the parish of St. Bernard, in favor of the defendant in said suit; and, on her demand in reconvention therein, against the said plaintiff, Joseph Hernandez, decreeing a separation from bed and board, and a final divorce a vinculo matrimonii, dissolving forever the bonds of matrimony existing between them, as is shown by a duly-certified copy of said judgment, herewith filed, and made a part of this answer, marked 'Exhibit A.' That the aforesaid judgment was rendered, and the divorce therein granted allowed, in favor of the said Rosema D'Aunoy, wife of said Joseph Hernandez, and against her said husband, on the ground of adultery. That the petitioner herein, now styling herself as Mistress Augusta Lodolska Church, widow in community of Joseph Hernandez, deceased, but, in times past styling herself as Mistress Ogden and as Mistress Ida Curtis, was the chief accomplice in adultery with the said Joseph Hernandez, and, at various times and places anterior to the rendition of the aforesaid judgment of divorce, had illicit sexual intercourse with the said Joseph Hernandez, viz. in 1879, 1880, and 1881, and in other years prior thereto, in the city of New York, at the St. James Hotel and elsewhere, and in the city of New Orleans, at the St. Charles Hotel

and elsewhere, time and time again. That owing to the said judgment of divorce granted as aforesaid in favor of Mistress Rosema D'Aunoy, wife of said Joseph Hernandez, against her said husband, and on account of said petitioner's complicity in adultery with said Joseph Hernandez, the said petitioner and the said Joseph Hernandez became, forever, legally incapable of contracting marriage with each other, and the so-called marriage relied on by petitioner, if ever contracted, which is herein specially denied, was, is, always has been, and always will be, absolutely null and void, and without any lawful force or effect. Further answering, these respondents say that no community of acquets and gains ever existed between the said petitioner and the said Joseph Hernandez; that said petitioner never had any right, title, interest, or claim in or to any of the property, real, personal, or mixed, appertaining or belonging to the estate of the late Joseph Hernandez; that the so-called legacy of ten thousand dollars and the so-called legacy of the movable effects in the residence of the said Joseph Hernandez, at the corner of St. Charles avenue and Bordeaux street, in this city, claimed by petitioner in her aforesaid petition, were and are unlawful, and without any force or effect, and should be so decreed and held by the judgment of this honorable court. Respondents, further answering, show that immediately after the aforesaid judgment of divorce was rendered and executed the said Joseph Hernandez had held and owned not less than two hundred thousand dollars (\$200,000), real and personal property, and at the date of his death, in April, 1893, all that could then be found, and all that has since been discovered, of his entire estate, will not equal in value the sum of one hundred thousand dollars (\$100,000); that from 1881 to April, 1893, the said Joseph Hernandez was living openly with the said petitioner, Mistress Augusta Lodolska Church, as man and wife, notwithstanding the prohibition aforesaid, which inhibited them from living in that way, and from ever contracting the marriage relationship; that during the period aforesaid—that is, since 1881—a large portion of the estate of the said Joseph Hernandez has been illegally wasted and lavished upon the aforesaid petitioner, owing to her unlawful and undue influence over the said deceased, and the diminution of said estate has been largely occasioned by petitioner's extravagant living, and by the many large and unlawful gifts and presents and transfers which the said petitioner illegally obtained from the said Joseph Hernandez; that the so-called legacy of ten thousand dollars (\$10,000), and the so-called legacy of the movables in the residence of the said deceased, claimed as aforesaid by petitioner, composes more than one-third of the entire estate of said Joseph Hernandez so far discovered. That by law the said testator could

not, under any circumstances, have lawfully given the said petitioner more than one-tenth part of the movables of his estate, which portion, and more, the said deceased had long before disposed of, in favor of petitioner, by gift, donation, and otherwise. And these respondents, further answering, say that for the foregoing and other reasons the said petitioner is not entitled to said so-called legacies, or either of them, nor can she have possession or delivery of the same, as claimed in her petition or otherwise; that the gifts, transfers, and donations made by the said Joseph Hernandez to petitioner at various times exceeded fifty thousand dollars, and more than exhausted his ability and power to give or bequeath anything to petitioner by his last will and testament; that all the provisions of said last will containing bequests in favor of petitioner should therefore be canceled, and decreed and held illegal, null, and void. And now reconvening, and becoming plaintiffs in reconvention, respondents pray for judgment on the original demand herein, in their favor, and against petitioner; and, upon the demand in reconvention, appearers pray for judgment in their favor, and against the said Mistress Augusta Lodolska Church, illegally styling herself 'widow in community of the late Joseph Hernandez,' for fifty thousand dollars (\$50,000), or for so much thereof as will be shown on the trial of this cause to have been illegally given, transferred, or disposed of, in favor of said petitioner, by said Joseph Hernandez, and that all such unlawful gifts and transfers may be annulled. And reconvenors further pray for a judgment decreeing the alleged marriage between petitioner and the said Joseph Hernandez to be, and to have always been, an absolute nullity, and without any legal force or effect."

Several months subsequent to the filing this answer, the heirs filed a petition making a direct demand for the annulment of the legacy on the same averments of illegality of the marriage of the plaintiff with their father, and praying for a personal judgment against her for the sum of \$50,000, approximately. As the language of this petition is somewhat more comprehensive than the answer of the heirs, and the charges against the plaintiff are somewhat more elaborated and intensified, we will reproduce the following extracts, namely: "Petitioners further show that the said judgment granting a divorce in favor of said Rosema D'Aunoy against her said husband, Joseph Hernandez, on the ground of his adultery, and the complicity of the defendant herein in adultery with the said Joseph Hernandez as aforesaid, constituted a fixed, absolute, and perpetual barrier to any marriage between the said Joseph Hernandez and the defendant herein. * * * That if any marriage was ever contracted between the said Joseph Hernandez and the defendant herein, which petitioners specially deny, said so-called marriage was

entered into in bad faith on part of said defendant, and in violation of prohibitory laws, and was, is, always has been, and ever will be, absolutely null and void. Petitioners further show that, as there never was any legal marriage between the late Joseph Hernandez and the defendant herein, there was not, and never could have been, any community of acquets and gains between them, and said defendant has not, and never has had, any community rights nor claims whatsoever in or to any of the assets or properties, real, personal, or mixed, appertaining or belonging to the estate of the late Joseph Hernandez." In order to be explicit, we reproduce the prayer of the defendants' petition, namely: "Wherefore, petitioners pray that Mistress Augusta Lodoiska Church, illegally claiming to be widow in community of the late Joseph Hernandez, be cited to appear and answer this petition, and, after due proceedings had, judgment be rendered in favor of petitioners, and against said defendant, decreeing said defendant never to have been the wife nor the widow, in community or otherwise, of the late Joseph Hernandez; furthermore, annulling all bequests contained in the last will and testament of the late Joseph Hernandez in favor of the said defendant, and ordering the entire estate of the late Joseph Hernandez to be distributed among his forced heirs as their interests may appear, regardless of any bequests contained in said will in favor of said defendant; furthermore, decreeing that all the movables and other properties inventoried in this estate be held and adjudged to have belonged exclusively to the said Joseph Hernandez, and to his aforesaid surviving forced heirs, and condemning the said defendant to pay back to this estate fifty thousand dollars (\$50,000), or so much thereof as will be shown on the trial of this cause to have been illegally given, transferred, or disposed of by said Joseph Hernandez to or in favor of said defendant, and that all such unlawful donations, gifts, and transfers be annulled. And, if it be shown that the contract of marriage was ever solemnized between defendant and said Joseph Hernandez, then and in that event that judgment be rendered herein decreeing said marriage to have been always an absolute nullity, and without legal force or effect."

In answer to these charges, the original plaintiff, the alleged surviving widow of Hernandez, states and "avers that she was legally married to the late Joseph Hernandez on the 29th of December, 1881, in the city of New York, by the mayor of said city, and under the laws of that state, and that no impediment of any kind existed against said marriage, either at the time of its celebration, or before; that the charges preferred by the petition of complicity in adultery with the said Joseph Hernandez are false and untrue, and no judgment to that effect was ever rendered, nor was respond-

ent party to any proceeding in which said issue was asserted or maintained; that the petitioners have, ever since her marriage, acknowledged the validity of the same, visited the common domicile daily, and have recognized respondent as the lawful wife of said Hernandez, and they are now estopped from denying the validity of said marriage; that respondent owned, in her own name, when she married the said Joseph Hernandez, property amounting to not less than twenty-five thousand dollars, consisting of money, jewelry, paintings, carriages, furniture, table and bed linen, and household effects; that petitioners are estopped from denying the truth and reality of the acts of purchase by respondent of the two pieces of immovable property situated in the parish of St. Tammany, in this state, in which acts of purchase the said Joseph Hernandez acknowledged and declared that the price was paid with the paraphernal funds of your respondent. Wherefore, respondent prays that plaintiffs' demand be dismissed, with costs, and that there be judgment in favor of respondent, decreeing that she was lawfully married to Joseph Hernandez; that the legacy he made her in his last will is valid and legal, and should be paid to her; that she be recognized as entitled to half of the community property left by him; and that her paraphernal rights be recognized and decreed for such amount, and specific effects and things, as she may prove herself entitled to on the trial of this cause."

These extended extracts from the pleadings best serve to characterize the controversies in this case, and fix the mind of the court on the questions that are to be solved by testimony, much of which was received over objection.

2. The foundation of the attack of the Hernandez heirs upon the claims of the alleged surviving widow depend, primarily and mainly, upon a proper construction of article 181 of the Revised Civil Code, the text of which is as follows, viz: "In case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy; and under penalty of nullity of the new marriage." The contention of the heirs is that the denunciation of that article against the marriage of the guilty party with his or her accomplice in adultery is matter in pais, to be determined by the administration of proof on the trial of a suit that involves the validity of the marriage, while that of the plaintiff is that it is against the marriage of the guilty party named in the divorce suit as an accomplice, or particeps criminis, in the adultery charged as the cause of the action, whether such accomplice be made a co-respondent or not. Hence, upon the determination of the correctness of these contentions, pro et con, depends the admissibility

of the large volume of evidence found in the record; and upon the construction of the cited article of the Code mainly depends the legality of the marriage of Joseph Hernandez with plaintiff on the 29th of November, 1881.

The proofs principally relied upon by plaintiff are the following, to wit: "(1) The last will of the late Joseph Hernandez. (2) The certificate of marriage, issued from the office of the mayor of New York, certifying that the ceremony between Mr. Joseph Hernandez and Mrs. Augusta L. Ogden, of Paris, France, was performed by the mayor of New York on the 29th of December, 1881, at his office in said city. (3) Volume 3 of the Revised Statutes of New York (7th Ed.) tit. 1, art. 1, par. 8, at page 2332, for the purpose of showing the mayor's authority to celebrate a marriage. (4) Her testimony to the effect that the Augusta L. Ogden named in said marriage certificate was the same person as herself."

"The fundamental facts on which the forced heirs of the late Joseph Hernandez rely to overthrow the demands of Mrs. A. L. Church for a delivery of her aforesaid legacy, and, on which they have sought, and are still endeavoring, to annul the same, and to have her aforesaid marriage decreed to be without any legal force or effect, are: (1) The divorce granted Mrs. Rosema D'Aunoy, wife of Joseph Hernandez, by the district court of the parish of St. Bernard, on the 4th of October, 1881, on the ground of adultery; and (2) complicity in adultery on the part of Augusta L. Church with said Joseph Hernandez during his marriage with Rosema D'Aunoy."

In support of the foregoing charges, defendants made the following proofs, viz.:

First. The record, and pertinent facts therewith connected, in the suit entitled Joseph Hernandez v. His Wife, No. 70 on the docket of the twenty-fourth judicial district court, parish of St. Bernard. (a) The aforesaid suit was directed against Rosema D'Aunoy, as the wife of plaintiff, claiming a divorce a vinculo matrimonii on various grounds, which it is needless to mention. The record of this suit was lost or destroyed by the fire which burned the courthouse on the 2d of March, 1884, as is stated in the certificate of the clerk, which is appended to the copy of the minutes of the court,—same alone surviving the fire. (b) The testimony of the presiding judge and the lawyers engaged in the trial of the case was taken with the view of establishing the purport of the pleadings, evidence, and judgment pronounced therein. The judge states his recollection to be that the defendant charged adultery on the part of her husband, and asked judgment of divorce accordingly; that several witnesses were examined; and that the charge of adultery on the part of the husband was fully established, but with what particular person he cannot remember. But he further

amplifies his statement thus: "I have stated all I remember of this case, in the above answer. I cannot state whether the pleadings set forth the name of the person or persons with whom Hernandez was charged with having committed adultery. My impression is that the evidence established that he visited houses of assignation, and committed adultery with prostitutes." The statement of the attorney who brought that suit is: That no one was named as co-respondent, and no one was named or specified as the person or persons with whom the plaintiff had committed adultery, on the faith of which the defendant's reconventional demand was made. That his recollection is that the evidence was not reduced to writing. He remembers that one witness stated, substantially, that he knew of two instances wherein Mr. Hernandez had committed adultery. He states positively that "no witness specified any particular person with whom Mr. Hernandez had committed adultery; and no one stated that he had committed adultery with one Mistress Augusta L. Church, sometimes called Augusta Ogden, and sometimes called Augusta L. Curtis. To the best of his recollection, the name of Mistress Church, Mistress Ogden, or Mistress Curtis was not mentioned on the trial." That "he remembers no evidence introduced on the trial of the cause for divorce tending to show that Mr. Hernandez was guilty of adultery with his second wife, Mrs. A. L. Hernandez, nor anything in the judgment of divorce fixing the guilt of adultery upon the said Mistress A. L. Church, now the widow of Joseph Hernandez."

The testimony of a prominent lawyer who was connected with the case is best evidenced by the following, viz.: "Q. Were you present in the district court of St. Bernard parish on the day when the cause of Hernandez against his wife for a divorce was tried? A. I was. Q. Did you see at the time, or previously, the pleadings in that case? A. I did. Q. Do you remember at this date who was the party named as the accomplice, or guilty person in the adultery there charged by the wife against the husband? A. My memory is that there was no person named. My memory of the suit is that it was a suit by Mr. Hernandez against his wife for a divorce; she reconvening, and claiming a divorce from him on the ground of adultery. Q. I believe your memory is correct. You heard the evidence administered in support of the charge of adultery? A. I did, sir. Q. Do you remember the name of the witness who was examined? A. Yes, I do, sir. Q. What is it? A. L. E. Lemarie. Q. Did he, or did he not, give any testimony implicating Mrs. Augusta L. Curtis,—the present Mrs. Hernandez? A. None in the world, sir." The witness last named was placed upon the stand as a witness in this case, and his statement is in keeping with the testimony of the witness

last quoted from: "Q. Have you no recollection of having mentioned any one in your testimony that you gave on the trial of that cause? A. I don't think I have. I don't think the question was asked me."

One of the attorneys who represented the defendant in the suit was examined as a witness, and produced and filed in evidence, in connection with his evidence, a copy of the defendant's answer and reconventional demand, which is of the following tenor, viz.: "Joseph Hernandez v. His Wife. No. 70. 24th Judicial District Court, Parish of St. Bernard. The answer of defendant herein denies generally each and every allegation in the plaintiff's petition contained, except the fact of marriage and community of property; and now, assuming the character of plaintiff in reconvention, she avers that her said husband, forgetting alike his vows and marriage with petitioner, did commit adultery with certain females, at various times and places, in this city, since the 21st of April, 1880, *the full particulars and specifications whereof have been served in writing upon defendant, and same are made part hereof*; and that by reason thereof, and the law, your petitioner is entitled to a final divorce. Wherefore, she prays judgment in her favor on the demand of plaintiff, and in her favor on the reconventional demand against her husband, Joseph Hernandez, decreeing a separation from bed and board, and final divorce a vinculo matrimonii, forever dissolving the bonds of matrimony now existing between them; that a separation of property be decreed; and that —, notary public, be appointed to partition the community property. And she prays for all such further aid, relief, and remedy as the court is competent to give in the premises. [Signed] W. S. Benedict and E. North Cullom, Attorneys." The counsel's attention having been attracted to the phrase we have italicized, namely, "*the full particulars and specifications whereof having been served in writing upon the defendant, and made a part hereof*," the following question was propounded, and answer given, viz.: "Q. In the copy of the answer that you have referred to in your testimony as having been filed in the case, mention is made of particulars and specifications served in writing upon the defendant, and made a part of that answer. Have you a copy of those specifications? A. There were none filed. Q. There were none? A. There were none filed with the answer." His remembrance of the facts detailed on the trial of that case is much the same as that of other witnesses. The exceptions filed related exclusively to the jurisdiction of the court, and same were overruled.

Notwithstanding the destruction by fire of the original records, the minutes of the court in that case were fortunately preserved; and they contain the judgment of the court, regularly signed, and which is of the following tenor, to wit: "Extract from

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the minutes of October 4th, 1881: The court met this day, pursuant to adjournment. Present: The Hon. A. E. Livaudais, Judge. Joseph Hernandez vs. Rosema D'Aunoy, Wife. No. 70. The expert herein appointed, Edgar H. Farrar, this day appeared in open court, and presented his report, which was ordered filed, and made a part of the record of this case; and this case, being regularly fixed, came up for trial on its merits. Present: A. G. Brice, attorney for plaintiff, and W. S. Benedict and E. North Cullom, of counsel for defendant. When, after hearing pleadings, evidence, and counsel, and the report of the expert herein appointed, the court considering the law and the evidence to be in favor of defendant on the plaintiff's demand, and in favor of the defendant on her reconventional demand, and against the plaintiff, it is ordered, adjudged, and decreed that there be judgment herein, on plaintiff's demand, in favor of the defendant, Rosema D'Aunoy, and against Joseph Hernandez, plaintiff, with costs. And it is further ordered, adjudged, and decreed that on the reconventional demand there be judgment herein in favor of Rosema D'Aunoy, wife of Joseph Hernandez, and against the said Joseph Hernandez, her husband, decreeing a separation from bed and board between the said parties, and a final divorce, a vinculo matrimonii, forever dissolving the bonds of matrimony existing between them. It is further ordered, adjudged, and decreed that the rights of the said Rosema D'Aunoy, wife of Joseph Hernandez, against her husband, Joseph Hernandez, resulting from the community of acquets and gains lately existing between them, be fixed and determined in the sum of fifty-five thousand dollars, and that, in accordance therewith, there be judgment in favor of Rosema D'Aunoy, wife of Joseph Hernandez, and against her said husband, in said sum of fifty-five thousand dollars, with legal interest from date, with all costs. * * * Judgment rendered and signed in open court this 4th day of October, 1881. [Signed] A. E. Livaudais, Judge 24th Judicial District Court of Louisiana."

The foregoing resume of the record and evidence in the divorce suit fully and conclusively demonstrates that the action was not grounded on any charge of adultery in which the present plaintiff was alleged or shown to have been a participant; and, on the plaintiff's theory of the law, she was not an accomplice in the adultery of which the plaintiff in that case was proven guilty,—the purport of the defendants' charge against her being, "*that owing to the judgment of divorce granted, as aforesaid, in favor of Mrs. Rosema D'Aunoy, wife of said Joseph Hernandez, against her said husband, and on account of said petitioner's complicity in adultery with the said Joseph Hernandez, the said petitioner and the said Joseph Hernandez became forever legally incapable of contracting marriage with each other; and*

the so-called marriage relied on by petitioner, if ever contracted, which is herein specially denied, was, is, always has been, and always will be, absolutely null and void, and without any lawful force or effect." (The italics are ours.)

At this stage of the proceedings the defendants offered evidence aliunde to prove that the plaintiff had committed adultery with Hernandez at different times and places, for the purpose and with the object of establishing the fact that, on their theory, she was his accomplice in adultery, in the sense, and within the denunciation, of the Code. To this evidence, counsel for the plaintiff objected, on the following grounds, viz.: "First, that no proof was admissible beyond the scope of the allegations, which claimed the nullity of the marriage exclusively on the ground that the judgment in the divorce suit of Rosema D'Aunoy had established the adultery of Joseph Hernandez with Augusta L. Church; and, secondly, that the prohibition of marriage between the guilty spouse and his accomplice in adultery, as provided for in article 161 of the Code, applies only to the accomplice decreed as such in a divorce suit, and on account of whose adultery with the guilty spouse the judgment of divorce is rendered." An attentive and careful consideration of the pleadings of the defendants, as a whole, does not disclose that the nullity of the marriage, exclusively, is rested on the finding of the court to the effect that Hernandez had been guilty of adultery with the plaintiff. Consequently, the first rule of exclusion urged is not good, and in this respect the ruling of the judge a quo was correct.

But the second ground for the exclusion of the evidence offered is serious, and requires careful consideration. What is the meaning and significance of the words of the article, "In case of divorce, on account of adultery, the guilty party can never contract marriage with his or her accomplice in adultery"? Does it mean an accomplice in the particular adultery of which the guilty party is charged, and on which the suit for divorce is predicated and decided? Or does it mean an accomplice in any adultery, with any one, antecedent to the institution of the divorce suit, regardless of whether she is the person named or contemplated in the suit, or not? The answer of plaintiff's counsel to the foregoing query is found so well stated in their brief that we extract the most pertinent portion, as the best mode of presenting it. It is as follows, viz.: "We see, first, that it is only *in case of divorce* that a subsequent marriage is prohibited between the guilty spouse and his accomplice. The prohibition does not apply if the first marriage was dissolved by death. The guilty spouse surviving could clearly marry his accomplice in adultery, inasmuch as no law forbids it, and penal statutes cannot be extended by implication. We find this well

explained in 10 Merl. Repert. p. 216, verbo 'Empeachment de Mariage.' He gives there, also, the origin of this prohibition. It was taken from the Roman law by the Catholic Church. The subsequent marriage with the accomplice was only prohibited when the adultery was committed under a promise of marriage. But, says Merlin: "The Civil Code is more severe: it provides (article 298) that, "In the case of divorce on account of adultery, the guilty spouse can never marry his accomplice." Thus, in order to create the prohibition, it is no more necessary that the promise of marriage should concur with the adultery. But—let us observe it well—this provision is limited to the case where the adultery *has been followed by a divorce*. There could be, therefore, no opposition to the marriage of a widow with a man with whom it would be pretended that she had lived in adultery during her marriage; *such a proof would not be admissible.*" (The italics are ours.) A comparison with the text of the article 298 of the Code Napoleon proves the correctness of the foregoing quotation.

In Locre's commentary on the French Code, title "Of Divorce," he says: "That the wife against whom the divorce has been pronounced for this cause [adultery] is incapable of contracting a new marriage." 5 Locre, p. 161. "That the husband against whom the divorce has been pronounced for cause of adultery will not be incapable of contracting a second marriage, if it is not with his concubine." Id. "The adulterous husband will never be able to marry afterwards with his accomplice. He should not be able to find, by and through the judgment which condemns him, a title and instrumentality to satisfy a guilty passion." Id. p. 311, § 38. This author is in full accord with the views of other French commentators, who hold that the reason for the prohibition is that the guilty party should not be allowed to procure a divorce for the purpose of marrying his accomplice; or, in other words, the effect of the judgment releasing him from his marriage covenant, ought not to be furnish him immunity from his crime, by permitting him afterwards to contract a new marriage, with the particeps criminis in the adultery of which he has been convicted. 2 Laurent, p. 478, § 367; 1 Toullier, p. 465; 2 Duranton, p. 124, § 177; 3 Demolombe, pp. 165, 167; 1 Marcadé, p. 599. By a comparison, it will appear that the language of the Code Napoleon is almost identical with that of our Civil Code. The legislature of 1827 incorporated into the body of our law the provisions of the Code Napoleon, in the following phraseology, viz.: "That in cases of divorce on account of adultery, the guilty party can never contract matrimony with his or her accomplice in the adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy and under the penalty of nullity of the new marriage." Act Rela-

tive to Divorces, § 10, p. 130. This statute was re-enacted in 1855 without any other change or modification than the omission of the word "the" which occurs in the original text just before the word "adultery." Act 307 of 1855, § 8. Counsel for the defendants refer to this omission from the act of 1855—which is identical in terms with article 161 of the Code—of the article "the," as significant of legislative purpose on the question, and they employ this language, viz.: "Be that as it may, the fact that when, in 1855, the present article 161 of our Code was adopted, the word 'the' was omitted, shows, beyond all doubt, that if our legislature, in 1827, did intend to restrict the bar to marriage between the divorced spouse and his accomplice to any one accomplice, or any one set of accomplices, that it abandoned the policy, and, in its wisdom, made the law conform to the Code Napoleon, except in this: that, while the French law is only mandatory, ours renders the marriage null."

The question presented is apparently *res nova* in our jurisprudence; no pertinent decision of this court, or of the court of cassation, having been cited on either side. True it is that counsel for defendants have referred to and quoted from several cases, and notably the following, viz.: *Dupre v. Boulard's Ex'r*, 10 La. Ann. 411; *Succession of Minvielle*, 15 La. Ann. 342; *Summerlin v. Livingston*, Id. 520; *Succession of Caballero*, 24 La. Ann. 573; *Succession of Colwell*, 34 La. Ann. 266. But all of those cases treat of the nullity of marriages between white and colored persons, which was prohibited by the terms of article 95 of the Code of 1825, which was expunged from the Revised Code of 1870, which, for the first time, embodied the present article 161. Therefore, those cases bear no analogy to the question under consideration. But *Succession of Taylor*, 39 La. Ann. 825, 2 South. 581, points in a direction opposite that of defendants' view. From the statement of the case, it appears that J. C. Taylor married Miss Sarah Castleberry in 1852, and in 1865 they voluntarily separated, and thereafter lived apart. In 1866 Mrs. Sarah C. Taylor sued her husband for a divorce on the ground of adultery, but judgment went against her. In December of that year, Taylor and Widow McFarland were married in the state of Arkansas, and thereafter they lived and cohabited together. In 1867 Mrs. S. C. Taylor renewed her suit against Taylor for a divorce, grounding her demand upon the alleged adulterous life he was then leading with his pretended wife under the Arkansas marriage ceremony; and, in the month of November of that year, judgment was rendered in her favor, granting her a full divorce against Taylor. In the case under consideration, the children of the marriage of Taylor and Widow McFarland sought to obtain a share in their father's estate, and the children of the marriage of Taylor with

Miss Castleberry resisted their claims, invoking the nullity of the marriage, on the authority of article 161, Revised Code. Of this controversy the court said: "We conclude from the record that Mrs. McFarland's conduct in marrying Taylor, in Arkansas, in December, 1866, was not characterized by good faith, in law, and that, in cohabiting with him thereafter, she became his accomplice in adultery," and therefore their marriage was void. In that case the wife, suing for and obtaining a judgment of divorce, alleged that her husband had committed adultery with the identical person with whom he had been living, and the proof on the trial sustained the charge. Hence she was, in the sense of article 161, his accomplice in the adultery. That case appears to confirm the theory of the plaintiff, though it possesses two features which distinguish it from the instant case, and they are (1) that Taylor married Mrs. McFarland before he was divorced from his legal wife, while Hernandez was not married until after he was divorced from his first wife; and (2) that in the Taylor Case the accomplice was named, though in the Hernandez suit she was not. Independent of the support which that decision brings to the plaintiff's theory, the rule of our jurisprudence is that in a suit for divorce, grounded on a charge of adultery, the plaintiff must specially mention the person with whom the adultery has been committed, and full particulars of time and place must be given, so as to put the defendant on his guard, though it is not necessary that such person should be formally cited to answer as a co-respondent. As an illustration of that rule the following cases may be cited, namely: *Compton v. Compton*, 9 La. Ann. 499; *Suberville v. Adams*, 46 La. Ann. 119, 14 South. 518. This precept of jurisprudence seems to have been followed in the Taylor Case, 39 La. Ann. 825, 2 South. 581. Not only is this theory in accord with correct rules of judicial procedure and pleading, but they comport with the principles of article 161 of the Code, which manifestly indicates the necessity of the accomplice being named and disclosed, as the means of enforcing its behests. If this were not so, grave and serious injury might result, and the rights of inheritance, the legitimacy of children, and the security of marital rights, as well as the title to property, would be imperiled by the uncertainty and insecurity of the tenure; depending, as it would, upon the uncertain recollection of witnesses, long years after the occurrences had happened. Who could be an accomplice of the guilty party, other than the person with whom the adultery was committed? To constitute the defendant in a divorce suit a "guilty party," the proof must show that he has committed adultery with some one, for if the proof does not establish his guilt, the divorce cannot be granted. If, indeed, the defendant had been engaged in promiscuous sexual in-

tercourse with sundry persons, and these facts were not disclosed by proof on the trial of the divorce suit, he could not, in respect to such transactions, be considered a guilty party, and consequently the persons with whom such undisclosed adulteries had been committed could not possibly be deemed accomplices, in the sense of the Code; for to be an accomplice necessarily presupposes a principal, whose guilt has been established, and in whose guilt she is a particeps criminis.

On mature reflection, and a careful examination of all the authorities bearing on the question, we have reached the conclusion that the plaintiff's second objection was well taken, and should have been sustained by the judge a quo, and the testimony that is covered by it rejected and excluded. The conclusion that necessarily results is that Hernandez was under no legal disability to enter into a contract of marriage with the plaintiff, resulting as a consequence of the judgment of divorce, albeit the same was grounded on a charge of adultery; that is, if the marriage ceremony had been performed in the state of Louisiana. We are therefore dispensed from making an examination of the previous divorce proceedings, and the judgment of dismissal thereof, and the resulting effect of the estoppel and *res adjudicata* pleaded, as well as of the parol proof of adultery *vel non* between the plaintiff and Hernandez prior to the institution of the last suit for divorce.

3. It remains for the court to consider the legal effect of the contract of marriage which the plaintiff entered into with Hernandez in the city and state of New York, and we are to determine whether the contracting parties thereby came under the denunciation of the New York statute which prohibits the second marriage of persons who have been divorced because of adultery during the lifetime of the former husband or wife. The following is a literal copy of the New York marriage certificate, viz.: "State of New York, City and County of New York. I, W. R. Grace, mayor of the city of New York, do hereby certify that on the 29th of December, 1881, at the mayor's office, I duly performed the marriage ceremony between Mr. Joseph Hernandez, of New Orleans, La., and Mrs. Augusta L. Ogden, of Paris, France; that the said parties were satisfactorily made known to me, and were of lawful age to contract marriage; and that, upon due inquiry by me made, there appeared no legal impediment to said marriage. I further certify that the following persons, C. H. Woodman and C. G. Crocker, were present, and became subscribing witnesses to said marriage. [Signed] W. R. Grace, Mayor. [Seal affixed.]" The following is the section of the Revised Statutes of New York, the prohibition of which the defendants' counsel invoked, viz.: "Section 5 of the Revised Statutes of New York (Birdseye's Ed.), p. 1401, reads as follows: 'No second or other subsequent marriage shall be con-

tracted by any person during the lifetime of any former husband or wife of such person, unless (1) the marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person, or, (2) unless such former husband and wife shall have been finally sentenced to imprisonment for life. Every marriage contracted in violation of the provisions of this section shall, except in the case provided for in the next section, be absolutely void.'" On this state of facts the defendants' counsel contend that the terms of the New York statute include within its prohibition all persons divorced, whether under the law of Louisiana or that of New York, because of adultery, and render them incapacitated to enter into a contract of marriage in New York, notwithstanding they have their residence in Louisiana at the time. On the contrary, the contention of the plaintiff's counsel is to the effect that the law of New York, being a penal statute, can have no extraterritorial effect, and therefore cannot annul a contract of marriage between persons residing abroad, though solemnized in that state. The question for this court to decide is whether the plaintiff's marriage celebrated in New York was valid; Hernandez having been divorced by a judgment of a Louisiana court, because of adultery,—his divorced wife still living.

Not only does the marriage certificate show that Hernandez at the time resided in Louisiana, and Mrs. Augusta L. Ogden resided in Paris, France, but the testimony shows that immediately after the marriage ceremony the newly-married couple came to New Orleans to live, and continuously thereafter resided there, as man and wife. In the course of the argument of defendants' counsel, they employ this language, viz.: "In Louisiana, however, while the general rule that the validity of a marriage is to be determined by the *lex loci contractus* is recognized, it has been held that, where parties go abroad to evade our local statutes prohibiting their marriage, the contract is null. *Dupre v. Boulard's Ex'r*, 10 La. Ann. 411; *Rabin v. Le Blanc*, 12 La. Ann. 367; *Maillefer v. Saillot*, 4 La. Ann. 375; *Saul v. His Creditors*, 5 Mart. (N. S.) 569; *Succession of Caballero*, 24 La. Ann. 573; *Pars. Cont.* (6th Ed.) § 575, note on page 724 (commenting on *Saul v. His Creditors*). We do not understand the law of Louisiana to limit the general doctrine that the *lex loci* shall govern marriages, as to the capacity of the parties, in any other way than by declaring that this rule shall not govern its citizens when they are incapacitated by a local prohibitory law from contracting marriage. That theory may be at once accepted, but it only goes to the extent that the marriage contracted abroad is intended to defeat the prohibition of a local statute. As this case stands now, with the prohibition of article 161 of the Code eliminated from the discussion, it is not the case of a marriage contracted

abroad for the purpose of defeating the prohibition of a local statute. In the present attitude of the case, the converse of that proposition is exhibited; and it is whether a marriage in New York, of persons fully capacitated to contract marriage in Louisiana, where the marriage domicile is to be established, and where the husband has theretofore resided, will be declared a nullity by a Louisiana court because of a prohibition of a New York statute. "The law considers marriage in no other view than as a civil contract." Rev. Civ. Code, arts. 86, 90. And a general provision of our Code is that "the effect of acts passed in one country, to have effect in another country, is regulated by the laws of the country where such acts are to have effect." Id. art. 10. We have frequently applied the precept of this last article to interstate contracts, that were entered into in other states, to be executed in Louisiana; notably, in *Gates v. Gaither*, 46 La. Ann. —, 15 South. 50. The principle is well settled that the matrimonial rights of the wife who marries with the intention of removing into another state must be governed by the laws of her intended domicile. *Ford's Curator v. Ford*, 2 Mart. (N. S.) 574; *Le Breton v. Nouchet*, 3 Mart. (N. S.) 60; *Fisher v. Fisher*, 2 La. Ann. 774. In *Hayden v. Nutt*, 4 La. Ann. 65, it was said that "it may be conceded that the defendant's counsel is correct in assuming that the marital rights of these parties must be regulated by the laws of their matrimonial domicile." In *Routh v. Routh*, 9 Rob. (La.) 224, it was held that "where the parties contracted marriage with the bona fide intention of making Louisiana the place of their common or matrimonial domicile, and, in pursuance of such intention, did, within a reasonable time, become domiciled in this state, then the property belonging to the wife before the marriage * * * remains her separate estate." *Connor's Widow v. Heirs of Connor*, 10 La. Ann. 440. In *Arendell v. Arendell*, Id. 566, the facts were that at the time of the marriage, in Alabama, the spouses intended to fix their matrimonial domicile in Mississippi, which they accordingly did; and the court held that the right of the husband to slaves owned by the wife at the time of the marriage must be determined by the laws of Mississippi, and not those of Alabama. In *Ford v. Ford*, 2 Mart. (N. S.) 574, Judge Martin employed this expressive term, viz.: "The wife does not contract where she enters into matrimony, but where she, after the marriage, migrates or removes. *Muller non agit ubi matrimonium contraxit, sed ubi ex matrimonio migravit, vel divertit, agit*." *Cujas*, ad l. 65, *Exigere Dotem*, 164." Or, in other words, "the place where marriage is contracted is not so much that where the ceremony is performed as that where the parties expect to live and settle;" the general rule being "to attend to the law of the husband's domicile, rather than that of the place in which the contract was

entered into." Not only is this so with respect to the wife's rights of property subsequently acquired, but it is equally so with respect to the contract of marriage itself. The rule is stated by Judge Story thus: "The general principle certainly is, as we have already seen, that, between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation." Story, *Conf. Laws*, § 113, citing *Ferg. Mar. & Div.* But that author explains, in a marginal note, that "the principle is established that the validity of a marriage—the word 'marriage' being used in the sense of 'ceremony of marriage'—depends upon the law of the place where the ceremony is performed. When the question is whether it is lawful for the two persons to be united in wedlock, there is a difference of opinion as to the law by which the validity of the marriage (the word being used to designate the union in wedlock which the ceremony is intended to effect) is to be determined." Story, *Conf. Laws*, p. 188. But the question immediately under consideration—that is, the binding force of the contract of marriage in jurisdictions different from the one in which it was celebrated—is distinctly settled conformably to the jurisprudence of this court, the language of that author being as follows, viz.: "It is no answer to this reasoning to say that every nation has a right, at its pleasure, to impose any restraints and prohibitions upon the marriages of its own subjects, whether they marry within or without its own territory. Admitting this to be true in the fullest extent to which it can justly be claimed, in virtue of national sovereignty, it must be quite as true and quite as obvious that no other nation is bound to recognize those restraints and those prohibitions as obligatory upon such subjects while they are domiciled within its own territory, or when they have contracted marriage there according to the laws thereof." That author again says: "Personal disqualifications, not arising from the law of nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries, where the like disqualifications do not exist." Id. § 104. This doctrine was announced by the supreme court in *The Antelope*, 10 Wheat. 66, employing this emphatic declaration, viz.: "The courts of no country execute the penal laws of another." And the New York court of appeals said in *Scoville v. Canfield*, 14 Johns. 338, viz.: "The penal acts of one state can have no operation in another state. They are strictly local and affect nothing more than they can reach." Story, *Conf. Laws*, § 621, p. 841. There can be no question of the fact that the New York statute under consideration is a penal law, and that the attempt of the defendants is to have it enforced against the plaintiff by the courts of

this state. Mr. Wharton puts the proposition thus: "I cannot but think that both the history and policy of the law require that the rule should be stated as follows: * * * Consensual marriages abroad, by domiciled citizens of states holding such marriages to be valid, will not be invalidated because the forms prescribed in the state of celebration were not adopted," etc. Whart. Conf. Laws, § 170, p. 237. That author again says: "A marriage abroad, it is alleged, would be a nullity, if in fraud of the home law; but valid, if not in fraud of such law." *Id.* § 182, p. 264. That author quotes approvingly the following extract from Parsons on Contracts, viz.: "The rights of parties, as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be, domiciled;" citing *Le Breton v. Nouchet*, 3 Mart. (La.) 60; *Ford v. Ford*, *ut supra*; *Allen v. Allen*, 6 Rob. (La.) 104. Whart. Conf. Laws, § 190, p. 272. Mr. Bishop puts the proposition quite tersely, thus: "Statutes take effect only in the country of their enactment. They do not so much as bind citizens abroad, except by express words. Therefore, a prohibition to the guilty party in divorce, to contract a second marriage, is without effect outside of the territorial limits of the prohibiting state. And this is so even under special statutory terms." That author then illustrates by citing a Kentucky case, as follows: "A Kentucky statute declared that the divorce for which it provided 'shall not operate so as to release the offending party, who shall nevertheless remain subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living.' Thereupon, an offending woman, whose husband had procured the dissolution decree, removed to Tennessee, and there married, and the Tennessee court held the marriage to be good." 2 Bish. Mar. & Div. § 1618; *Cox v. Combs*, 8 B. Mon. 231; *Roach v. Garvan*, 1 Ves. Sr. 157.

In construing the statute of New York prohibiting second marriages of persons convicted of adultery, the court of appeals decided that the prohibition of the statute did not invalidate a second marriage entered into in Connecticut, where it was valid; the act being in the nature of a penalty, and not, in express terms, showing the legislative intent to render such marriage, entered into in another state, void. *Van Voorhis v. Brintnall*, 86 N. Y. 18. In *Cropsey v. Ogden*, 11 N. Y. 228, the court gave an interpretation to the legislative act as it existed previous to the revision of the statutes of the state, with reference to the second marriage that was celebrated between citizens of that state, and by an officer of that state, and said: "The incapacity of an adulterer, divorced on that ground by our own courts, to marry again in this state during the life of the injured party, was grounded upon the views

entertained by our legislature in respect to the marriage relation." *Thorp v. Thorp*, 90 N. Y. 602, announces the same principle as that announced in *Van Voorhis v. Brintnall*, and affirms that decision. In *Moore v. Hege-man*, 92 N. Y. 521, a similar question is stated and discussed,—the court stating that the main question which is presented upon this appeal is whether a marriage in New Jersey was legal and valid, or illegal, as in violation of the New York statute; and, answering that proposition, the court said: "The statute and decree prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of this state. Where the laws of another state do not prohibit such a marriage by a party divorced, its validity cannot be questioned in this state." In our opinion, those decisions are strictly in keeping with our own jurisprudence, and the opinions of text writers on the subject. They distinctly hold that the prohibition of the New York law has no extraterritorial effect, and that a citizen of that state is at liberty to go into another state, and contract a new marriage there, to which legal effect will be given by the courts of New York. That is no more than the plaintiff did. Residing in Paris, France, and Hernandez residing in the state of Louisiana, they availed themselves of the law of New York, and contracted marriage therein, intending to reside thereafter in Louisiana; and, actually residing there subsequently, it must be given the effect of a contract of marriage in Louisiana *eo nomine*, and, thus considered, it comes within the principle of the decisions of the New York court. A careful examination of authority has satisfied us that the plaintiff's contract of marriage, though celebrated in the city and state of New York, was legal and valid, and did not come within the prohibition of the New York statute. We see no reason to alter the decree of the court *a qua*. Judgment affirmed.

On Application for Rehearing.

(May 24, 1894.)

We adhere to the principles of law announced in the opinion herein rendered, sustaining the marriage between the deceased, Joseph Hernandez, with Augusta L. Church, and recognizing Augusta L. Church to be the surviving widow in community of said Hernandez, and entitled to receive the legacies named in the last will of the deceased; but we are of opinion now that the rights and claims of such widow in community, as well as the demands of said Augusta L. Church for the payment of her legacies under the will, should be adjusted, liquidated, and finally settled, in the mortuaria of the deceased, contradictorily between the executors and heirs, in due and orderly course of the administration of the succession, and that such should have been the judgment and decision of the judge *a quo*. It is therefore ordered and decreed that so much of our

opinion and decree as recognizes the legality of the marriage between Joseph Hernandez, deceased, and Augusta L. Church, and as decrees her entitled to receive the legacies specified in the last will of Joseph Hernandez, deceased, be, and the same are, maintained, but that in all other respects our former decree is set aside, and the cause remanded for further proceedings in the court a qua according to law and the views herein expressed. It is further ordered and decreed that the judgment appealed from be so amended and corrected as to conform to the judgment and decree herein pronounced; the costs of appeal to be taxed against the appellee; those of the lower court to await final judgment therein. Rehearing refused.

(46 La. Ann. 995)

CITIZENS' BANK OF LOUISIANA v. JANIN (THIRD NAT. BANK OF NEW YORK, Intervener). (No. 11,361.)

(Supreme Court of Louisiana. March 23, 1894.)

CHATTEL MORTGAGE—PLEDGE—CHANGE OF POSSESSION—RIGHTS OF EXECUTION CREDITORS.

1. The plaintiff, a judgment creditor of the defendant, had the steamboat *Kinta* seized. The defendant had pledged it to the Third National Bank of New York, but remained in possession for his own account, and never completed the pledge by an actual delivery to the pledgee. The act of pledge was drawn up in the common-law form, and was intended to operate as a chattel mortgage. It contains, as to the form of the act, the essentials of an act of pledge.

2. The Third National Bank, as pledgee, claimed the proceeds of the sale. The property, when it was seized, was in the possession of the subtenant. It is not proved that plaintiff colluded with the defendant, and thereby gained an improper advantage. Pledge is not made perfect by the consent of the parties. It requires absolute possession. The alleged pledgee never was in possession during the tenure of the defendant.

3. It (the Third National) could not obtain possession through the agency of the sublessee, who held possession for his lessor, the defendant.

4. A pledge cannot be made perfect by the sublessee's delivery of possession without the consent of his lessor.

5. The obligation of the lessor to account for the property, and whatever revenues were realized therefrom, binding between him and his creditor, the Third National Bank,—the property not having been delivered,—did not affect his other creditors, who could seize the property in his possession, or in that of his sublessee, who held possession for his lessor.

Nicholls, C. J., dissenting.

(Syllabus by the Court.)

Appeal from district court, parish of St. Bernard; A. E. Livaudais, Judge.

Action by the Citizens' Bank of Louisiana against Albert C. Janin. Certain property having been sold by said plaintiff under its judgment, the proceeds were claimed by the Third National Bank of New York. Judgment for plaintiff, and intervener appeals. Affirmed.

Farrar, Jonas & Kruttschnitt, for appellant. Branch K. Miller, Henry C. Miller, and Thomas J. Semmes, for appellee.

BREAUX, J. The Third National Bank of New York advanced a large amount to the St. Louis, New Orleans & Ocean Canal & Transportation Company, the payment of which the defendant undertook to secure by executing a chattel mortgage in New York of property in Louisiana. The Citizens' Bank, another creditor of the defendant, having obtained a judgment, seized the property, and had it sold. The proceeds are claimed by the Third National Bank of New York. This bank alleged, in its opposition claiming the proceeds, that the chattel mortgage was in effect a pledge, and that it was in possession of the property as pledgee. At a time subsequent to the date of the "chattel mortgage" the defendant executed another obligation, for a larger amount, in which the property described in the deed of mortgage is referred to as having been pledged to the opponent bank of New York. The Citizens' Bank denied that opponent had a pledge; because it contends the opponent had possession of the property pledged. The issue involves the possession of the pledgee vel non. The district court dismissed the opposition. The opponent appealed.

The correspondence between the defendant and the opponent discloses, that the defendant acknowledged that he was the agent of the Third National Bank, and expressed himself as quite willing to hold the property as agent for the bank; to lease it, and pay that bank the rental, less the costs and expenses of operation. In an interview with opponent's counsel, it is proved that counsel said to the defendant, Janin, that there were three ways of securing their client: One of them was to sell the property. Another was to continue in possession as the agent and attorney of the bank, their client. The last was that delivery of the property be made to them. The defendant declined to accede to the first and last propositions, giving as reason that he was unwilling to sell; that delivery of the property to others would occasion expenses he was anxious to avoid, but he consented to continue in the possession of the property as agent for the bank; to lease it, and account to the pledgee, the bank, for the proceeds. Counsel for the opponent informed him that it would be satisfactory to them, and to their client. He, at one time, sought to lease the property from the pledgee at a rental of \$1,500 per year. The bank was willing to accept the proposal, but required that the contract of lease be submitted to their counsel for their examination and approval. The defendant did not comply with opponent's desire in this respect. Shortly after, he made a lease of the boat for \$500 per month, but conveyed no knowledge of this lease to the bank, or its counsel. Two days prior to the expiration of the second month of their lease, he inclosed a draft to his creditor, the Third National Bank, for

\$125, and advised its president that it was for one month's rent of the dredge boat. The draft was returned, and he was informed that the bank would not accept a lease without the approval of counsel. The defendant wrote to the president of the bank that he had received the draft on his return from the interior of the state, where, he stated, the property was; that he intended to use the amount of the draft in paying a portion of the boat's liabilities; that he would devote the most of his time during the next few months in efforts to pay all claims on the property, provide new cranes, new chains, and other articles needed, and pay the bank \$125 per month. This was not accepted. The joint lease by defendant to O. J. Burdette, of the property, was transferred by the latter to J. B. Camors, who, with defendant's consent, became lessee. The latter informed the counsel of the Third National that he was renting the property from the defendant at a rental of \$500 per month. On December 22, 1892, i. e. immediately after having received the information, counsel notified the lessee, Camors, that the property leased to him by the defendant, Janin, belonged to the Third National Bank; that it had been transferred to that bank as security for a large sum of money due by Janin. They also informed him that the debtor, Janin, was left in possession of the boat as the agent of the bank, and that his possession was precarious, and subject to be terminated at will; that they had informed Janin that his custody of the property, as the agent of the bank, was terminated, and that the bank ratified, for its own account, the lease made to him, and directed him to retain possession under the lease, as the agent of their client, and pay the rental to them. The lessee informed the defendant, his lessor, of the notice received from local counsel. He thereafter consented to hold for the Third National Bank, as its lessee. The property was seized, at the instance of the Citizens' Bank, on the 6th day of January, 1893, and subsequently sold. Counsel for intervener called on the president of that bank, and complained of the seizure, and informed him that their client was in possession. The attorney of the Citizens' Bank advised the release of the seizure. The president persisted in maintaining it. The attorney testifies that he was informed by the president of conflicting claims to the property, and that, as he was adverse to the seizure of steamboats by banks when there were claims by third persons, he stated that the bank would release the seizure; that at the time he was not advised of the claim of the Third National Bank. He states it as his impression that the president of the Citizens' Bank received his information that the boat was subject to seizure from the defendant; that his communications were not very free in reference to the transactions between him and the defendant. It

is admitted that the Kinta, the property claimed to have been pledged, was a steam shovel (movable property), and not a sea vessel; that it was not registered or licensed under any laws of the United States or of the state, being nothing but a steam spade, or floating steam shovel.

Common-Law Chattel Mortgage.

The argument for opponent, the New York bank, is that the contract was one of pledge, intended to secure the creditor's claim by pledging property in Louisiana, under the form of a common-law chattel mortgage; that the chattel mortgage did not, as it purports on its face, divest the owner of his property, but that, in so far as it related to power, it contained all the elements of a pledge, and as such was enforceable in Louisiana. This was not controverted by plaintiff's counsel, who contended that the pledgee never was in possession, and that, therefore, there was no pledge which could be enforced as such. The effect to be given to acts such as the one relied upon in this case, as being in effect a pledge, has received this court's interpretation in several decisions. It has never been held that they effect a translation of the property; it not being the intention of the parties to sell the property, though the word "sell," or its equivalent, is used in the common-law deed of mortgage. The act is given effect as a mortgage if it contains the essentials of a mortgage or of a pledge,—if it contains, as to form, the requirements of an act of pledge. This view has received the sanction of this court in several decisions. *Miller v. Shotwell*, 38 La. Ann. 891.

Possession.

The privilege of pledge is subject to unbending conditions. There must be an actual delivery, in order that those who transact with the pledgor may know that the property is held in pledge. There should not be any good reason to consider the thing pledged in the possession of the pledgor, for his account and benefit. The possession of the pledgee should be real and effective at all times. It must be apparent and well known. As between the parties, consent is sufficient to transfer property. As to third persons, there must be delivery. If there has been no delivery, the innocent buyer from the pledgor of the thing cannot be evicted. He could not be aware of the adverse right on the property not delivered, and in regard to which there is no contract, save that known only to the pledgor and the pledgee. Were it otherwise it would frequently be impossible to buy with any safety that the title to the movable is complete and legal. "It is evident that if the pledge of movables could, without delivery, have effect in regard to third persons, it would be the source of great fraud and deceptions. When the debtor is obliged to surrender possession, he cannot deceive third parties dealing with him, by keeping posses-

sion of the pledged articles, as part of his estate, and getting credit thereby." Dalloz Nant. 313. Possession is essential to complete a real right to movables. The pledge withdraws the thing from the hands of the debtor, and sets it aside as property subject to a pledgee's privilege. Possession is the most sure foundation, and the most striking index, of the privilege. Casaregis says preference is accorded to a pledgee, on the thing pledged, because he has it in his hands. This possession should not be equivocal, and so placed as to deceive other creditors, and lead them to believe that the debtor always continued the possessor. With reference to the pledgor's act, possible without affecting the possession and the pledgee's right, Troplong illustrates by saying that merchandise in the creditor's warehouse may need the care of the debtor, and that he may give his attention to it without destroying the right of pledge. Third persons cannot be deceived by this care, for the creditor remains in possession of the property, in his own storehouse. The principle is laid down by the French authorities that, "whenever the assistance of the debtor is necessary to the accomplishment of the object of the pledge, it ought to be permitted, provided, always, that it does not disturb the possession of the creditor in any respect." *Casey v. Cavaroc*, 96 U. S. 484. The learned judge, in the case just cited, says "that it seems to be evident that in the French law, at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledge, followed by a return thereof to him for the purpose of enabling him to collect them, and apply the money to his own use, on substituting others in their stead, and with general liberty of substitution, and to appear as the owner and possessor thereof in his dealing with others (the title of the securities not being transferred to the creditors), is not such a delivery of possession as is necessary to establish the privilege due to a pledge, as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect. It would not be mere evidence of fraud, which might be rebutted by counter evidence, but it would be contrary to the rule of law adopted to prevent fraud. In other words, as to third persons, it would not be a pledge at all, within the meaning and requirements of the law. We think that the decisions in Louisiana lead to the same conclusion." In support of the proposition of opponent that the right of pledge is complete where the debtor himself is in the precarious possession of the thing pledged, as trustee ad hoc, we are referred by opponent's counsel to the cases of *Conger v. City of New Orleans*, 32 La. Ann. 1252; *Weems v. Moss Co.*, 33 La. Ann. 973; *Jacquet v. His Creditors*, 38 La. Ann. 863. In the first case the pledge was statutory. Moreover, the dictum had no reference to the conclusion reached, for it

was decided that the pledge had been destroyed by a sale of the property. In the second case cited the property had been placed in the possession of an agent. The court said in that case: "Under the provisions of article 3162, which allows the possession of the pledgee to be vested in a third person, agreed upon by the parties, we find that these transactions show such a possession in the pledgee as the law requires, even under a rigorous construction of its provisions." In the last case cited the property was placed in the hands of an agent, who held the key of the building in which it was. This agent testified that he exercised control over the property for about 10 months, and took care of it, and cleaned the machinery. He was paid for his services as keeper. With his permission, and that of the pledgee, the pledgors used the machinery at times. The keeper at all times, however, retained possession. Only in the last case cited was there any reference made to the use of the property by the pledgor. The occasional use of the property pledged, with the consent of the pledgee, did not dispossess the keeper, who remained in charge as required (said the court) by article 3162 of the Revised Civil Code. The possession of a creditor is not inconsistent with the open, well-known co-operation of the pledgor, when the latter's co-operation is not incompatible with the idea of the possession of the creditor. In the case at bar, while the defendant, Janin, was in possession, no third person suspected that he was operating the boat for any one's account save his own. When it is considered that the boat was at some distance, in charge of the owner and pledgor, who informed no one of his agency; that it had been leased by him, and the rents collected for his account,—it becomes manifest that the pledgee, during the pledgor's active operations, was not in possession.

The Illegal and Improper Understanding Charged.

An understanding between the plaintiff and the defendant, such as charged by the opponent, would operate as a bar to considering the plaintiff as a third person. If the third person conspired with a pledgor to obtain an advantage, he would not be in the attitude of a person not interested, and without notice. The only testimony introduced was that of plaintiff's attorney, who gave it as a mere impression that the president of the Citizens' Bank obtained his information from the defendant. A similar question to that presented in the case at bar, at this point, received consideration in the case of *Rawlins v. Pratt*, 45 La. Ann. 67, 12 South. 197. This court said in that case: "If they had legal claims, they [the creditors] were entitled to proceed, and were not prejudiced by the mere circumstance that their information came from the debtor." In the case at bar it is not positively shown by whom the creditor was notified of the possi-

bility of making a valid seizure of the property of the pledgor. The burden of proof to establish collusion between the common debtor and the president of the plaintiff bank rested with the opponent. "The party having the burden is the party who, if no proof is offered, will be defeated in the suit." The fact that the plaintiff's president did not testify did not have the effect of shifting the burden of proof, and give rise to a presumption of knowledge on his part of the obligation of the defendant to the opponent. The plaintiff was a third person, against whom it is not shown that it had knowledge of any pledge on the part of the defendant to the opponent prior to the last lessee's possession,—Camors. As against Janin, the bank had an absolute right to seize the property in his possession, or in the possession of his lessee.

As Subrogee of Last Lessee, is the Third National Bank a Pledgee?

This brings us to the consideration of the last point involved in the case. The opponent, the New York bank, having recognized the lease to Camors, and having, through him, obtained the possession of the boat it held when the seizure was levied, the important question is presented as to whether it was legally possible for this creditor to obtain possession and control through Camors, the lessee of Janin, of property that had been pledged to it. The principle is well settled that the title of the lessee is in fact the title of the lessor. He comes in by virtue of the lease, he holds by virtue of the lease, and upon it he relies to maintain and justify his possession. He acknowledges thereby the title of the lessor, and he cannot invoke the title of another, and change the nature of his possession. He is not permitted to deny that the lessor had a title to possession at the time that he, the lessee, came into possession. 3 Am. & Eng. Enc. Law, 188. The law regarding pledge is plain: "It is essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession of it already by some other right." Pledge is not made perfect by the consent of the parties. It requires absolute possession. As to creditors, the pledge was not complete when Janin was in possession. The property was subject to seizure. The lessee, at the end of the lease, owed possession to the lessor, and not to his creditors. They had no claims upon him. Let us assume that the Third National Bank called on Camors to deliver the property, and that he refused to surrender possession. The Third National never having been in possession, Camors had the absolute right to decline to surrender his possession. Not having the authority to compel delivery, they were equally without authority to obtain possession by virtue of a contract with

the lessee. Delivery of possession to the pledgee must be given by the pledgor, and not by his lessee. The obligation to deliver devolved upon the debtor, and not upon the one who held under a lease. As between Janin and the national bank, the pledge and its fruits were due by the former to the latter. This indebtedness could become secured, as intended by the creditor, only after asserting the right contradictorily with the debtor. Third persons have rights distinct from those of the pledgor. As to them, there must be actual delivery, and no control retained of the property by the owner for his personal account. In order that there may be no question about this pledge, there must be absolute compliance in this respect. "La loi," says Baudrie Lacantineree, "se montre pleine de sollicitude pour les interets des tiers auxquels ce privilege pourra pre-judicier." 3 La Loi, p. 599. The property must be placed and remain in the possession of the creditor, or of a third person agreed upon by the parties. It was not in possession of the creditor, nor in possession of a third person agreed upon by the parties. It was therefore subject to seizure and sale to pay and satisfy other indebtedness of the debtor. Judgment affirmed, at appellant's costs.

NICHOLLS, C. J. (dissenting). Janin, being indebted to the New York bank, in order to secure the debt, entered into a contract with it, which, all parties concede, is to be regulated by the rules governing pledges. By this contract he pledged to the bank a dredge boat belonging to him, and consented to hold possession of the boat for the bank, and, in repeated letters to it, recognized and acknowledged that fact. Had any judgment creditor of Janin seized the boat at that time, and under those conditions, the rights of the creditor seizing would have primed those of the bank. I agree with the majority of the court that such a constructive, fictitious possession by Janin for the bank would have been unavailing, as against Janin's seizing creditor, and that the decisions of this court, upon which a contrary doctrine is attempted to be grounded, do not, when analyzed, bear it out. But no seizure was made when matters stood in that position. Matters had advanced far beyond that point when the seizure, as made, was made; for Janin, holding constructive possession of the boat for the New York creditor, leased the boat, which went, visibly and corporally, into the hands of the lessee. In making the lease, Janin did not explain to the lessee the character in which he made the lease, or the circumstances under which he held the boat; but after the lease had been made he wrote to the New York bank, informing it that he had leased it for its account, and transmitted to it a check or draft, as representing rent. The New York bank, uncertain what effect this lease

might have upon its rights, returned the check, saying it could not recognize the lease, unless with advice of its attorney. The attorney subsequently called upon Camors, to whom, in the meantime, the lease had been assigned by the original lessee, and explained to him the bank's rights, whereupon Camors consented to hold possession of the boat for the bank, and to recognize it as his lessor. Now, from that moment, if not before, the rights of these three parties became fixed beyond question. Camors consented to look to the bank as lessor, the bank consented to consider him the lessee, and Janin's consent to Camors being the bank's lessee resulted, not only from the fact that, from the commencement of the lease, he had made the lease (as he wrote the bank) for and on its account, but the necessity of the situation forced him to have so made it. He could not, by his own act, as between himself and the bank, change the character of his possession; and he could not lease the boat for his own account without a violation of his trust and his good faith. He was estopped, as between himself and his pledgee, from doing so. When Camors consented to hold possession as lessee for the New York bank the prior intermediate constructive possession of Janin ceased to play any part in ascertaining the rights of parties. Things assumed the shape they would have taken had the bank originally taken corporeal possession of the boat, and had, with Janin's consent, leased it to Camors. Article 3145, Rev. Civ. Code, declares that one person may pledge the property of another, provided it be with the express or tacit consent of the owner. In the case at bar there was not a contract of pledge between the pledgee and one of his creditors, but a contract of lease of the thing pledged, made directly by the pledgor himself, holding possession for the pledgee, for the benefit of the pledgee. The pledgee was the undisclosed principal of Janin when Janin made the lease. Janin's letters and legal position estop him from denying that such was the fact.

It has been said that Camors, having received possession of the boat from Janin, and being his lessee, was estopped from contesting his title, and had no right or power to consent to hold possession for the bank. That doctrine is correct, under a proper condition of facts, but it has no applicability here. It was Camors' right and his duty, when informed of the facts, to recognize the bank as his lessor, and to consent to hold possession for it. Let us eliminate for the moment any idea of a seizure having been made, and test matters as between Camors, the New York bank, and Janin (matters being in the exact situation we have described), and imagine a suit between those three parties to ascertain for whom Camors should be holding possession. Of what avail would it be to Janin to claim that, as between him-

self and Camors, Camors was estopped from contesting his title? Would not the bank successfully contend that no matter how matters might be, on general principles, between Camors and him, in the particular case the estoppel between them could not be urged, for the reason that the relations between the bank and Janin were such as to estop Janin himself from setting up the estoppel? There would be estoppel against estoppel, and there can be no question as to which would be the superior and controlling estoppel. Janin could not reach the position of being the lessor of the boat for himself, as a principal, without being guilty of a fraud upon his creditor and pledgee, who was really (as his letters show) the principal (though the undisclosed principal) originally in the lease to Camors. Suppose, on a trial of a case between Camors, the New York bank, and Janin, on the issue we have supposed, Janin's letters to the bank would have been produced, showing that he repeatedly acknowledged holding possession of the boat for his pledgor under the contract of pledge, and showing that in making the lease he acted as an agent for the bank. What sort of a pretense would Janin have to ask a court to throw off these obligations for his benefit? Now it was when the corporeal, visible possession of the boat was not in Janin, but in Camors, and after Camors had consented to hold possession for the New York bank, that the Citizens' Bank, which had no fixed, real right in or upon the boat, but was a mere ordinary judgment creditor, seized the boat. At that time, Camors was in possession, and holding possession for the bank, under circumstances which would estop Janin himself from denying that fact. This estoppel, which would bind and control Janin, in my opinion, binds and controls the Citizens' Bank,—a mere seizing creditor. He has no greater right than Janin, under the circumstances.

MILLER, J., recused.

Application for Rehearing.

(May 31, 1894.)

WATKINS, J. Third opponent resists a levy of a dredge boat by the Citizens' Bank, under *fi. fa.* against the defendant, on the following grounds, viz. that at the time of the seizure the dredge boat was in its possession, through its tenant, J. B. Camors, who was using and operating the same, for account and benefit of the opponent, under a lease; that at the time of said levy under *fi. fa.* the dredge boat was in the opponent's possession, and that he held said property as a pledge to secure a debt of \$8,407.73, by virtue of a written act of pledge signed by the defendant in execution, of date February 24, 1890, under which the property was delivered, and that opponent has held it in actual possession since that date; that, at various times since, defendant has recognized

his rights thereunder. The answer of the defendant is a denial that the property seized was at date of seizure, or at any other time, in third opponent's possession, through Camors, or any one else; the fact being that the boat was, at the time of seizure, in the possession of the defendant, Janin, through Camors, under contract of lease signed by the defendant, as owner, and said boat had been continuously and uninterruptedly in defendant's possession, as owner, since it was built, in 1889. The answer of the Citizens' Bank was that the opponent had no pledge or possession of the property seized, etc. On the trial there was judgment dismissing the third opposition, and sustaining the seizure of the Citizens' Bank, and third opponent has appealed. Our opinion and decree affirmed the judgment.

The application for rehearing goes upon the following grounds, to wit: "(1) That the court erred in holding that the possession of Camors, at the time of the seizure, was not the possession of the Third National Bank of New York; (2) that the court erred in holding that the possession of Camors could not be made the possession of the bank; (3) that the court erred in holding that Camors had the absolute right to decline to surrender his possession; (4) that the court erred in holding that the intervener had no authority to compel delivery of the boat to Camors; (5) that the court erred in holding that the obligation to deliver devolved on the debtor, and not on Camors, holding the lease; (6) that the court erred in refusing to hold that the Citizens' Bank was bound by the same estoppels Janin was bound by." On this application the argument of third opponent is that (1) as the court found as a fact that Janin had possession of the boat as the agent and representative of the bank, under his promise to rent the boat, and account for the proceeds to the bank, any lease he made must have been, in law, for the account of the bank; (2) that as the court did find that Janin did lease the boat, and so informed the bank, this finding shows that Janin acknowledged the legal duty which was upon him, and that the lease was for the account of the bank. Or, in other words, that while, in point of fact, the lease was from Janin to Camors, Janin was the agent of the bank, as an undisclosed principal, and all that was necessary to put the contest in shape was that the bank should disclose to Camors, the lessee, that it was principal, instead of Janin, and have Camors recognize it (the bank) to put Camors in possession for the bank, and in this manner continue in force and efficacy the act of pledge from Janin to the bank, and defeat a seizure of the boat by one of Janin's creditors. It is further claimed that this course was pursued by the bank, and due notice was given to Camors, and same was accepted by him, and acquiesced in by Janin; and counsel's argument is, further, that the seizing creditor of

Janin is bound by the same estoppels that Janin is, and concluded thereby. The theory of our opinion is that while it is true that Janin acknowledged himself willing to hold the boat as the agent of the bank, and account to the bank for the rentals, and shortly afterwards made a lease to Burdette, and he transferred it to Camors, for \$500 per month, yet did not report that fact to the bank; that the latter informed counsel for the bank that he had leased from the defendant at \$500 per month, and counsel informed him that the boat belonged to the third opponent, as security for a debt, and that the boat had been left in Janin's hands, as agent of the bank, and that his possession was precarious, subject to termination at will. He further stated to him that he had informed Janin that his custody was terminated, and that the bank ratified the lease for its own account, and directed him to retain possession for the bank. The lessee gave the defendant notice of the information he had received, and he thereupon consented to hold for the bank. It is conceded that the defendant primarily gave third opponents a chattel mortgage on the property, having the effect of a pledge of the property. On this state of facts the opinion holds that opponent's possession of the thing pledged was not real, actual, and effectual at all times, or, in other words, there was nothing to advise the Citizens' Bank of Camors holding as pledgee of the bank, because his contract of lease from Janin showed that the latter was the owner, entitling them to seize; that there was nothing in the transaction between Janin and Burdette, nor in that between Burdette and Camors, to put the Citizens' Bank on notice of the pledge of Janin to third opponent, nor that the bank was an undisclosed principal in the contract of lease. Claim is not made in this case that the bank and Janin had agreed upon a third person to hold the property. In that view the opinion concurs. And our opinion still is that third opponent never had physical, actual possession of the thing pledged, but it was always in the actual possession of Janin and his lessee, and, while perfectly good as between the parties, it had no effect as to third persons, and seizing creditors of Janin. Rehearing refused.

(46 La. Ann. 530)

ZEREGA et al. v. PERCIVAL. (No. 11,280.)
(Supreme Court of Louisiana. April 23, 1894.)
OLOGRAPHIC WILL.—DATE.—CAPTION AND SUGGESTION.—HUSBAND AS LEGATEE.

1. The law not having designated the particular place in which the date must be put in an olographic will, it may be placed at the head, at the foot, or in the body of the instrument.

2. A demand in nullity of a testament on the ground of captation and suggestion is barred

* Rehearing denied May 22, 1894.

by the provisions of article 1492 of the Revised Civil Code.

3. An action in nullity of a testament on the ground that it was obtained by means of the ascendancy acquired by the legatee over the testatrix, in his character as a minister of religious worship, while in attendance upon her during the illness of which she died, is barred by the provisions of articles 1489 and 1492 of the Revised Civil Code; the further averment being necessary, if the legatee is the husband of the testatrix, that he married her in fraud of the law, or with fraudulent design of defeating the incapacity established by law.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Theard, Judge.

Action by Alice A. Zerega and others against John Percival. Judgment for defendant, and plaintiffs appeal. Affirmed.

Joseph C. Gilmore, Marshall Gasquet, and Farrar, Jonas & Kruttschnitt, for appellants. Carleton Hunt, for appellees.

WATKINS, J. This is an action for the revocation and annulment of the will of Martha Vaughan Gasquet, deceased wife of the defendant, instituted by her two surviving sisters and one niece, as heirs at law; it being alleged that the deceased was married to the defendant on the 16th of December, 1886, and departed this life on the 11th of October, 1891, leaving neither ascendants nor descendants. The will is olographic in form, and was admitted to probate on the 14th of October, 1891. It is couched in the following terms, to wit: "In the name of God, the Holy Trinity, Amen. I, Martha Vaughn Gasquet Percival, in view of the uncertainty of human life, do make this, my last will and testament, in olographic form. I give, will, and bequeath all the property of whatever kind, real and personal, movable and immovable; all moneys, assets, and effects which I may possess or own or have any claim or interest in at the time of my death,—to the Rev. John Percival, my husband. I make him my sole heir, and give to him, my said husband, immediate and unconditional seisin of my whole estate at my decease. This is my good and valid will and testament, and I now revoke and declare to be null and void any and every other will and testament heretofore made by me. This done in the city of New Orleans, state of Louisiana, this Tuesday, the ninth day of July, in the year of our Lord 1889. The whole written, dated, and signed by me *personally*. Martha Vaughn Gasquet Percival." Under the decree of the presiding judge the defendant was recognized as universal legatee under the terms of the testament, and invested with possession of the decedent's succession. The grounds of attack set out in the plaintiffs' petition are substantially of the following purport, to wit: First, That the testament is not clothed with the formalities required by law for such an instrument, in that it is not properly dated; second, that it is not the voluntary act of

the deceased, and was not made the repository of her intentions, because same was procured by means of undue influence exercised by the defendant in his own favor, and with the view of supplanting her legal heirs. To this petition the defendant, for answer, pleads a general denial, accompanied with the special defense that the charge of undue influence made against him is an unjust and slanderous charge; and the averment is made that the will is complete and perfect in every essential particular, and valid in form. Upon these issues a trial of the cause was begun, and testimony was being introduced on behalf of the plaintiffs, when the defendant's counsel objected thereto, on the ground that the charge of undue influence was tantamount to that of captation and suggestion, proof of which is inadmissible under article 1492 of the Revised Civil Code. This objection was sustained on the ground that such allegations were insufficient to authorize the introduction of proof under them, same being unaccompanied with specific charges or facts of fraudulent practices. Thereupon the trial was continued on the issue remaining; that is to say, upon the alleged informality of the testament. Thereupon the plaintiffs filed a supplemental petition with the evident purpose of supplying the defects of their original petition. In this supplemental petition the plaintiffs make quite an elaborate statement of the various acts and facts of fraudulent captation charged, and among them the following, to wit: That the defendant was at the time of his marriage with testatrix and since professionally attending her as a minister of religious worship during her sickness of the malady with which she died, to wit, tuberculous consumption, and the legacy which the defendant had obtained from his sick wife, instead of proceeding from conjugal affection, was the result of the abuse of the ascendancy which he had obtained over her in the exercise of his calling; that, notwithstanding their said marriage, defendant employed unlawful power over his wife's testamentary intentions, to defeat her will, and to perpetuate the pretended will which he had procured from her at his dictation; that the said Mrs. Percival was fraudulently prevailed upon and coerced by the defendant to leave him her said estate under fear of threats and violence, and in her weak condition of health she was subjected to constant surveillance and restraint up to her last moments, to such an extent as to deprive her of and destroy her testamentary capacity; that the will was not left in the keeping of the decedent, where she could have access to it, and that she was prevented by every means from exercising her volition as to her testamentary intentions in any manner, or revoking the said instrument, which had been obtained from her by illegal and fraudulent means, and had never expressed her true and final in-

tentions." About this juncture of time a change occurred in the personnel of the judges of the district court, whereby the judge who presided when the proceedings outlined above occurred was displaced by the judge who conducted the subsequent proceedings to final judgment and appeal. Subsequent to this change, defendant filed the following peremptory exceptions, to wit: "(1) That the plaintiffs' petition and the intervention herein, being petitions in nullity of the testament of exceptor's wife in favor of exceptor on the ground of defect in the form thereof as an olographic will, and especially as not having been dated by the testatrix, because of the situation in the testament of the date and of the manner of indicating the same, cannot be maintained. (2) That the plaintiffs' petition and the intervention herein, being petitions in nullity of said testament on the ground of captation and suggestion, are barred by article 1492, Rev. Civ. Code. (3) That plaintiffs' petition and the intervention herein, being petitions in nullity of said testament as a disposition obtained by means of the ascendancy acquired by him over the testatrix in his character as minister of religious worship in attendance upon the illness of which she died, are likewise barred by article 1492 and article 1489, Rev. Civ. Code. (4) That plaintiffs' petition, and the intervention herein, being petitions in nullity of the testament of exceptor's wife, and charging fraud on exceptor, and fraudulent coercion on his part, in obtaining of said testament under fear of threats and violence, are vague and indefinite, and wanting in any and all proper specifications of time, place, and circumstance. (5) That the intervention herein is barred by the judicial confession of intervenor, Miss Frances Gasquet, who has sued exceptor for a partition. On motion of the defendant's counsel, these exceptions were at once taken up for trial, because they were peremptory in character; and the same were sustained, and the suit dismissed, and from the judgment of dismissal the plaintiffs have appealed.

1. The preliminary question to be decided is whether the district judge correctly disposed of the exceptions at the time he did, or should he have deferred his decision until he decided the merits of the cause? It is apparent upon simple inspection that the exceptions pleaded are of a peremptory character, and founded on the law, and for that reason pleadable during the progress of the trial, which had, however, just begun. The purport of the exceptions is—First, that the charges preferred are barred and precluded by the terms of articles 1489 and 1492 of the Revised Civil Code; and, second, that the charges of fraudulent coercion are too vague and indefinite, and so wholly wanting in specification of time, place, and circumstance, as to render all proof under them inadmissible. Manifestly these objections were so general and sweeping as to require action

on the part of the court at the very outstart, as they appeared at the threshold of the controversy. If, indeed, the matters set out in the petition and amended petition are barred by the law, and for that reason not actionable at all, the judge *a quo* was, by the exception of defendant, charged to determine and decide that question preliminarily. And if, in fact, the allegations of the petition are too vague, and proof was inadmissible thereunder, certainly the judge was bound to pass upon that question when the objection was urged against the admissibility of proffered testimony. The law provides that "peremptory exceptions founded on law are those which, without going into the merits, show that the plaintiff cannot maintain his action," etc. Code Pr. art. 345. Such exceptions "may be pleaded in every stage of the action previous to definitive judgment," etc. Id. art. 346. In *Jennings v. Vickers*, 31 La. Ann. 679, it was held that "an exception which, if maintained, will terminate the suit, ought to be tried and decided in limine." In *Farmer v. Hafley*, 38 La. Ann. 232, the court said that it was bad practice to refer to the merits exceptions which go to the foundation of the action. Such, indeed, is the settled jurisprudence of this court, and it has been established in the interest of a correct and economical administration of justice. Certainly no reason can be assigned why the trial and final disposition of an exception that may put an end to the case should be deferred to the final trial of the cause, thus inflicting additional cost and expensive delay on the litigants, and protracting litigation unnecessarily. We not only approve, but applaud, the action of the district judge in taking up and disposing of the exceptions during the progress of the trial; for, if they are maintained in this court, this litigation will be terminated.

2. First in order of occurrence, as well as in importance of result, if maintained, is the exception that the allegation of nullity of the will for want of form cannot be maintained; the averment being, substantially, that it is not dated, and is therefore lacking an essential element for its validity. As the objection, if it be well founded, is plainly and easily discovered on the face of the instrument, it presents a naked question of law as to whether the terms of the will, in this respect, constitute a date in the sense of the Code. Presented in this light, the objection is equivalent of the plea of no cause of action, and peremptory in character, and determinable in limine. The concluding portion of the testament is couched in the following terms, viz.: "This is my good and valid will and testament, and I now revoke and declare to be null and void any and every other will and testament heretofore made by me. This done in the city of New Orleans, state of Louisiana, this Tuesday, the ninth of July, in the year of our Lord 1889. The whole written, dated, and signed

by me *personally*. Martha Vaughn Gasquet Percival." The question raised by the defendant's exception is whether the terms of the instrument are responsive to the terms of the law, to wit: "The olographic testament is that which is written by the testator himself." "In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form," etc. Rev. Civ. Code, art. 1588. The contention of the plaintiffs is that the will has no date, within the meaning of the law, and their counsel propound this question, to wit: "How can we, therefore, be called upon to supply this date by appropriating a date out of the body of the will, as a date required by law, which it lacks? And, not having a date, how can we accept the instrument as a solemn act of last will and testament, gifted to speak out after death with most miraculous organ?" A careful perusal of this interrogatory discloses the objection of plaintiffs to be that the date is defective and illegal because of its being in the body of the testament, exceptants not doubting that the testament was wholly written by the testatrix herself, as the following quotation from their brief will attest: "The impression left on the mind by reading for the first time this will in the original is not only that it is not dated, but that it is not the personal act of the testator, although indisputably, we presume, in her handwriting. The perusal completed, the mind vaguely inquires for the date at the end of the will, and then recurs to the top of the instrument in search of it, and the envelope. Then, on further consideration, reverts to the date in the body of the instrument; during which time the conviction that it is a solemn act of last will and testament is suspended, if not lost; and cannot be said to resume moral consciousness in the enunciation in the words 'this * * * by me *personally*,' which no testator would think to add to the evidence of his own handwriting, in the entirety of the instrument; or then to underscore as done, except to expose the intervention of a foreign hand." But this course of argument is a clear departure from the text of plaintiffs' exception, in that it is not solely based upon the want of a proper date to the instrument, but is made to turn upon the alleged impression that is created on the mind by the absence of a date,—that the execution of the will was not the personal act of the testatrix; an altogether different question from the one propounded, viz. that the date given is in the body of the will, and for that reason same is null and void. Hence the inapplicability of the quotation counsel have made in support of that argument, viz.: This court has said, in the case of the Succession of Bobb, 41 La. Ann. 250, 5 South. 767: "In interpretation of a will the first and natural impression derived from reading the clause involved is entitled to great weight. The writer is not supposed to be propounding

riddles, but rather to be trying to convey his idea in the simplest and most natural manner, so as to be correctly understood at first view." And for like reason we think the reference to Succession of Morvant, 45 La. Ann. 208, 12 South. 349, equally inapplicable. Neither of those cases involves the question we have here for consideration,—the date of the testament. As a confirmation of the statement that the date must be appropriated from the body of the will, the concluding paragraph is pointed to, viz.: "The whole written, dated, and signed by me *personally*." Given its literal meaning and interpretation, this sentence asserts the truth of the proposition plaintiffs' petition denies; for it declares that "the whole"—that is, the will—"was written, dated, and signed," by the testatrix. At most this seems to be a mere repetition of the fact that is made evident by the paragraph immediately preceding it, viz.: "This done * * * this Tuesday, the ninth day of July, in the year of our Lord 1889." How this mere repetition of the fact that the testament was dated can be made to operate as a denial of that fact we cannot perceive, unless it be upon the converse of the proposition that two negatives equal an affirmative. This addendum, occurring, as it does, after the actual date of the will, is restricted in terms to the declaration of the fact that it was written, dated, and signed by the testatrix, and does not make reference to the disposing part of the instrument. It relates exclusively to the confecting of the will, and constitutes no part of the body of it. Per contra the contention of defendant's counsel is that the law prescribes no particular place in the will where the date must be placed, and that, consequently, the date of an olographic testament may be either at the beginning or at the end or in the body of the instrument itself, provided that it is fairly and plainly inferable from an inspection of the instrument that it was the intention of the testator that it should have the date in question. He closes his argument on this question thus: "Whether or not this be the case must be made the subject of judicial inquiry in every suit, where the issue has been properly joined and tried; but whenever relations truly reciprocal between the date of the testament and the bequests are, reasonably speaking, made clear, the mere locality, or the exact situation, of the date in the will, the instrument being otherwise valid, is matter of small, if, indeed, it is of any, importance at all." The district judge entertained the defendant's theory, and expressed the following view in his reasons for judgment, viz.: "Albeit article 1588, in stating that the olograph shall be written, dated, and signed by the testator, is suggestive of the order to be observed in the preparation of the act, still, as the law has not prescribed in terms the place to be occupied by the date, it is immaterial where it is put. It may be at the be-

ginning, at the end, or even in the context of the act. It may also follow the signature. Succession of Fuqua, 27 La. Ann. 271. But in that case it is for the court to decide whether the date is intended to apply to the testamentary dispositions, or whether it is so far from them as to exclude all idea of its being connected therewith. In the same manner, when the date is in the body of the instrument, the court must inquire whether the date refers to the dispositions which follow as well as to those which precede it, thus making the several parts of the instrument a continuous and congruous entity, or whether the subsequent dispositions are without date, and hence null. Prudence would, therefore, counsel a testator, anxious to place the execution of his last wishes beyond the uncertainty of litigation, to date the will immediately before signing it; but his failure to do so, and the writing of the date in the body of the will, would not be a cause of nullity. Such is the consensus of opinion among the French commentators on article 910, Code Nap., of which our article 1583 is a translation. Rogron, Code Napoleon Annote, pp. 1001, 1002; 4 Marcade (Ed. 1852) pp. 6-9, par. 12 et seq.; 5 Zachariae, pp. 84, 85, § 688; 77 Poth. Obl. p. 277; 9 Duranton, pp. 30, 31, Nos. 31, 32; 3 Toullier-Duvergier, p. 205, No. 309; 1 Dalloz, Codes Annotes, No. 148, p. 783; Coin de l'Isle, Don. et Test. No. 2, p. 336, No. 30, p. 343. The will under consideration in Succession of Fuqua, 27 La. Ann. 271, to which case the district judge referred, was first signed, and then dated, thus: "Mrs. Sarah B. Fuqua. September 12th, 1873." Of it the court said: "We come now to consider whether the instrument above quoted is a will. We are of opinion that it is. It is in the olographic form,—entirely written, dated, and signed by the testatrix. Objection is made that the date is not affixed in the proper place. It is not essential that the date to an olographic will should precede the signature. It may be placed below. See Coin de l'Isle, under article 970, Code Nap. No. 30, where the authorities on this point are cited." The same proposition is quite as distinctly announced in Lagrave v. Merle, 5 La. Ann. 278. In that case the will was dated at the beginning, and signed at the end, and of the complaint made of it the court said, viz.: "The argument of counsel has been principally directed to the last clause, revoking all former wills, which comes after the date given to the closing part of the principal testamentary disposition. This, though in the handwriting of, and signed by, the testator, has no date appended to it,"—stating a case much stronger against the will than that stated by the plaintiffs. Of it the court said: "The case turns on the consequence attending the posterior clause not being dated. The Code provides that for the validity of an olographic will it must be written, dated, and signed by the hand of the testator. It is subject to

no other form, and may be made out of the state. Article 1581. * * * The law not having fixed the place in which the date must be put in an olographic will, it may be placed not only at the head, but also at the foot, of the instrument, and in the body of it." "A date, though affixed to the first clause, and before the second, may be applied to one as well as to the other, and thus both may be considered as dated and signed. Droit Français, lib. 3, tit. 2, § 34 et seq." Hence it is quite clear that, under the provisions of our own Code, as well as under the Code Napoleon, and the jurisprudence of France as well as our own, the particular position or place of the date of a will is not fixed or sacramental, and our conclusion is that the exception of the defendant is well taken, and that same was correctly maintained by the judge a quo.

The second ground of exception is that no evidence is admissible under the allegations of the plaintiffs' petition, which are of the following tenor and effect, to wit: "That said Mrs. Percival was fraudulently prevailed upon and coerced by the defendant to leave him her said estate, under fear of threats and violence; and in her weak condition of health she was subjected to constant surveillance and restraint, up to her last moments, to such an extent as to deprive her of and destroy her testamentary capacity," etc.; the objection being that the charge of the petition is that of captation and suggestion, which is barred under the provisions of the Code. The Code declares that "proof is not admitted of the dispositions having been made through hatred, anger, suggestion, or captation" (Revised Civ. Code 1492 [1479]); and the argument of defendant's counsel is that the allegation that the testatrix's testamentary capacity was destroyed by the persuasive power and coercion of the defendant, and by the constant surveillance and importunities of the defendant up to her last moments, is, in effect, a charge of suggestion and captation in the sense of that article. The learned judge of the district court, in the course of his examination of this case, gave due attention to the question, and in his reasons for judgment employed the following language, which we adopt as our own, as the views expressed are both clear and forcible, viz.: "Is undue influence a cause of nullity of testaments? Undue influence is an expression unfamiliar to civilians. It is borrowed from a system of law not prevalent in Louisiana, and it is there used in the same sense as captation and suggestion in the civil law. Schouler, Wills, pp. 230, 231, § 227. When, therefore, plaintiffs, in their petition, allege undue influence, they must be understood as alleging captation and suggestion. Captation has been defined as the act of one who succeeds in controlling the will of another, so as to become master of it. Captation takes place by those demon-

strations of attachment and friendship, by those assiduous attentions, by those amenities, by those caresses, by those ready services, by those officious little presents usual among friends, and by all those methods which, ordinarily, render us agreeable to others, and enable us to secure their good will. 'Suggestion' is often used as a synonym for 'captation,' but it is applied specially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view. *Bouv. Law Dict. verbo 'Captation';* 1 Furgole, p. 131." An examination of Bouvier fully attests the accuracy of the judge's definition; and, as Abbott's Law Dictionary gives no definition whatever of the word "captation," that of Bouvier is controlling. Simplified, the question is whether, under the Code, it was permissible for the plaintiff to make proof of undue influence having been employed by the defendant in superinducing the testatrix to make the testament in his favor, for the purpose of procuring its annulment. If the term "undue influence" comes within the meaning of the term "captation and suggestion," then the offered evidence came within the reach and prohibition of the cited article of the Code. When the case was first on trial the judge then presiding held that an objection then taken to that effect was well grounded, and disallowed the testimony; and subsequently the plaintiffs amended their petition, and made the averment above quoted of fraud as having accompanied the undue influence exercised,—doubtless with the object of meeting the views entertained by the judge then presiding, and which are as follows, viz.: "Undoubtedly," said the judge, "undue influence is sufficient to annul a will when it is proven that undue influences have operated; but undue influences must be indicated in the proceedings by specific acts of malpractice or fraudulent practice, and showing that the intention of the testator was thereby deceived, and that the disposition is therefore tainted with fraud;" his theory being that the plaintiff could overcome the prohibition of the Code by making specific charges or facts of fraudulent practices in the employment of the "undue influence" used; or, in other words, the prohibition of the Code is directed against simple, and not against fraudulent, captation. But, after the personnel of the district court had been changed, the judge taking the bench subsequently entertained a different view, holding that the terms of the Code are general, and not susceptible of the distinction his predecessor had given it. In the "reasons for judgment" the trial judge assigned, this question was carefully and comprehensively treated, and they are well worthy of reproduction. Said he: "Article 1492, Rev. Civ. Code, provides that 'proof is not admitted of the dispositions having been made through hatred, anger, suggestion, or captation.' The

language of this article is plain and unambiguous, and the rule of exclusion which it formulates would seem to admit of no exception. But counsel for plaintiffs, arguing in the same manner as my esteemed predecessor, contend that article 1492 is merely declaratory of what the jurisprudence was in France formerly, and what it was in the state of Louisiana at the time of its adoption, and that it prohibits the evidence of simple captation and suggestion, but does not embrace questions of fraudulent captation or fraudulent suggestion. When this argument was first addressed to me, impelled by a sense of deep respect for the great erudition and the ponderous logic of the magistrate by whom it was advanced, I was inclined to concede its soundness. Further reflection, however, and a careful and searching review of the French commentators, has led me to a different opinion. I find that from time immemorial, under the ordinances and customs of Paris, captation and suggestion were causes of nullity of testamentary dispositions; but at no time was the nullity decreed, unless captation and suggestion were accompanied by fraudulent practices capable of leading the testator into almost invincible error regarding those in whose favor he wished to make his will. The reason was that, albeit the kindly offices, the cajolery, the flattery, the presents, and the many other demonstrations of feigned friendship usually resorted to by cupidity are repugnant to honesty and good conscience, still human laws have not affixed a penalty thereto. They could not do so for captation, because the springs of human action are hidden in the secret of the heart; because true devotion, sincere friendship, and the sacrifice of one's future to an aged relative or a suffering being abandoned by others too often bear the semblance of low sycophancy, of simulated friendship, and of interested self-abnegation; because benefactions should not, like contracts, be measured by the principles of exact justice; and because it is oftentimes useful for individual happiness that private interest should make closer the ties of affection that sickness, infirmity, old age, incompatibility of temper would otherwise destroy. Nor could human law visit a punishment upon suggestion, because suggestion is nothing more than persuasion; because one may seek advice from strangers in making liberalities as well as in business affairs; because the obsessions of a stranger, although pressing and importunate, are nothing more than obsessions, and, far from destroying the will of him who yields, tend to shape it; because an act is not less voluntary for being originally suggested by some one else. *Coin De L'Isle, Don. et Test. pp. 84, 85.* But when the captator coupled his maneuvers with fraudulent practices, when he resorted to defamation and calumny to estrange the testator from his rightful heirs, when he used unlawful means to keep them aloof,

when he confined the testator, and denied him intercourse with the outside world, then the law, considering that fraud was the cause, while captation and suggestion were merely the means, intervened, and directed the annulment of the tainted disposition. 1 Demolombe, Don. et Test. p. 413. Such was the established jurisprudence in France when Napoleon, first consul, being desirous of codifying the laws of that great nation, confided this task to a government commission composed of Tronchet, Portalis, Mallville, and Bigot-Preameneu. In the projet prepared by those eminent jurists there was an article in these words: 'La loi n'admet point la preuve que la disposition n'a été faite que par haine, colère, suggestion ou captation.' It was thereby intended, as stated by the commentators, to drain the source of those scandalous suits which recurred so frequently before the courts. Not that French judges readily received evidence of captation and suggestion; not that litigation of that character was encouraged or looked upon with favor; on the contrary, although the suits were numerous, so difficult was it to make satisfactory proof that instances of success were very few. But the accursed greed of gold, once it has entered the human heart, rules it with relentless sway, and stops at nothing short of crime to sate itself; and disappointed relatives, whose long-cherished hopes of securing a fortune have been rudely dispelled, will not hesitate, when they cannot attack a will for any other cause, to trump up a charge of captation, and upon the most frivolous pretext exhume the testator, and heap upon his memory the most insulting accusations. His private life, his habits, his secret thoughts, nothing is respected, but everything assumes, at the will of an ardent polemic, the most odious coloring. (Mr. Attorney General Delange before the court of cassation.) This is precisely what the framers of the projet of the Code Napoleon wished to prevent. But when the article of exclusion prepared by them came up for discussion in the government halls it met with strong opposition. The argument which claimed that, if it was inserted in the Code, fraud would find in law itself a title of impunity, and would be encouraged and emboldened, finally prevailed. The measure was voted down. The Code Napoleon remained silent on the subject, and, in the absence of contrary legislation, the jurisprudence which allowed proof of captation and suggestion only when coupled with fraudulent practices continued undisturbed. 1 Bedarride, Dol et Fraude, p. 392, No. 389; p. 396, No. 392; 1 Demolombe, Don. et Test. p. 409, par. 382; p. 410, par. 384; p. 412, par. 385; p. 413, par. 386; Grenier, Traité des Donations, pp. 423-426; 5 Zacharie, pp. 50, 51; 2 Laurent, Editio Parva; 17 Furgole, p. 133. It thus appears that article 1492, Rev. Civ. Code, was not taken from the Code

Napoleon. It is a literatim translation of the article contained in the projet of Tronchet and his colleagues. It was borrowed therefrom. It was first inserted in the Code of 1806, known as the 'Old Code.' At the time the Code was adopted (March 31, 1808) the Code Napoleon, then called the 'Civil Code of France,' had been in force for more than four years, and the makers of our Code had had the benefit of the debates which preceded the enactment of its prototype in the French council of state and legislative body, so that, when our legislators embodied in the Old Code the provision that 'proof is not admitted of captation and suggestion,' they must be held to have done just what Tronchet and the other authors of the projet desired, and what the French lawmakers declined to do, i. e. close the temple of justice against all suits of nullity for the cause of captation, whether unaccompanied or coupled with fraudulent practices. Their intention could not have been merely to declare what was the jurisprudence in France or in Louisiana at the time; on the contrary, they must have meant to protest against it, to condemn it, and to forever banish from the courts a species of litigation which, except in very rare instances, originates in disappointment, rancor, or covetousness, which offers a strong temptation for perjury and subornation of perjury, which feeds on scandal and calumny, and which penetrates within the charnel house to pour obloquy upon the ashes of the departed. Our state reports, be it said to the credit and honor of the people, and in proof of the wisdom of our lawgivers, are almost barren of cases of this description. The only two to which I have been referred (Chardon's Heirs v. Bongue, 9 La. 469, and Godden v. Burke's Ex'rs, 35 La. Ann. 163) appear to be in accord with the views here expressed. I am therefore clearly of the opinion that whether undue influence be understood to mean simple captation and suggestion, or fraudulent captation and suggestion, proof of neither being admitted under the textual provisions of article 1492, Rev. Civ. Code, defendant's exception of no cause of action in this respect, too, is well founded, and must be maintained.

"Following the course of the judge's argument, we find it fortified both by the history of the article under consideration, and by the two decisions to which he refers. The article appears in the Code of 1806 exactly in its present form. Vide article 18, p. 212. Digest of the Civil Law. Then, as now, the article is found in the chapter that treats 'of the capacity necessary for the disposing of, and receiving by donation inter vivos, or mortis causa.' Evidently no change of purpose had taken place on the part of the legislature, since the establishment of the state government, in respect to this article; and, as there is no corresponding article in the French Code, the conclusion seems to be irresistible that the framers of the Code of

1808 contemplated and intended a change in the body of the law, and this necessitated a departure from the French jurisprudence on the question of captation and suggestion. Consequently a review and discussion of that jurisprudence, and an examination and comparison of treatises of French authors on the question, would not subserve any useful purpose; but, on the contrary, it might serve to confuse the discussion, and direct attention from the simple theory of our own Code to the duplex theory of captation and suggestion that prevails in France, fraudulent captation and suggestion being regarded as a dependency of the statutes of fraud. This question arose in an early case (*Chardon's Heirs v. Bongue*, 9 La. 468) wherein the will was attacked on various grounds, and, *inter alia*, on the ground that the testament was not free, and was the result of fraud and of moral constraint; and the court disposed of the question by making the statement "that it is no longer permitted by our law to attack a testament on the ground that its dispositions were the result of suggestion, hatred, anger, and captation (article 1479)," thus indicating very clearly that the terms of the Code are to be strictly construed; and what is particularly noticeable in the opinion in that case is the close similarity of the facts therein given to the case stated by the plaintiffs. In *Godden v. Burke's Ex'rs*, 35 La. Ann. 160, the identical question here presented was there examined and decided, the will being attacked on the ground that it was obtained through undue influence, and the defense being that such charge is not susceptible of proof, under the law of Louisiana. The court disposes of the issues thus squarely raised in the following clear and concise terms, viz.: "It is an error to suppose that the article [Rev. Civ. Code, art. 1492], which was first incorporated in the Code of 1808, and which finds no place in the Napoleon Code, was designed to prevent the admission of proof to establish the circumstances which transpire at the making of an authentic will, under charges tending to the nullity of the act, for want of compliance with the exigencies of the law. The prohibition embodied in that article against the admissibility of certain proof was intended to apply only to facts arisen prior to the making of the will, and to close the door effectually against inquiries into the motives which animated the testator in disposing of his property." Or, in the language of the court, the object of the compilers of the Code was to preclude all evidence of acts, conduct, or motives of the testator antecedent to the making of the will, as exercising influence over the testamentary dispositions therein contained; but same was not intended to prevent the admission of proof of what occurred at the making of the testament; for, say the court, "unless it was so, it would ever be impossible to prove that the dictation was the result of intimidation, fraud,

or some other ill practice, or to establish some other fatal irregularity." The test which that decision establishes is that the date at which the undue influence is exercised, and the object it is designed to accomplish, and not the character of the undue influence used, must control; the purpose of the prohibition being to close effectually the door against inquiries into the motives which animated the testator in disposing of his property." In a recent case the Illinois court had under consideration a precisely similar charge of nullity against a will (*Pooler v. Cristman*, 34 N. E. 58), it being alleged by the complainant that the testator, in executing the will, was, in fact, under improper restraint and undue influence from the said acts and fraudulent practices of the person named. In disposing of that question the court said that the first clause of the instruction to the jury, directing them that fraud and undue influence which should render a will invalid must be connected with the execution of the will, and operating at the time the will is made, is sustained by *Brownfield v. Brownfield*, 43 Ill. 147, and other cases cited; and that opinion is strictly in accord with that announced in the *Burke Case*. The supplemental petition will be scrutinized in vain for any allegation to the effect that "undue influence" was, by the defendant, exerted upon the testator at the time of making the will, to wit, the 9th day of July, 1889. On the contrary, the averment is that defendant employed unlawful power over his wife's testamentary intentions to defeat her will." Also that "in her weak condition of health she was subjected to constant surveillance and restraint up to her last moments, to such an extent as to deprive her of and destroy the testamentary capacity." Now, in view of the fact that the will was executed on the 9th of July, 1889, and the testatrix died on the 11th of October, 1891,—two years and three months subsequent,—any evidence in support of the charge made is impertinent and inadmissible. Our conclusion is quite clear that the exception of the defendant was well taken, and in sustaining it the judge *a quo* decided correctly.

4. The charge of the supplemental petition at which the third exception is directed is that the testamentary disposition in the defendant's favor was obtained by means of the ascendancy he had acquired over the testatrix in his character as minister of religious worship while he was in attendance upon her during the illness of which she died; plaintiffs' averment being "that the defendant was, at the time of his marriage with the testatrix, and at all times since, professionally attending her as a minister of religious worship during the sickness of which she died;" and that the disposition of the will in his favor "was the result of the abuse of the ascendancy which he had obtained over her in the exercise of his calling,"

etc.; the defendant's objection to evidence in support of it being that same is barred by articles 1489 and 1492 of the Code. Both of these articles occur in the same chapter and title of the Code which treats of the capacity of disposing and receiving by donations and testaments. Therefore it will be unnecessary for us to repeat anything that has been said in regard to the admissibility of evidence to prove that a testament was made through suggestion or captation on the part of a beneficiary therein, and we will consequently confine our argument to the effect of article 1489 upon the averment and proofs of the plaintiffs. The following is the text of that article, viz.: "Article 1489 (1476): Doctors of physic or surgeons who have professionally attended a person during the sickness of which he dies, cannot receive any benefit from donations *inter vivos* or *mortis causa*, made in their favor by the sick person during that sickness. To this, however, there are the following exceptions: (1) Remunerative dispositions made on a particular account, regard being had to the means of the disposer, and to the services rendered. (2) Universal disposition in case of consanguinity. The same rules are observed with regard to ministers of religious worship." Plaintiffs' theory is that the terms of the article absolutely exclude a minister of religious worship, professionally attending the testatrix during the sickness of which she dies, from receiving any benefit from testamentary dispositions made in his favor during that sickness; and their contention is that the presumption of the Code is a conclusive presumption of law, that cannot be destroyed by contravailing proof; and that the beneficiary minister, in order to sustain a legacy in his favor, will not be allowed to prove that the reprobated disposition was voluntary. *Per contra*, the argument and contention of defendant is that article 1489 must be construed with articles 119 and 1749 of the Revised Civil Code; and, as thus construed, an exception is created in favor of the husband of the testatrix, notwithstanding he is a minister of the gospel; that is to say, that although, as a minister of the gospel, a donee under the testament has professionally attended the testatrix during the sickness of which she afterwards dies, he will not be deprived of any benefit from donations made in his favor during that sickness, if he be the husband of the testatrix, the law declaring that the husband owes to his wife "fidelity, support, and assistance" (Rev. Civ. Code, art. 119); and plaintiffs' averment being that the defendant was, at the time of his marriage and since, professionally attending (the testatrix) as a minister of religious worship, during the sickness of which she died, etc.

Counsel for defendant has very succinctly stated the theory of the defense in his brief as follows, to wit: "The conclusion to be derived from consideration of the different

articles of the Code appears to be an unavoidable one. Mutual fidelity, support, and assistance are enjoined in article 119 upon the husband and wife. Their relations, each to the other, presuppose as much. Such being the nature of the article, it would be inconsistent with it to affect with incapacity the particular spouse who may have bestowed care and given comfort in affliction to the other. In point of fact, to do this would be to condemn and punish the discharge of duty. The civil law does not do violence in this way to the natural law. On the contrary, the natural law introduces the civil law, and travels along with it. The influence of the husband over the wife, when he happens to be a minister of the gospel, is no more to be apprehended than is any other devoted and pious relation of human existence. The influence in question, if subversive of liberty at all, should be guarded against, not only in the case of illness, or when the husband appears in this or the other part of the drama of life, but must be controlled by some rule of daily use and of universal application. It is just this which the law has attempted. It would have been unwise, if not impossible, to forbid all donations or acts of liberality between spouses. The Code, therefore, has taken the proper precaution in the premises by declaring that all donations between married persons, made during marriage, should remain revocable. Rev. Civ. Code, art. 1749. It is, then, in the proper interpretation of article 212 and of article 1749, and in the application and enforcement of both of the articles to the facts and circumstances as they arise, that the security of the married parties is to be sought, and not in the false theory upon which plaintiffs have proceeded,—of danger to society from the devoted relations of man and wife." Our attention has been attracted to other articles of the Code as illustrative of the reciprocal weights of the spouses in the matter of their power to dispose of property by gratuitous title generally. One of them provides that the spouses "can, by marriage contract, make to each other, reciprocal, or the one to the other, what donations they think proper, under the modifications hereinafter expressed" (Rev. Civ. Code, art. 1743); the corresponding article of the French Code being 1091. Another of them provides that "one of the married couple may, either by marriage contract, or during the marriage, give to the other, in full property, all that he or she might give to a stranger" (Id. art. 1746); the corresponding article of the French Code being 1094. And the support which the provisions of those articles bring to the defendant's theory is that, notwithstanding the law imposes upon the husband the duty of fidelity, support, and assistance as a debt of the spouse, yet it at the same time permits the wife, during the marriage, to make a donation to the husband, in full property, of all that she might give to a stranger;

thus illustrating the theory of the law to be that the duties and relations of the spouses *inter se* do not operate as an obstacle to the exercise of testamentary capacity by one in favor of the other; and that this theory, when construed with the provisions of article 1489, negatives its denunciation in respect to a minister of religious worship when he is at the same time the husband of the testatrix. These articles are in keeping with the provisions of article 1749, making donations, whether *inter vivos* or *mortis causa*, always revocable, and conferring upon the wife the power of revoking "without her being authorized to that effect by her husband, or a court of justice;" this free and unrestricted power of revocation being the fair equivalent of her power of testamentary disposition. Our attention has also been called to the fact that article 212 of the French Code corresponds with article 119 of our own Code, article 909 of the former with 1489 of the latter, article 1091 of the former with article 1744 of the latter, article 1094 of the former with article 1746 of the latter, and article 1096 of the former with article 1749 of the latter; thus rendering an examination of the French jurisprudence permissible, if not necessary.

Referring to the treatise of Marcade on Donations and Testaments, we find his commentary on the foregoing articles of the French Code to favor the defendant's theory,—from which his counsel's argument is chiefly drawn,—and, inasmuch as the learned judge of the district court accepted this author's interpretation of the French law, and, in connection with his own "reasons for judgment," has furnished a translation of the text, we have reproduced it as follows, to wit: "Article 1489, Rev. Civ. Code, provides that: 'Doctors of physic or surgeons who have professionally attended a person during the sickness of which he dies cannot receive any benefit from donation *inter vivos* or *mortis causa* made in their favor by the sick persons during that sickness. To this, however, there are the following exceptions: 1. Remunerative dispositions made on a particular account, regard being had to the means of the disposer and to the services rendered. 2. Universal dispositions in case of consanguinity. The same rules are observed with regard to ministers of religious worship.' Does the incapacity created by this article attach to the physician or minister who is also the husband of the testatrix? The question is new in our jurisprudence, but not so in France. Article 909 of the Code Napoleon is, in terms, identical with our article 1489. In his commentaries thereon, Marcade, with his usual lucidity of exposition, says: 'All authors concur in the opinion that the prohibition of article 909 is not intended for the doctor or minister of worship who may be the husband of the person who has made her will during the sickness of which she died,' and it has been so decided by the court of

cassation on August 30, 1808; and, in fact, as article 212 imposes upon each spouse the obligation of personally assisting the other, to strike the husband with incapacity for having given his care and services to his wife would be to punish him for having performed his duty. Besides, between spouses, the captation, the extreme influence of the one over the other, is not more to be feared in case of sickness and because of the service which the husband may render as a doctor or as minister than it is in all circumstances of life. It is every day, and in all those moments of outpouring of the heart and of confidential intercourse, that that influence subversive of freedom is to be dreaded. Hence, between spouses, it was not a special rule, founded on sickness, or on this or that quality of the husband, that should have been established. It was by a general rule of daily application that the effects of the too great influence of one spouse over the other had to be prevented, and this is what the law has done. But, as it was impossible to prevent all liberalities between husband and wife, the Code has deemed it sufficient safeguard to declare that every gratuitous disposition between spouses shall be revocable at the will of the disposer, as in case of testaments. And, even though the marriage of the doctor or of the minister should have taken place during the malady of which the testatrix died, and in the course of which liberalities were made, it is clear that, inasmuch as the marriage is valid, and must produce all its effects, the rules which we have indicated would apply, since they are among the effects of marriage. But this rule is subject to exception if it be shown by the heirs of the testatrix that the marriage was contracted solely to escape the prohibition of our article. In that case the liberalities would be annulled at the death of the sick person, because the infamous conduct of a man who has entered in the holiest of covenants for the sole purpose of accomplishing his shameful designs could not relieve him of his incapacity under the law. The principle and the exception are justly consecrated by jurisprudence. Volume 3, p. 408, No. 530." The judge also makes quotations from Demolombe to the following effect, viz.: "By the terms of article 212 the husband owes assistance to his wife. Thence flows the duty and the right to give her his services during sickness. It would be revolting to say that the husband should then keep away from his wife, and abandon her, in order to preserve his title to the evidences of her tenderness and gratitude. Ergo, since the husband who attends or who assists his wife in sickness by doing so fulfills one of the noblest duties of marriage, it is impossible that the legislator should have stricken him with incapacity by reason of the very accomplishment of that duty. And the legislator has not done so. On the contrary, he has by special provision regulated what liberalities may be made be

tween spouses, whether by marriage contract or during the marriage. Those provisions embody a complete order of principles on that subject, and apply in all cases, and to all husbands, without distinction, whatever be their calling, doctor, minister of worship, or other and in whatever situation they may be. Whence it follows, as has been said by the court of cassation, that it was not for husbands that the prohibition in article 909 was established." Demolombe also holds that the fact of the marriage having been solemnized and of the testament having been made during the last sickness of the testatrix does not alter the rule, provided, however, that the physician or the minister of worship has not married the sick person for the sole purpose of fraudulently eluding the incapacity resulting from his calling. 1 Demolombe, Don. et Test. p. 556 et seq., No. 543 et seq. To the same general effect are the following authors, viz.: 2 Vazelle, Don. & Test. p. 135; 3 Toulhier, Don. & Test. p. 29, No. 66; 2 Troplong, Don. & Test. pp. 234, 235; 1 Coin de l'Isle, Don. & Test. p. 106. This theory is enforced by Demolombe in the following terms, to wit: "(1) Aux termes de l'article 212, le mari doit assistance à sa femme; et de là résulte le devoir et le droit aussi sans doute: de lui donner ses soins dans ses maladies; il serait révoltant de dire que le mari devrait alors s'éloigner de sa femme et la délaisser précieusement afin de conserver ses titres aux témoignages de sa tendresse et de sa reconnaissance. Donc, puisque le mari qui soigne ou qui assiste sa femme remplit ainsi l'un des plus nobles, devoirs au mariage, il est impossible que le législateur l'ait frappé d'incapacité, à raison même de l'accomplissement de ce devoir. (2) Aussi, n'en est-il rien; le législateur au contraire, a réglé par des dispositions spéciales, ce qui concerne les libéralités entre époux, soit par contrat de mariage, soit pendant le mariage (Art. 1091 et suiv); ces dispositions forment un ordre de principes complet sur cette matière, et qui s'appliquent dans tous les cas et à tous les maris sans distinction, quel que soit leur état médicaux, ministres du culte ou autres, et dans quelque situation qu'ils puissent se trouver; et il en résulte, comme la Cour de Cassation la dit fort justement que ce n'est pas pour époux qu'a été établie la prohibition contenue dans l'article 909." Demolombe, p. 556, No. 543. That author expresses the idea to be that it is not the minister of religion who would be deemed incapable of receiving testamentary dispositions, but the husband, if the strict interpretation of the article 909, Code Nap., contended for, prevails; as, in such case, the husband's influence is far greater over the wife than that of the minister can possibly be. 2 Laurant, p. 494.

In French jurisprudence, *Rey v. Broison* is considered the leading case, and one upon which the discussions of French authors have chiefly turned. Vide 7 Journal du Palais, p. 121. Subsequent decisions of the

court of cassation, while differing therefrom in some respects, have with general unanimity affirmed the principles announced therein. *Bonnet v. Dusordet*, 15 Journal du Palais, 689; *Dusordet v. Bonnet*, 14 Journal du Palais, 592; *Boyer v. Damiens*, 17 Journal du Palais, 580. The only exception stated in those decisions to the applicability of Marcade's theory is that of a man who married a woman in fraud of the law, "or with the fraudulent design of defeating the incapacity established by law." In *Rey v. Broison*, the court of cassation say: "Whereas the Rev. Civ. Code, by article 1094, empowers the spouses to give to each other reciprocally within the limits therein set forth all that they may dispose of in favor of a stranger; whereas article 212 imposes upon the spouses the mutual duties of fidelity, support, and assistance, whence it follows that it was not for husband and wife that the prohibition of article 909 was established; and whereas the application of that prohibition was not formally asked before the lower court, as should have been done, —the appeal is dismissed," etc. In that case it appears that a girl who was afflicted with phthisis married her attending physician. A few weeks after the marriage she made a public will, by which, after making a few special legacies, she left the bulk of her fortune to her husband as universal legatee. Her brother brought suit to revoke the will on the grounds: First, that the marriage was a simulation, intended to evade the provision of the law relative to the prohibition against physicians attending persons during their last illness; second, that, even if the marriage be valid and legal, the husband being at the same time the physician attending his fiancée, the prohibition of the law invalidates her subsequent testamentary disposition in his favor. It was upon these propositions that the judgment of the court was pronounced. In *Bonnet v. Dusordet*, 15 Journal du Palais, 689, the court of cassation held that if, under articles 1091 and 1094 of the Revised Civil Code, the physician who treated a person during the sickness of which she died, and who married her during the course of her illness, can legally take donations made to him during that interval, it is because these donations are presumed to have been freely made by reason of conjugal affection; but it is otherwise when the donations are shown not to have sprung from this affection, and free consent, but that they had no other cause than the influence which the physician had over the patient, and the abuse of this influence by the physician, to obtain these donations from her during her last moments. It was upon such a state of facts as is contemplated in the last paragraph having been alleged and proven that the donation under consideration in that case was revoked and set aside. In *Dusordet v. Bonnet*, 14 Journal du Palais, 599, the court held that, conceding, in the

first place, that it clearly appeared from all the evidence in the case that the marriage contracted on the 14th of October, and the subsequent universal testamentary bequest of the 18th of the same month, took place during the sickness of which the testatrix died; and, in the second place, that the husband had been originally the only physician of the widow whom he married, and after he had married her and called in other physicians, that he was the habitual physician and attendant in whom she placed confidence, and that he was thus brought within the prohibitive terms of article 909 of the Code, hence it was impossible for the legatee to be released therefrom by means of a marriage which was evidently contracted entirely for the purpose of escaping from the prohibition. In that case the donation was annulled and set aside, the wife having died just one month and two days after the marriage. In *Boyer v. Beaufort*, 17 Journal du Palais, 581, the court had under consideration an antenuptial marriage contract, which the collateral heirs sought to revoke on the ground that, the husband of the deceased having attended her as physician previous to her marriage, while she was suffering from the illness of which she died, he was incapable of receiving anything from her by such contract. Notwithstanding the court sustained the defendants' plea of 10 years' prescription,—treating the action as one of rescission,—yet they held that, if the law prohibited physicians from receiving donations from their patients, it was only in cases where a dangerous influence had brought about these donations, and not when they were freely and voluntarily made in view of a marriage which actually took place subsequently; the donation in this last event, possessing a legitimate cause, was secure from attack. Vazelle defines the articles of the French Code thus: "Article 909 does not make an express exception for the husband who, being a physician, gives to his wife the aid and assistance of his art; but article 212 establishes between spouses the reciprocal obligations of aid and assistance, and article 1904 authorizes them to make donations to each other. From all which it has been properly concluded that the husband who is a physician performs a duty in employing his art and in giving his attention and care to the treatment of his wife when sick; and that his profession of physician or surgeon ought not to make him lose the right, which all other husbands have, to the donations of his wife. But it has been held that a marriage which took place during the sickness of the wife, for the purpose of getting rid of the prohibition of the law, ought not to have the effect of validating the donation, otherwise void." 2 Vazelle, Don. & Test. p. 135; Code Nap. 909. Vide *M. Grealer*, No. 127; *Toullier*, No. 66; *Duranton*, No. 257; *Dalloz*, c. 2, § 7,

No. 9. As *Duranton* has well said: "Unworthiness should not cover or shield incapacity." *Toullier* states that physicians who give their wives the care and assistance of their art are excepted from the prohibition. Article 1094 gives the spouses the power of giving and receiving without excepting husbands who are physicians. Under article 212, spouses owe to each other reciprocally aid and assistance. This is sufficient to establish or prove that the general prohibition of article 909 does not strike or attach to husbands who are physicians. 3 *Toullier*, Don. & Test. p. 29, No. 66.

The foregoing ample citations from the French Code and jurisprudence, as well as from the treatises of French commentators on the Code Napoleon, clearly show their concurrence in text, as in opinion, with our own Code and jurisprudence. After careful examination of this interesting subject in all of its bearings, we have reached the same conclusion at which our learned brother of the district court arrived,—that the plaintiffs' complaint of the testamentary disposition, being null on account of the supposed ascendancy the defendant had acquired over his deceased wife by reason of the influence he exerted over her as a minister of religious worship, is barred by the provisions of articles 1889 and 1492 of the Revised Civil Code.

5. Considering the authorities cited, and the views that are expressed in paragraph 3, *supra*, to the effect that the framers of the Code intentionally closed the portals of justice against "all actions of nullity for cause of captation, whether unaccompanied or coupled with fraudulent practices," it is immaterial for us now to inquire whether the allegations of plaintiffs' petition in this regard are full and complete or vague and indefinite; and it is likewise equally unimportant for us to inquire whether the intervention is barred by certain antecedent judicial admissions or not. Altogether the case has been examined and disposed of in a manner comporting with the important questions and large values involved, and the high character of the defendant as a minister of religious worship; and we feel justified in saying that none of the charges preferred are tenable in law. Judgment affirmed.

(46 La. Ann. 1186)

REDDICK v. WHITE. (No. 11,382.)

(Supreme Court of Louisiana. April 23, 1894.)

WIFE'S PARAPHERNAL PROPERTY — ADMINISTRATION BY HUSBAND—SUIT AGAINST WIFE'S PARTNER—PRESCRIPTION.

On Motion to Dismiss Appeal.

There is no provision in our law permitting the filing of the record of appeal "in forma pauperis." The record must be stamped, or the cause cannot be heard. Const. 1879, art. 145; Act No. 136 of 1880, § 1, par. 45; *Id.* §§ 10, 22.

On the Merits.

1. The administration by the husband of the paraphernal property of the wife is not displaced, and the community deprived of the fruits, merely because the husband receives a salary from the partnership of which his wife is a member, formed for the cultivation of the plantation, a part of which is her paraphernal property, the husband having the management of the entire plantation for the partnership as well as for his wife. Rev. Civ. Code, arts. 2383, 2385, 2386; *Clarke v. Insurance Co.*, 18 La. 431; *Pinckney v. Mulhollan*, 6 Rob. (La.) 41; *Richard v. Blanchard*, 12 Rob. (La.) 524.

2. An action by the husband for alleged advances to and debts paid for such partnership, brought against the partner of his wife, is subject to the rule that one partner cannot sue his copartner for specific sums, but only for a settlement of the partnership, and for the balance, with interest, thereon found due on settlement. Story, Partn. §§ 217, 219, 221; *Gridley v. Conner*, 4 Rob. (La.) 445; *Dromgoole v. Gardner*, 10 Mart. (La.) 433.

3. An action to recover the amount of alleged debts paid and advanced for another is an action for the settlement of a partnership, and is prescribed by ten, not one, three, or five, years. Rev. Civ. Code, arts. 3538, 3544; Acts of 1888, No. 78; *Owen v. Holmes*, 12 Rob. (La.) 148.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by W. S. Reddick against R. M. White. Judgment for defendant, and plaintiff appeals. Reversed.

Frank C. Zacharie, for appellant. E. Howard McCaleb, for appellee.

On Motion to Dismiss.

MILLER, J. The motion to dismiss in this case is on the ground that the record of appeal is not stamped, as required by section 1 of Act No. 136 of 1880. The appellant claims that, under the order of the lower court, the appeal was allowed in forma pauperis, dispensing him from stamping the record. We are aware of no legislation that authorizes this court to dispense with the stamping of the record as a preliminary to the hearing of the cause. The appellant refers to the dispensation from costs accorded by courts of equity to the poor litigant, and insists our courts can observe the same rule. But our courts are controlled by the legislation on the subject. That legislation is to provide the means to maintain the judiciary by stamps to be paid for by the litigant and affixed to all papers filed or used in the courts, including records of appeal. The state is exempted from costs on the general principle that in its own courts the sovereign pays no costs. The city pays none in advance in criminal cases by statutory exemption, and there may be other exemptions by statute. The exemption illustrates the rule that all litigants must observe the law requiring stamps in legal proceedings. It is claimed that the eleventh article of the bill of rights of the state constitution declaring that the courts are open to all entitles the appellant in forma

pauperis to file the record without stamps. The same constitution provides for stamps to be paid by litigants as the revenue of the state for supporting the courts. If, under article 11 of the bill of rights, the courts are to be open without costs to the claim of litigants who claim privileges as poor litigants, on the same principle it might be claimed there was no authority under the bill of rights to exact any stamps. We think the right of all to appeal to the courts for the redress of grievances is subject to the limitation of the constitution itself that fees shall be paid in the form of stamps. We find no warrant in the constitution or in our legislation to dispense the appellant from stamping the record, and we cannot supply an exception when the lawgiver has made none. Const. art. 145; Act No. 136 of 1880, § 1, par. 45; Id. §§ 10, 22. In *State v. Recorder*, 33 La. Ann. 226, an application was made to the court to compel the lower court to send up the record without the stamps, on the ground of the poverty of the litigant. This court, without passing on the question of the exemption of the litigant from costs, referred the applicant to the lower court. The case decides nothing, except the application must be made primarily to the lower court. In this case that application was made, and the issue now is presented to this court whether it can entertain this appeal on an unstamped record. In our opinion, we cannot, but, in view of the appellant's application to the lower court, and by reason of its order, we think the appellant should be allowed the opportunity to stamp the record if he desires to submit his case for decision. It is therefore ordered, adjudged, and decreed that the appeal be dismissed at the appellant's costs, unless within 10 days he places the required stamps on the record of appeal.

On the Merits.

(May 14, 1894.)

The plaintiff, alleging that his wife inherited a plantation, sold a portion to defendant, and formed a partnership with him for the cultivation of the property; that in defendant's purchase he assumed as part of the price one-half of certain debts of the wife, agreeing in the partnership articles that the profits of the plantation should be applied to pay these debts, and as to any residue left unpaid the defendant should be bound for his part. The plaintiff alleges that he administered his wife's share of the partnership property, made payments out of the profits of the debts stipulated to be paid, and also advanced his own funds for those payments as well as for other partnership debts; that defendant's share of the profits was insufficient to pay the half of the debts he had assumed and his part of the partnership debts, and that he is indebted to the extent of plaintiff's payments of that part of the debts for which defendant was

liable. The suit is to recover that indebtedness. The defendant pleaded the prescription of one, three, and five years. The exceptions being overruled he answered, denying that plaintiff administered his wife's share of the partnership property; hence, had no claim for payment made with her funds,—i. e. arising from her share of the partnership property,—or that plaintiff ever advanced his own funds for the partnership. The plaintiff's wife intervened, joining the defendant in controverting the asserted liability of defendant. The judgment was for him, and the plaintiff appeals.

When the partnership was formed, in 1878, the plaintiff's wife was largely indebted, for part of which indebtedness the plantation was mortgaged. The defendant, in purchasing part of the plantation, agreed to pay as part of the price one-half of the wife's indebtedness; the half being fixed at \$4,908. The partnership agreement proposed that all the revenues derived from the cultivation of the property should be applied to pay the wife's indebtedness subsisting at the date the partnership was formed; that the defendant was to be bound for one-half of any amount left unpaid, and there was the usual stipulation for the equal division of partnership profits and debts. The plaintiff managed the property, attended to the cultivation, shipment of the crops, and received and applied the proceeds. The crops appear to have been meager. The funds realized from their sale seem to have been applied in payments on the mortgage debt, and expenses of the plantation; and at the close of the partnership in 1883 a large portion of the debt expected to be discharged from the crops remained unpaid. We have been unable to determine from the record the contention of plaintiff that he paid the debts of the partnership to the extent of becoming a creditor of the defendant for \$4,430, the amount for which judgment is claimed. The petition refers to an account annexed. We find an account of crops and payments, another headed "Black's Note," and a mass of testimony referring to disbursements for the partnership. From all this we cannot ascertain how plaintiff makes up the amount he claims, nor how it is supported. The record furnishes no basis on which the pecuniary relations of the parties can be adjusted, and hence, determining the legal questions, we will remand the case.

The law presumes the paraphernal property of the wife to be under the husband's administration, and, when thus administered, the fruits belong to him. Rev. Civ. Code, arts. 2333, 2385, 2386. The defendant denies that the husband so administered, and in this the wife, in her intervention, concurs with defendant. To support their contentions both rely on the fact that the plaintiff was paid for his services in managing the plantation, and it is claimed that he was a mere laborer for the partnership. We think

the argument of defendant on this point misconceives the facts, as well as the legal relations arising out of the facts. The partnership agreement stipulated \$300 per annum should be allowed for labor,—that is, all the labor required. It was this \$300 plaintiff was paid, or rather received for himself out of the partnership revenues, and with which he defrayed all labor charges. The fact that he received this \$300 per annum from the partnership, in which his wife was a partner, did not exclude him from administering the paraphernal interest of one-half in the partnership, or deprive him of the right *jure mariti* arising out of that administration. The defendant's brief suggests the plaintiff was a laborer on the plantation before his wife acquired it, and that relation the defendant insists was not changed after the wife acquired, sold one-half the plantation to defendant, and formed the partnership. We think, on the contrary, when the wife acquired the property, and at a later period formed the partnership for its cultivation, the property first, and afterwards the partnership interest in respect to it, fell by operation of law under the husband's administration. The wife may retain the administration of the paraphernalia by appointing the husband her agent. *Miller v. Handy*, 33 La. Ann. 160; Rev. Civ. Code, art. 2384. In this case no such agency existed. The husband administered solely by virtue of the marital relation. The wife sued to resume the administration of her paraphernal estate, but not till 1888. It is our conclusion, therefore, the plaintiff became entitled to the share of his wife in the partnership revenues, and in the adjustment of defendant's liability, if any, plaintiff is entitled to charge all payments of partnership debts made with or from the wife's share of the partnership funds. If, over and above the funds derived from the partnership, the husband made payments of the partnership debts during its existence or after its dissolution, he is entitled to recover one-half the amount so paid, with legal interest from the dates of such payments. If these payments should have been on account of the mortgage debt of the wife, that would not entitle the husband to any subrogation to the rights of the mortgage creditor, as there was no conventional or legal subrogation. The husband is not bound for the debt of the wife resting on her separate property,—i. e. acquired by inheritance, as in this case,—and hence, if he paid her mortgage debt, or that of the defendant, her partner, there would be no subrogation.

The plaintiff in this case is asserting, in respect to the paraphernal interest of the wife in the partnership, the right of one partner against his copartner. The same rule applies as in ordinary cases for the settlement of the partnership. It is well settled one partner cannot sue the other for specific sums. The suit must be for the settlement

of the partnership, which of course embraces an inquiry into the assets of the partnership, its liabilities, the profits, the credits in favor of each partner, and the charges against him. On all these elements the balance for or against the partners is ascertained, and judgment given accordingly. Story, Partn. §§ 217, 219, et seq.; Gridley v. Conner, 4 Rob. (La.) 445; Dromgoole v. Gardner, 10 Mart. (La.) 433, passim. It is only for the balance found due on the final settlement that the partner can sue. If either partner has paid mortgage debts which the partnership assumed, or if the share of the profits of either partner has been thus applied, there would be no subrogation in favor of either partner to the mortgage debt. The whole rights of the partners are merged in the balance found due on the settlement.

The prescription of three years pleaded by the defendant has no application to the demand of plaintiff. That prescription refers to accounts for goods sold, and merchants' accounts against their customers, and generally to those business or other relations in which accounts are usually rendered. Rev. Civ. Code, art. 3538; Acts of 1888, No. 78. The prescription against the action for moneys advanced or debts paid by one for another, or for the settlement of a partnership, is ten, not three or five, years. Rev. Civ. Code, art. 3544; Owen v. Holmes, 12 Rob. (La.) 148.

Reserving our opinion on the question of liability, we will remand the case, with instructions for the lower court, by testimony or the report of experts, to ascertain: (1) The amount of the payments, if any, by the plaintiff out of his own funds,—i. e. not the funds of the partnership,—of the debts of the partnership; (2) the amount of the debts of the partnership, if any, paid by defendant out of the funds of the partnership; (3) the amount of the partnership funds received by each partner; (4) the balance for or against each partner on the adjustment of the partnership affairs. We assume that, as to the amount of the crop proceeds and the mortgage debt of Bowland, the record as it now stands affords full information; and it is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, that the case be remanded as directed and for the purposes stated in this opinion, and that appellee pay costs.

On Application for Rehearing.

(May 26, 1894.)

As the record does not furnish the basis to adjust the controversy, we will so far modify our previous opinion as to reserve for determination, when the case comes again before us, the questions of interest claimed by plaintiff, and whether he is entitled to any subrogation to the mortgage rights of Bowland, or the judgment rights of Black and Davis. In making this reservation we are not to be understood as acquiescing in the

view of plaintiff's counsel advanced in support of the application for rehearing. We simply reserve the questions. It is therefore ordered, adjudged, and decreed that our former opinion and decree be modified to the extent stated, and the cause be remanded for the purposes stated in the original opinion and decree, and, although we think all the testimony needed has been indicated, with the rights of the parties to offer besides such testimony as they deem pertinent. Rehearing refused.

(46 La. Ann. 830)

STATE ex rel. WHITAKER v. ADAMS et al.
(No. 11,526.)

(Supreme Court of Louisiana. May 7, 1894.)

REMOVAL OF RECORDER OF RECORDER'S COURT —
POWER OF CITY COUNCIL.

The provisions of article 201 of the constitution—that, for any of the causes enumerated in article 198, district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal, and ward officers, shall be removed by judgment of the district court of the domicile of such officer (in the parish of Orleans, the civil district court)—are not exclusive of all other methods by which municipal officers may be displaced. The power granted by the general assembly, in sections 58 et seq. of the charter of New Orleans, to the common council, to remove the recorders of the recorders' courts by impeachment proceedings, is constitutionally granted. Miller, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Petition of the state, on the relation of E. S. Whitaker, against Thomas B. Adams and others. Decree for plaintiff, and defendants appeal. Reversed.

E. A. O'Sullivan, City Atty., for appellants. Farrar, Jonas & Kruttschnitt, for appellee.

NICHOLLS, C. J. The question submitted to us for decision is whether, while the recorder of the first recorder's court of the city of New Orleans is present, able, and willing to perform the duties of his office, he can be suspended from exercising his functions, and temporarily replaced by the recorder pro tem., through an order of suspension from the mayor of the city; this order being grounded upon the pendency of impeachment proceedings before the city council, directed against the recorder. Defendants invoke, in favor of the affirmative of this proposition, sections 58 et seq. of Act No. 20 of 1882, known as the "Charter of the City of New Orleans," which confer upon the common council the power of impeachment, and name the recorders of the city, among others, as holding their offices subject to this power. Relator's contention, on the other hand, is that for high crimes and misdemeanors; for nonfeasance and malfeasance in office; for incompetency; for corruption, favoritism, extortion, or oppression in office; or for gross misconduct or habitual

drunkenness,—an exclusive method of removal from office is provided by article 201 of the constitution, which declares that, for such causes, district attorneys, clerks of court, sheriffs, coroners, justices of the peace, and other parish, municipal, and ward officers, shall be removed by judgment of the district court of the domicile of such officer, and that the office which he holds is one of the offices covered by the article.

Recorders, in New Orleans, are part and parcel of the machinery of the city government. They are not constitutional officers. *State v. Ramos*, 10 La. Ann. 422. The recorder's court is purely a statute court. It might be conceded that the recorders, as to removal from office, fall under the terms of article 201 of the constitution, without determining the issue raised in this case. The real issue is whether the power of removal referred to in the article of the constitution is identical with the power of amotion, impeachment, or quasi impeachment, on which the defendants base their right to act, and whether proceedings under article 201 are exclusive of any other method by which municipal officers may be displaced. If the two proceedings are referable to separate and distinct powers, as the source from which they spring, and the former method of removal is not necessarily exclusive of the latter, the provisions of article 201 of the constitution do not control this case. Relator's contention—that he is not "removable for cause," otherwise than by the civil district court—could be well admitted, as thoroughly correct, if "judicial" proceedings be referred to, and yet the course pursued by the defendants be perfectly sustainable, as legal. That the general assembly conceived there was a difference between "judicial removals for cause after trial," and impeachment, quasi impeachment, or amotion of its officers by a municipal body acting politically, and in the discharge of an administrative duty, and that both could be resorted to though under different circumstances and varying conditions, appears on the face of the act; for while section 49 declares that, for the causes specified in article 196 of the constitution, the recorders shall be "removed" in the manner pointed out by article 201, sections 58 et seq. confer expressly upon the council the power of "impeaching" these same recorders. We are of the opinion that the legislature was justified in making the distinction it did. Proceedings for the removal of officers, whether by that name, or that of impeachment, addressal, expulsion, amotion, or quasi impeachment, do not properly and regularly belong to the judicial department. They are universally recognized as arising in and from the exercise of the political power of the state, lodged in its legislative and executive branches. If the judiciary has jurisdiction, in any manner, shape, or form, over such proceedings, it is only by virtue of direct, special, exceptional grant.

While the distribution of the different powers in a state to the different departments is, of course, under the control of the convention which framed the organic law, and it is at liberty, in its apportionment of powers, to depart, in greater or lesser degree, from what is and has been, for generations, regarded as the functions legitimately belonging to each, and those separating each, and such action must be maintained and enforced, it is none the less true that such action preserves a distinctive exceptional character. As exceptional in its nature, it has, to a degree, to be construed, as to its scope, by the rules governing exceptional legislation. While full effect is to be given to it, it should be kept within precise limits, and not be extended beyond the cases evidently contemplated to be covered by it. The reason, the object, and the purpose to which it owed its origin must be constantly kept in view. It must be conceded that in adopting article 201 of the constitution the convention made, not only a departure, but a very great departure, from established principles. We are therefore of the opinion that when it provided a method for the removal of officers, through courts, after a full trial, and slow and regular judicial proceedings, it intended to establish a special and additional, and not an exclusive, method of removal, and that, if the proceeding be exclusive, it is exclusive only to the extent that it has been so specially made by express declaration.

What were the object and purpose of this extraordinary grant of exceptional power to the judiciary? In our opinion, it was to furnish a guard and a protection against the unjustifiable continuance in office of incompetent and unworthy officers, by giving to the people, acting directly in their own right, a special remedy, to which they could themselves have free recourse, independently of the official action of others. Without this article the people would have to rely entirely for relief upon the governor or general assembly, or the municipal authorities, who, no matter how great the occasion or cause for action might be, would be free to act, or not, as they thought proper. With the article, they could themselves force an issue in any given case,—willful inaction, misplaced friendship, or partisan favoritism to the contrary notwithstanding. A second purpose was to substitute in lieu of the removal of officers by addressal —by mere resolution—the special method through judicial proceedings, without interfering or clashing with other powers, either of the legislature or of the municipal authorities. That the convention did not think that the method of removal of officers provided for by article 201 was exclusive of others, of and by its own force, but required a direct affirmative declaration to that effect to make it exclusive, will appear from article 152, in which it is provided that, quoad addressals from

office by the legislature, it should be so to the extent of its terms. The absolute deprivation of the political right of holding an office under the state, or of holding a municipal office under the city charter, brought about through the instrumentality of the legislature or the municipal authorities, is something other and different from the temporary displacement of an officer from an office to which he might again be legally elected or appointed, operated through the courts by regular judicial proceedings. The source of power of the two proceedings is not only different, but the penalty is different, and the character of the proceeding is different,—one being political and administrative; the other being now judicial, by constitutional grant. A proceeding for the judicial removal of a district judge would not bar an impeachment proceeding by the legislature against the same judge, for the same offenses, while he was still in office.

Pursuing the subject further, we find that the constitution reserved and gave to the general assembly full power and control over the creation of a government for the city of New Orleans. It did so with knowledge of, and with reference to, the well-recognized existence, inherently, in municipal corporations, of the power of removal or amotion of its officers; and, in giving this unrestricted power to the general assembly, it must have contemplated, and did contemplate, that in creating the corporation the legislature would deal with that power, either widening or restraining it as in its judgment it would deem best. The general assembly under the constitution, had the power to determine what the officers of the corporation should be, and to define and fix their respective duties. It had the right to fix and determine what the qualification for those offices should be,—the terms and conditions upon which they should be assumed, and the terms, conditions, and circumstances under which they should be vacated. Every person accepting office under the city charter accepted it on the conditions constitutionally affixed to the office in the charter. The recorders' courts, as we have said, are part of the machinery of the city government. They were not organized by direct special act under the grant of power conveyed in article 136 of the constitution, but through the act organizing the city under the constitutionally reserved and granted power of creating a government for the city. The courts are purely statute courts, liable to entirely disappear by legislative action, and subject to modification as to their powers, just as is the city government, of which they form a part.

We do not think that any of the decisions quoted by relator reach this case. The only point decided in *Richard v. Rousseau*, 35 La. Ann. 934, was that article 201 of the constitution had no reference to minor officers elected by the various parish and municipal

corporations of the state. The mind of the chief justice, who was the organ of the court on that occasion, was as to who was outside of the provisions of the article,—not who was inside of the same, nor what the effect of being within it would be.

The fact, referred to in relator's brief, that the recorders are elected by the people, and not by the common council, would perhaps have furnished a good argument before the legislature in favor of withholding the power of amotion from reaching the recorders; but it does not legally affect the situation, when the general assembly has thought proper not to do so, and there was no constitutional obligation on its part to withhold it. It must be observed, however, that the mayor of the city, and other officers elected by the people, are brought under the operation of the same power. It may also be observed that the attention of the legislature seems to have been directed to this subject, and to the cases of the officers elected by the people, as, in one respect, it distinguishes them from those elected by the council; for section 30 of the act declares "*that in addition to the power of removal by way of IMPEACHMENT the council shall have power to remove at any time from office any officer of the council elected by them, by RESOLUTION declaratory of its want of confidence in said officer; provided that two thirds of the members elected to said council shall vote in favor of said resolution.*" (Italics ours.) In the minds of some persons, it may doubtless be considered unwise to have lodged in the common council as much power over the elective officers as the general assembly has granted to it; but we are not to deal with statutes from what we might consider impolitic or unwise. The issues which are presented in this case are similar to those in the case of *State ex rel. Behan v. Judges*, 35 La. Ann. 1075, though advanced at a little later stage of the impeachment proceedings, and presented under somewhat different form. The decision in that case strongly supports the views herein expressed. We discover no unconstitutionality in Act No. 20 of 1882, in the respects complained of. The impeachment proceedings being legal, the order of suspension based thereon was also legal. For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that relator's demand be rejected, at his costs.

WATKINS, J. (concurring). The statement of this case is best given in the language of the relator's petition, thus: "That your relator was, on the 22d day of April, 1892, elected recorder of the first recorder's court of the city of New Orleans, for the term of four (4) years. That he was thereafter duly commissioned, qualified, and took

possession of and enjoyed the office of recorder of the first recorder's court of the city of New Orleans until the 18th day of January, 1894, when one Thomas R. Adams did usurp, intrude into, and unlawfully take possession of the said office of recorder of the first recorder's court of the city of New Orleans, and has ever since continued to usurp, intrude into, unlawfully hold, and exercise the functions of said office, to which your relator is lawfully entitled, and which he has the right to exercise. That the said Thomas R. Adams claims the said office by virtue of a certain *alleged order of the mayor of the city of New Orleans, suspending your relator as recorder of said court, and by virtue of said alleged proceedings taken by the common council of the city of New Orleans, through its committee on public order, as also through all of its members, sitting as an alleged court of impeachment, to remove your relator from the office aforesaid. The said alleged order of suspension, and said proceedings of said city council are all taken under authority alleged to be vested in said mayor and in said common council, and in its committee of public order, under the charter of said city, being Act No. 20 of the Acts of the Legislature of the State of Louisiana for the 1882, and especially under section 19 and sections 58 to 62, inclusive, of said act. Relator further avers that said act of the legislature of the year 1882, and especially the hereinabove named sections of said act, in so far as the same purport to confer upon the mayor of the city of New Orleans, or the members of the common council of said city, or any number of them, any power to suspend your relator as recorder of said court, or to remove him from his office as recorder of said court, are unconstitutional, null, and void, for this: that the said act, in so far as it vests any power in said city council or in said mayor to suspend or remove your relator from office, vests in said mayor and common council judicial functions, in violation of articles 14 and 15 of the constitution of the state of Louisiana; and it also violates articles 196 and 201 of said constitution, which confer upon the civil district court for the parish of Orleans, alone, the power of removing your relator from said office. That said Thomas R. Adams, notwithstanding the premises, pretends and claims that he has the right to exercise the duties of recorder of the first recorder's court of the city of New Orleans; that he is entitled to perform the duties of said office, and to receive the salary thereof,—notwithstanding the fact that your relator is not sick, nor absent from the city of New Orleans, nor legally suspended from office.” (My italics.) The prayer of the petition is that the said Thomas R. Adams may be ousted from the said claim, and debarred from asserting the same against relator; that it may be adjudged and decreed that he is the judge of said first recorder's court, and entitled to perform its functions, and recover the profits, honors, and emoluments thereof, notwithstanding said order of suspension,*

and the proceedings of the city council looking to his impeachment and removal from office. The answer is practically a general denial, coupled with an averment of the mayor's right to suspend the relator from the performance of the duties of his office, under the powers vested in him by law. It further avers that the provisions of the city charter in no manner conflict with the constitution; the relator being a municipal, and not a constitutional, officer; that recorders' courts in the city of New Orleans were for the first time created by the city charter of 1882, and for that reason the provisions of the constitution adopted in 1879 did not include the judges of these recorders' courts; that, as these officers were created by the legislature, it was competent for it to indicate the mode of electing and displacing the incumbents of them, and for that reason the act of the legislature does not come in conflict with the constitution. On these issues the case was tried, and judgment was pronounced in favor of the relator, and the respondent has appealed.

The judge a quo assigned as his “reason for judgment” that the relator is a municipal officer, and comes within the designation and provisions of article 201 of the constitution, viz. “and all other parish, municipal, and ward officers,” and that “the formidable power and responsibility of removal, having been, by the sovereign will, formulated in the constitution, lodged in the judiciary alone, cannot be delegated by the legislature—a co-ordinate department of the state government—to another body of magistracy. A consideration of articles fourteen (14) and fifteen (15) of the constitution makes this conclusion more inevitable and imperative.” “The mayor and common council are without power in the premises.”

It is evident that the judge a quo accepted the theory of relator's counsel, as set out in his petition, to the effect that the legislative grant of power to the common council of the city of New Orleans (Act No. 20 of 1882) to impeach, and to the mayor to suspend, a municipal officer, is unconstitutional and void, because it is a judicial power of removal, which, by the terms of article 201 of the constitution, is confided exclusively to the civil district court, and consequently cannot be exercised by any other department of the state government, “nor by any person, or collection of persons holding office in them.” Articles 14, 15, Const. 1879. And it is equally evident that this supposed conflict between the city charter and the constitution arises from the fact that the power conferred on the common council and the mayor is the same power that is conferred on the civil district court; otherwise, articles 14 and 15 of the constitution would have no applicability to the question under consideration. No other ground is assigned for the unconstitutionality of the city charter, and no other can be considered. This supposition of counsel must be correct; otherwise, the

position assumed is illogical. And attention is attracted at this time to the position that is assumed by the relator, in order to disembarass the argument of any reference to the question of the constitutional authority of the legislature to impart political power to the municipality of New Orleans. But is the legislative grant of the power of removal by impeachment, which the city charter confers upon the common council of the city of New Orleans, and the power of suspension conferred upon the mayor, in any sense a judicial power, incompatible with the power that is conferred by article 201 of the constitution on the civil district court? That question was, in effect, decided just the other way in *State ex rel. Behan v. Judges*, 35 La. Ann. 1075. That was a case of prohibition issued by this court against one of the judges of the civil district court, who had granted an injunction restraining and prohibiting the common council of the city of New Orleans from further proceeding with the impeachment of City Treasurer Walshe, and the mayor from in any manner interfering with said treasurer in the possession and administration of his said office. "The preliminary writ of injunction," say the court, "was granted at the instance and request of the treasurer, and was predicated mainly on his allegation, and on the district judge's opinion, that the provisions of the city charter which authorize the removal of city officials by impeachment by the city council were in direct violation of the constitution." And in its analysis of the respondent judge's defense to the writ of prohibition, the court said: "The alleged unconstitutionality of the proceedings is [subject] to two subdivisions, viz.: (1) That in organizing a court of impeachment, the city council was usurping judicial functions, in violation of articles 14 and 15 of the state constitution. (2) That the provisions of the city charter on the subject of impeachment were violative of the constitution (articles 196 and 201), which has conferred upon the judiciary department the sole power of removing municipal officers." And in considering and disposing of that defense the court found the municipal corporation was controlled by a legislative charter, which had then been recently granted, in pursuance of the authority delegated by the 254th article of the constitution; this charter specifically recognizing the inherent power of amotion of municipal officers as existing in the corporation, and making additional provision for the exercise of that power,—by impeachment. "We therefore hold," said the court in summing up its opinion on the proposition above stated, "both in reason and on abundant authority, that no court of justice had the legal power to interfere by preliminary injunction with the municipal council in the exercise of that franchise,—one of its plainest and most essential administrative functions," etc. Entertaining

this opinion, the court, of necessity, made the writ of prohibition peremptory, and the twofold effect of the judgment was (1) to maintain the perfect consonance of the impeachment proceedings of the common council with removal proceedings contemplated under article 201 of the constitution, because the former were legislative and the latter were judicial; (2) because the power of amotion of municipal officers is inherent in all municipal corporations, entirely distinct from, and independent of, the power of removal provided for in the 201st article of the constitution, which inherent power of amotion found expression in the city charter in the shape of provisions looking to the impeachment of such municipal officers. That decision clearly shows that the power of impeachment is not a judicial, but a legislative, function; and, being a legislative function, the power of impeachment did not come in conflict with articles 201 or 14 or 15 of the constitution. That decision proceeded on the theory that the act of the legislature did not confer a power of removal, *per se*, being examined and considered extrinsically, but recognized the existence of a power of amotion that is inherent in all municipal corporations, and apparently conferred upon the common council of New Orleans authority to exercise it by means of impeachment. Yet the court did not pass upon the question of the constitutional right of the legislature to provide that means of amotion, but distinctly left that question open for future settlement. A careful examination and consideration of the principles announced in the *Behan* Case clearly indicate that they must control the decision of the present case, because the issues are almost identical. In that case the common council had inaugurated impeachment proceedings for the amotion of the city treasurer for certain crimes and misdemeanors specified in the city charter, and said treasurer resorted to an injunction in the civil district court for the purpose of arresting their further progress, and to prevent his suspension from office by the mayor pending the trial of the impeachment. In this case the same council inaugurated like impeachment proceedings for the amotion of the relator, as city recorder, for certain causes assigned in the city charter, and relator resorted to this suit in the civil district court for the purpose of ousting the respondent from the office to which he had been elected, and from which he had been suspended by the mayor pending the impeachment trial; relator contending that his suspension and respondent's appointment were illegal, because of the illegality of the impeachment proceedings, resulting from the unconstitutionality of the city charter in that particular. The only possible difference that is discoverable between the two cases is in the fact that the impeachment proceedings have gone a little further in this case than

they had in the Behan Case; the mayor having actually suspended the relator, and appointed the respondent in his stead, to act ad interim. This being the exact situation of the case, was not the civil district court asked to do just what it was prohibited from doing in the Behan Case, namely, restrain impeachment proceedings of the city council? And does not this appeal invite this court to undo what that court has done, on the same ground, and for like reason, that it made Mayor Behan's writ of prohibition peremptory? Undoubtedly it does.

Realizing, doubtless, the difficulty of this situation, counsel for relator attempts, by argument, to break the conclusive force of the Behan Case by citing from the opinion that paragraph in which the court states that the view taken of that controversy obviated the necessity of passing on the alleged unconstitutionality of the city charter on the subject of impeachment; the court holding that its conviction was clear to the effect that the district court had wrongfully exceeded the bounds of its jurisdiction, in enjoining the city council in the exercise of its power of amotion of a municipal officer, albeit the process of amoting the officer was by statutory impeachment. But it seems clear that counsel entertain a proper conception of the distinction that was made by the court, when they make, in their brief, the following statement: "In the Behan Case a judge of the civil district court had enjoined the city council from prosecuting impeachment proceedings against Walshe. The supreme court issued a writ of prohibition against this exercise of jurisdiction by the district court, upon the old and well-settled principle that a court will not interfere with the legislative or quasi legislative proceedings of a municipal body, but will restrict its interference to a protection of persons and property against unlawful interference with rights by any one claiming under color of a void municipal ordinance or resolution. This was the decision in the Behan Case, and anything else was clearly dictum." But, as is shown in the argument, this controversy is in the identical situation of the Behan Case; Whitaker, recorder, and Walshe, treasurer, occupying identically the same plane, as municipal officers, and equally without right of action in the civil district court to arrest the impeachment proceedings pendente lite. And while the proposition announced by counsel for relator—that the jurisdiction of the civil district court will be recognized, and was in the Behan Case recognized, to protect the right of "persons and property against unlawful interference by any one claiming under a void municipal ordinance, or resolution"—may be accepted as correct, as a general proposition, yet it does not go to the extent counsel claim it does. The theory of the court, doubtless, was that the rights of persons and property could be tested and determined by the courts

after the impeachment proceedings were carried to the period of finality, and not while they were in motion; for non constat that the impeachment would not fall of convicting the municipal incumbent, but that in the event of conviction the removed official might then test before the courts of justice the constitutionality of the law which conferred the power to impeach, or, in other words, whether the terms and provisions of the constitution were sufficiently broad and comprehensive to permit the general assembly to confer on the municipal corporation the legislative power of impeachment, as a means of amotion of municipal officers, and to entail, as a consequence, future deprivation of the right of the incumbent to hold municipal office. But that is not the present situation of the Whitaker Case. The impeachment court has not as yet disposed of the question before it; and having as yet arrived at no conclusion, and rendered no judgment, the stage at which the jurisdiction of the courts has its inception has not been reached.

My conclusion is that, in so far as the question of the unconstitutionality of the city charter, on the ground that it is an attempt to vest in the common council of the city of New Orleans and the mayor a power of removal that by the constitution is exclusively conferred on the civil district court of New Orleans, is concerned, it must be answered in the negative, and that, in so far as the question of the constitutional power of the general assembly to vest in the common council of the city of New Orleans the power of impeaching municipal officers, and entailing, as a consequence of conviction, deprivation of the right of the ousted official to thereafter hold municipal office, is concerned, no authoritative opinion can be now pronounced, because (1) it is not made an issue in this case; and (2) it can become a question for the courts only when the impeachment proceedings have been completed, and the rights of persons or property are properly put at issue thereunder, and said proceedings and decree are set up as the foundation of some right or claim, or same are relied upon as the muniment of some title, to office. For these reasons, I concur in the opinion and decree reversing the judgment appealed from.

McENERY, J. (concurring). The principle contended for by relator—that, when the organic law provides for the removal of an officer, it is exclusive of any other mode than that pointed out in the constitution—admits of no controversy. The recorders' courts in the city of New Orleans are part of the judicial system provided for that city by the constitution. Const. art. 136. The recorder is a judicial officer, possessing generally the power and authority of a judge. *Com. v. Dallas*, 4 Dall. 219. But the recorder's court is not a "court of record," within the meaning of article 196 of the constitution. Therefore, that article, providing for impeachment of

judges of courts of record, can have no application to this case. The recorder is excluded from the mode of removal provided by said article and article 197 by articles 201 and 93. There are three modes provided by the constitution for the removal of recorders of the city of New Orleans for high crimes and misdemeanors: (1) By suit before the civil district court, parish of Orleans, in accordance with article 201; (2) by impeachment; (3) on address of two-thirds of the members elected to each house of the general assembly. The last two modes are provided for by article 93 of the constitution. It is generally conceded that article 197 of the constitution, vesting the sole power of impeachment in the house of representatives, applies only to the officers mentioned in article 196. Article 93 is as follows: "The judges of all courts shall be liable to impeachment for crimes and misdemeanors. For any reasonable cause the governor shall remove any of them on the address of two-thirds of the members elected to each house of the general assembly. In every case the cause or causes for which such removal may be required shall be stated at length in the address and inserted in the journal of each house." There is a clear distinction between articles 196 and 93. If it had been intended that all judges should be impeached by the house of representatives, article 196 would have said so, and article 93 would have been unnecessary. The impeachment mentioned in article 93 is not vested in the house of representatives, and it was competent for the general assembly to lodge it elsewhere. In all matters not prohibited by the constitution, the general assembly is supreme. If the constitution had said that the city council could impeach the recorder for high crimes and misdemeanors, there would be an end of the controversy. The constitution not having forbidden the delegation of this power, either directly or by implication, the general assembly, in the exercise of its supreme authority, can vest it in the city council of New Orleans. That article 93 contemplated, in the case of recorders, a delegation of this power to the city of New Orleans, is very plain, from the text of article 198. It is significant that in this article, instead of using the word "governor" or "executive," the words "appointing power" are employed. The article says: "All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the functions of their office during the pendency of such impeachment, and except in case of the impeachment of the governor, the appointing power shall make a provisional appointment to replace any suspended officer, until the decision of the impeachment." That this article applies also to another "appointing power" than the governor or executive, who issues commissions for original vacancies or to elected officers, is very clear, because of the omission of the word "governor" or "executive," and the

delegation, by article 253 of the constitution, to the citizens of New Orleans, the right of appointing the several public officers necessary for the administration of the police of said city. The recorder is a necessary officer for such purposes, and article 93 seems specially to have been framed for the purpose of allowing the city council, by permission of the general assembly, to impeach, for high crimes and misdemeanors, the recorder of the city of New Orleans. *State ex rel. Behan v. Judges*, 35 La. Ann. 1075. In my opinion an offense embraced in the description of article 196 of the constitution, which is not a crime or misdemeanor, must be, for the removal of the recorder, prosecuted according to article 201. I concur in the decree.

MILLER, J. (dissenting). My examination has brought me to a conclusion different from that reached by the majority of the court in this case. The question is whether the relator, the recorder of the first recorder's court of the city of New Orleans, to which office he was duly elected under the laws creating it, can be removed by the order of the mayor of the city, and under color of impeachment proceedings of the city council. The constitution of the state under the rubric, "Impeachment and Removal from Office," provides that district attorneys, clerks of courts, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal, and ward officers, shall be removed by judgment of the district court of the domicile of such officer; specifies the mode of procedure; and designates the civil district court of the parish of Orleans as the tribunal for all removal proceedings against officials filling offices in the parish. Other articles under the same rubric deal with the impeachment and removal from office of the governor, and other constitutional officers of the executive department. The removal of the judges is provided for in another article, and then is found the provision for the removal of recorders. Const. arts. 196-201. The article expressly mentions his office, and, to make the scope of the provision more emphatic, declares that all other parish, municipal, and ward officers are intended to be embraced. The constitution uses the term "impeachment" only with reference to the governor, and other heads of the executive department. In dealing with the judges and municipal officers, the words "shall be removed" are used. While "impeachment" has a larger significance than removal, it certainly includes removal from office. The constitution specifies the causes for impeachment and removals, and embraces every conceivable cause, thus: High crimes and misdemeanors, nonfeasance or malfeasance in office, incompetency, corruption, favoritism, extortion or oppression in office, grave misconduct, or habitual drunkenness. With this enumeration of causes, and of all the executive, judicial, parish,

ward, and municipal officers, the constitution confides the impeachment and removal power to the senate and house in respect to the governor and chief executive officers; and to the courts is intrusted the removal of the judicial, parish, municipal, and ward officers. It seems to me the constitution manifests, plainly, that the whole power of impeachment and removal from office was to be exerted solely by the instrumentalities specified in the constitution. There is plainly exhibited the appreciation that the power was judicial in its nature. Following the precedent of the constitution of the United States, it clothes the house of representatives with the function of preferring articles of impeachment of the higher state officers; and their trial is to be by the senate, vested for that purpose with judicial power, the highest judicial officer of the state (the chief justice) presiding. In respect to judicial and other officers, including recorders and all municipal officers, the courts are designated to exert the power of removal. It is, in my opinion, useless to discuss whether the power of removal of officers like recorders, on general principles, pertains at all to the city council. All will recognize that it was for the constitution to determine whether the grave power of removal from office, carrying with it the stain on character necessarily implied, should be vested in a body like the city council, or reposed in that department of the government better qualified, by its structure and mode of proceeding, to deal with such questions. In my view the constitution expresses, in the clearest language, that the power of removal from office is not in the city council, but in the courts. The opinion of the majority of this court affirms that, notwithstanding the constitutional provisions on this subject, the power to remove the incumbent of the office of recorder, created by legislative act, is in the city council. Const. arts. 196, 201; Act No. 20, 1882, §§ 30, 58, et seq. I cannot appreciate the argument that there can be an impeachment or removal power in the courts by virtue of the constitution, and the same power, whether called "impeachment" or "removal," and for precisely the same causes as are prescribed by the constitution, vested in the city council. I see no purpose in the constitution to leave that power to be exerted by the courts or by the council. No such view, it is reasonable to suppose, ever occurred to the framers of the constitution. When the organic law confided the power to the courts, on any reasonable construction, it must be deemed to have intended the exclusion of any other instrumentality. Nor can I see the force of the argument that because the recorders, as now constituted, are named in the city charter of 1882, therefore the constitution framed in 1879 has no application to recorders. The constitution announced a policy for the future, as well as for the present. It refers specifically to recorders, known to the law,

since 1805, as exerting judicial functions in this city. The constitutional provisions in article 201 applied to the office of recorder, as then existing, and to the same office thereafter modified or created by subsequent legislation. As soon as the act of 1882 was passed the constitution applied itself to the office of recorder named in that act, and fixed for all time, as long as the constitution should endure, the power of removal in the courts. No refinement of language or of meaning can take recorders out of the scope of article 201. If the mode of removing recorders is not prescribed by that article, with equal reason it might be said sheriffs and coroners are not embraced. Recorders, sheriffs, and coroners are named, and, ex industria, all municipal and parish officers are added. The contention then admits of no support that the constitution does not provide for the removal of recorders. Is it now to be maintained that, consistently with the constitutional provision, the legislature could, by the act of 1882, provide another method of removal?

Least of all can I understand that the decision in the Behan Case, 35 La. Ann. 1085, controls the question here. It is familiar that courts never enjoin legislative bodies. The Behan Case was an injunction to restrain the council from continuing pending impeachment proceedings against the city treasurer. The issue was simply and only whether such injunction could issue. That determination disposed of the controversy. All the reasoning of the court was limited, in legal effect, to the point presented. The impeachment was never consummated. How, then, can it be affirmed that the court, in that case, determined the grave question here presented,—whether the impeachment is not exclusive in the courts? While the court, in that case, used language tending to affirm an impeachment power in the council, the reasoning cannot, by any canon of construction, be accepted as a decision of the issue here. Indeed, this view of the court in the Behan Case seems to be announced thus: "We are therefore clear in our conviction that in this case the district court has wrongfully exceeded the bounds of its jurisdiction, and that the proper and only efficient check is by the writ of prohibition. This view of the controversy obviates the necessity of passing on the alleged unconstitutionality of the city charter on the subject of impeachment, which will be disposed of whenever it comes up in a proper proceeding." This is no case of an injunction to stay proceedings of the council. Right or wrong, the council proceeds. But the case calls on this court to determine whether the relator can be deprived of his office and emoluments by virtue of the council proceedings. While courts never interfere with the proceedings of legislative bodies, it is the undoubted judicial function to determine the effect of such proceedings, when they affect the rights of parties, and

to protect such rights. That is the function this court is now called to exercise. In its exercise the court must decide whether the removal power exists in any department but the courts, and in my opinion the question admits only of one answer, which finds apt expression in the language of the late chief justice: "It is an axiomatic proposition that a legislature is powerless to act where the constitution has spoken, and left no room for its action. Hence, when a constitution has provided for the qualification of certain officers, for their removal for certain causes by certain authorities, and in a certain way, a legislature is incompetent to prescribe, as to those same officers, for different qualifications, different causes of removal, different authorities, or different ways. It can neither add nor take from the constitutional provisions on those subjects, which must remain untouched, and enforced as written." I think, too, that the previous adjudications of this court support the exclusiveness of the methods of removal prescribed by the constitution. *State v. Beard*, 34 La. Ann. 273; *Richard v. Rousseau*, 35 La. Ann. 933. In my opinion the relator is entitled to the relief he seeks.

(46 La. Ann. 383)

CLARK et al. v. COMFORT et al. (No. 11,484.)

(Supreme Court of Louisiana. March 12, 1894.)

RECORD ON APPEAL—RECORD OF CLERK'S OFFICE
— CONTRACT TO SELL LAND — ENTRY OF PURCHASER.

On Motion to Dismiss the Appeal.

The deputy clerk certifies that the transcript of appeal, together with the record of a previous appeal, is a correct transcript of all the proceedings. The appellants were parties to the suit in the previous case, and failed in their attempt to sustain their appeal. *Held*, that records of the clerk's office of this court may be used here, on appeal, to complete the record of a transcript when it is manifestly a correct transcript of the proceedings in the court of original jurisdiction, and that another transcript would only be a second copy of the proceedings.

On the Merits.

The reasons assigned in a case previously decided, and the decree, are adopted and followed. The plaintiff and appellant, whose rights were considered and passed upon in the prior appeal, in which he alone was appellant, was the coplaintiff, in the district court, of the appellants in the case at bar. Two separate appeals were taken, at different times, from one judgment. The reasons and decree in deciding the issues on the first appeal are determinative and followed in the second appeal.

(Syllabus by the Court.)

Appeal from district court, parish of Livingston; Robert R. Reid, Judge.

Action by Mary E. Clark and others against John Comfort and others. Judgment for the defendants, and plaintiffs appeal. Action dismissed as in case of nonsuit.

J. L. Bradford and Calhoun Fluker, for appellants. Cross & Cross, for appellees.

BREAUX, J. This case was before us for decision at the last term. 45 La. Ann. 502, 12 South. 763. This court decided that only one plaintiff, to wit, Nathaniel Ewing, was a party to the appeal. The bond of appeal was executed by him alone. The other appellants not having executed any appeal bond whatever, the court decided that they could not be heard in that capacity. As to those plaintiffs and appellants who had not furnished bond, the judgment of the court *a qua* at that time remained, rejecting their demand to be recognized as owners of the property described in their petition; also rejecting their prayer to annul and set aside an agreement of sale, and to annul and set aside the sale of any portion of the land by John Comfort to Thomas Cockerham, and denying the rent claimed and their right to possession. The judgment thus rejecting the demands of plaintiffs was signed by the judge of the district court on the 12th day of December, 1892. There was judgment rendered "as against the appellant of nonsuit, leaving all questions open between appellant and defendant which are involved in this litigation." The decree reads: "For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court, in so far as it affects the appellant Nathaniel Ewing, be, and the same is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that there be judgment in favor of the defendants against the plaintiff Nathaniel Ewing, dismissing his demand as in case of nonsuit." In this state of the case there was an absolute judgment in the district court in favor of the defendants, and against all the plaintiffs, except Nathaniel Ewing, appellant, against whom there is a judgment of nonsuit, pronounced by this court. On the 31st day of August, 1893, Mary E. Clark, wife of Robert D. Clark, and all her coplaintiffs in the suit, except Nathaniel Ewing, who had been nonsuited on appeal, obtained an order of appeal returnable to this court on the 2d Monday of February, 1894. The appeal was perfected by furnishing the required bond.

Motion to Dismiss the Appeal.

The appellees represent that the appellants have completed their record in this case by annexing the record in *Clark v. Comfort*, No. 11,220 of the docket of this court; that the clerk who certified the original record died before the certificate to the record in the case at bar was made; and that the deputy clerk who certified to the correctness of the transcript could not possibly have knowledge of the facts so certified to by him. The deputy clerk, whose authority is questioned, certifies that the transcript in the case at bar, together with the record already filed in this court in the case heretofore dismissed by us (*viz.* the case of *Clark v. Comfort*, No. 11,220), is a correct transcript of all the proceedings in the case of *Mary E. Clark et al. v. John*

Comford et al., No. 201 of the district court,—the case now before us on appeal. The plaintiffs, prior to the last appeal, and the appellant Ewing, had deposited a transcript which formed part of the record of this court. It contained copies of all proceedings, except those subsequently copied on four pages, which constitute the record of the last appeal, to enable them to bring up their appeal. There is not a fact needful to a decision of the case that is not before us on appeal. The appellees do not complain that the transcript is incomplete. They only urge that the officer could not certify to the correctness of the first transcript filed, i. e. of the transcript of record in the decided case. That transcript has the certificate of the clerk in office at the date of the appeal. It needs no further certification. Generally, these records of appeal must remain in the custody of the clerk of this court, and no permission will be given to use them as evidence, and to actually introduce them in evidence, in the trial of cases in other courts. There can be no well-founded objection, however, to the use here, on appeal, of a former record in this court, in order to avoid copying twice the proceedings of a case. This practice has received sanction when preceded by agreement of counsel. The court also has granted permission to use records here within its direct control to complete a transcript, when it was evident that they contained correct copies of the proceedings needful on appeal. It is manifest that there are of record complete transcripts of all the proceedings, and that each transcript has to it a legal certificate. Had an agreement been entered into between counsel prior to the last appeal to have the record annexed as forming part of the records, it would have served all purposes without question. Had an order of this court been applied for (the more regular practice), under the circumstances, it would have been granted. The failure to apply for the order will not carry with it the dismissal of the appeal, it being evident that the case is properly before us for decision. The motion to dismiss the appeal is therefore overruled.

On the Merits.

Counsel for the appellants, in support of their appeal, refer us to the statement of facts upon which the case, in so far as related to Nathaniel Ewing, was submitted to this court, and to their brief in that case. The issues received careful consideration at the time. No good reason is urged to justify a change from our previous decree, or to recall any of the grounds upon which it was based. The conclusion reached must be the same, in the case at bar, and the reasons assigned must be held to apply. All the plaintiffs have the same rights, and are subject to the same responsibility. It follows that the same is true of the defendants inter se.

It is ordered, adjudged, and decreed that the judgment of the district court appealed from in this case, in so far as it affects the appellants Mary E. Clark, assisted by her husband, Robert D. Clark, Mary V. Ewing, John K. Ewing, Jr., Samuel E. Ewing, Belle E. Howell, Eliza W. Wilson, assisted by her husband, R. H. Lindsay, Catherine W. Wilson, assisted by her husband, H. W. Hazard, and Mary Wilson, assisted by her husband, J. W. Harrison, be, and the same is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that there be judgment in favor of the defendants against the plaintiffs, Mary E. Clark and others, above named, dismissing their demand as in case of nonsuit.

(46 La. Ann. 371)

TAYLOR v. ELLINGTON.

ELLINGTON v. TAYLOR. (No. 11,465.)

(Supreme Court of Louisiana. March 12, 1894.)

SLANDER—WHAT CONSTITUTES—DAMAGES.

1. With all due allowance for mitigating circumstances, damages will be awarded for injury to character by slander, aggravated by repetition. Rev. Civ. Code, arts. 1934 (par. 3), 2315; Miller v. Holstein, 16 La. 389; Savoie v. Scanlan, 9 South. 916, 43 La. Ann. 967; Feray v. Foote, 12 La. Ann. 894.

2. To charge an innocent man with burning another's property is actionable. The law implies malice, and, without proof of special injury damages will be given the injured party. Miller v. Holstein, 16 La. 389; Feray v. Foote, 12 La. Ann. 894; Savoie v. Scanlan, 9 South. 916, 43 La. Ann. 967.

(Syllabus by the Court.)

Appeal from district court, parish of Rapides; Adolph V. Coco, Judge.

Action by Nelson Taylor against John J. Ellington. Action by John J. Ellington against Nelson Taylor. The cases were consolidated, and verdict was rendered against each plaintiff. Ellington appeals. The action of Taylor against Ellington affirmed, and the case of Ellington against Taylor reversed.

Arial & White, for appellant. Hunter & Hunter, for appellee.

MILLER, J. The plaintiff Nelson Taylor sues defendant John J. Ellington for damages for the loss of the stable and dwelling of Taylor, alleged to have been burned by the gross carelessness or imprudence of Ellington. The plaintiff in the second entitled suit, John J. Ellington, sues Taylor for damages alleged to have been caused by his slanders imputing to Ellington the burning of the property. The cases were consolidated, tried together, and the verdict was against each plaintiff, with divided costs. Ellington appeals, and Taylor answers, claiming an amendment of the judgment so as to give him the damages he claimed. The briefs place the cases before this court on their merits, without reference to some questions that arose during the trial.

The suit of Taylor will be first considered. Does the record show his property was burned by the imprudence of Ellington? The dwelling and stable occupied a square of ground, the dwelling being separated from the stable. The wing of the stable fronted the street, and from the end of the wing the stable extended back to Fourth street. Towards the rear was the mule pen, and over this pen, more than 10 feet from the ground, was the hay loft. In this loft the fire originated on the morning of the 8th of September, 1892, and was discovered soon after Ellington came to the stable. The basis, mainly, on which he is charged with responsibility for the fire, seems to be his statement that in the early morning of the fire, while it was yet dark, he went to the rear of the stable to look for a horse, taking a lamp in his hands. This purpose, it is manifest, would not have carried him into the hay loft, or brought the lamp in proximity to the hay. This incident is discarded as affording any basis to hold Ellington. It is claimed that other statements by him on the occasion of the fire place the responsibility for it upon him. The witnesses do not profess to give his words, but their impressions of his statements. One witness testifies that Ellington said he lit the torch, went back, stayed a little while, and, on returning to the front of the stable, noticed the hay on fire. This would be a frail basis to conclude that the lamp in his hand on the ground floor ignited the hay in the loft, 10 feet above him. Another witness gives his recollection of the "idea" conveyed by Ellington: That he carried the lamp back to where the horse was; after walking in the barn with the open lamp or torch, he looked back, and saw the hay on fire; and that Ellington said he was not certain the fire caught from the lamp, but did not see any other chance for it. The witness gives his idea of the significance of Ellington's language, and is quite positive of the accuracy of his impressions. Still, it must be accepted, that the deductions of a witness, drawn from statements of another, made months previous, may be erroneous. When these declarations are in conflict with other testimony, their force is further diminished. Another witness puts it thus: Ellington, referring to a torch used in the stable, described as a lamp on a pole, stated he reckoned the fire caught from the torch. This witness, alluding at the beginning to the lapse of time since the fire, stated his memory was very indistinct. On cross-examination he testified: Did not remember that Ellington used the word "pole" but the witness "pictured" the lamp on a pole, such as used by brass bands. He further testified Ellington said he did not know how the fire happened, unless from the torch, but did not say the fire happened from the lamp "going into it." The comment suggested by all this testimony is that Ellington himself

had no conviction of the cause of the fire. To accept the statements attributed to him as admitting he fired the stable would be to invest what he said with a meaning never intended, and not warranted by the fair significance of language. The fire attracted a crowd, naturally interested and curious as to the cause. The fire was in progress. In the excitement and confusion incident to the occasion, questions were put to Ellington, and answered by him, as to the origin of the fire. He himself was agitated. Under such circumstances, his answers may have been misconstrued. His answers indicate an inability to account for the fire, and, aside from the lamp incident avowed by him, he had no more knowledge on the subject than those whose questions he endeavored to answer. His answers practically added nothing to the fact that he had gone to the rear of the stable with the lamp. If that fact connected him with the fire overhead in the loft, his answers neither detracted from nor diminished the force of the circumstance. Another feature in the testimony as to his statements is impressive, and must be deemed to impair the effect of the testimony. The witnesses speak of a "torch." The word conveys the significance of a flaming light elevated on a pole. It is this flaming light "pictured" by one of the witnesses that doubtless colored the impression of Ellington's statements. It was the idea of a man walking about a barn with a "torch" that impressed another witness. The supposed torch, it seems, was an open tin lamp carried in the hand, and in use in the stable by Taylor, and continued to be used by Ellington when he became the lessee. It is urged, too, that there is a discrepancy in Ellington's testimony and in his statements. The supposed variance is this: That one statement is, when he first saw the fire, it was on top of the hay, and spreading. Another is that, going to the rear, and returning, he looked back, and saw the fire. And another statement is that, going back to the mule pen, he discovered the reflection of the fire on the back of the stable. If there is a discrepancy, in our opinion, it is of no weight. There is before us, also, the testimony of Ellington. He is accorded the highest character by the testimony. He testifies distinctly that when he discovered the fire he was 40 feet away, with the lamp, and the lamp had no connection whatever with the fire. The origin of the fire is not solved by the testimony. Whether caused by tramps entering through openings claimed to exist in the stable, or by the heating of the hay, suggested by the testimony, is pure speculation. It would be hard to make a man responsible for a fire because he cannot account for it, and harder, we think, to place the responsibility for the fire on Ellington, in view of the testimony in the record.

On the issue of damages claimed by Ellington of Taylor, the proof is that the slanderous words charged in the petition,—that Ellington had burned the property,—accompanied with opprobrious epithets, were uttered publicly by Taylor, and repeated. There was thus imputed to Ellington, not only the burning, but the intentional burning, of the property. For slander of reputation, the law gives damages, on the theory of injury sustained, as well as from public policy. The enforcement of the law in this respect is salutary. It substitutes the judicial vindication of character for the redress apt to be sought by violence, and affords some pecuniary compensation for the humiliation and injury wrought by slander. The case presents some features of mitigation, for which we are disposed to make allowance. With all due consideration for the impression or belief of Taylor of wrong at the hands of Ellington, the law exacts that damages should be imposed for slander grave in character, and aggravated by repetition. Rev. Civ. Code, arts. 1934 (par. 3), 2315; *Miller v. Holstein*, 16 La. 389; *Savole v. Scanlan*, 43 La. Ann. 967, 9 South. 916.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court, dismissing the suit of Nelson Taylor v. John J. Ellington, be affirmed, with costs; that the judgment of the lower court, dismissing the suit of John J. Ellington v. Nelson Taylor, be avoided and reversed; and it is now ordered, adjudged, and decreed that John J. Ellington do have and recover from Nelson Taylor \$300 damages, with costs in both courts.

(45 La. Ann. 1128)

RAWLINS v. GIDDENS et al. (No. 11,480.)
(Supreme Court of Louisiana. May 30, 1894.)

DISSOLUTION OF COMMUNITY — RIGHTS OF HUSBAND'S CREDITOR — SEIZURE OF UNDIVIDED INTEREST.

1. The separate creditor of either spouse has the right, after the dissolution of the community, to have the community liquidated, and to subject according to law, to the satisfaction of his claim, the interest of his debtor thus ascertained.

2. The separate creditor of the husband cannot, after the community has terminated by the death of the wife, and the rights of the parties have become fixed by that fact, deal with an undivided interest in any specific piece of property, if it belonged to the community, as if the husband had the absolute ownership of one undivided half thereof. He has not the right to seize directly an undivided interest in a specific piece of property, sell it, and apply the proceeds of the sale to the payment of his debt.

(Syllabus by the Court.)

Appeal from district court, parish of Red River; W. Pike Hall, Judge.

Action by S. W. Rawlins against D. M. Giddens and others. Judgment for plaintiff, and defendants appeal. Reversed.

J. F. Pierson, for appellants. J. O. Egan, for appellee.

On Application for Rehearing.

NICHOLLS, C. J. The community between D. M. Giddens and his wife, Mary J. Armistead, has never been finally settled and liquidated, and the rights of the spouses fixed and determined. The separate creditor of either spouse has the right, after the dissolution of the community, to have the community liquidated, and to subject according to law, to the satisfaction of his claim, the interest of his debtor thus ascertained. The plaintiff does not pretend to be a creditor of the community. If he be a creditor of Giddens, it is for a claim which originated after the community had terminated and the rights of parties had become fixed by the death of the wife. Even if the title to the property, or part of the property, involved in this litigation fell into the community by reason of the time at which it was purchased, this creditor cannot deal with an undivided one-half interest in any specific piece of property as if the husband had the absolute ownership of one undivided one-half interest therein,—proceed against it by direct seizure, sell it, and apply the proceeds of the sale to the payment of his debt. He has a remedy, but the remedy is not by direct seizure of an undivided interest in a specific piece of property.

We think the interests of justice will be best subserved by setting aside the judgment heretofore rendered by us in this case, and said judgment is accordingly set aside, and it is now ordered, adjudged, and decreed, the law and the evidence supporting this judgment and decree, that so much of the verdict of the jury in this case as "finds that D. M. Giddens owns one-third interest in the Sprowl place, excluding all movable property, and subjects said one-third interest to the payment of this judgment," and so much of the judgment of the district court (based on that portion of the verdict) which decrees "that D. M. Giddens is one-third owner in the Sprowl plantation, and that the same be subject to the payment of plaintiff's claim, interests, and costs," be and the same is hereby annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that the portion of the judgment appealed from which decrees "that the transfer and settlement from D. M. Giddens to Albert S. and Robert A. Giddens, of date December 28, 1892, be avoided, annulled, and set aside in so far as plaintiff's claim is affected by same," be and the same is hereby annulled, avoided, and reversed, and the case is remanded to the district court for further proceedings according to law, the right of plaintiff being expressly reserved by proper proceedings to force a final settlement and liquidation of the community between D. M. Giddens and his deceased wife, Mary J. Armistead, and to subject to satisfaction according to law, for his judgment, the interest of his debtor thus ascertained. Rehearing refused.

WATKINS, J., recused.

(46 La. Ann. 1406)

FLORSHEIM BROS. DRY-GOODS CO., Limited, v. GIDDENS et al. (No. 11,482.)
(Supreme Court of Louisiana. May 30, 1894.)

Appeal from district court, parish of Red River; W. Pike Hall, Judge.

Action by the Florsheim Bros. Dry-Goods Company, Limited, against D. M. Giddens and others. Judgment for plaintiff, and defendants appeal. Reversed.

J. F. Pierson, for appellants. Pugh & Wilkinson, for appellee.

On Application for Rehearing.

NICHOLLS, C. J. For the reasons assigned in the suit of Rawlins v. Giddens (No. 11,480) 15 South, 501, the judgment heretofore rendered by us in this case is set aside, and it is now ordered, adjudged, and decreed that so much of the judgment of the district court as adjudges and decrees D. M. Giddens to be the owner of one-third of the real estate embraced in the settlement of December 28, 1892, between D. M. Giddens and the defendants R. A. and A. S. Giddens, and to that extent annuls, revokes, and sets aside that settlement in so far as plaintiffs herein are concerned, and decrees that said third interest liable for plaintiffs' debt be and the same is hereby annulled, avoided, and reversed, and this case is remanded to the district court for further proceedings according to law, the right of plaintiffs being expressly reserved by proper proceedings to force a final settlement and liquidation of the community between D. M. Giddens and his deceased wife, Mary J. Armistead, and to subject to satisfaction according to law, for his judgment, the interest of his debtor thus ascertained. Rehearing refused

WATKINS, J., recused.

(46 La. Ann. 1406)

PIOR v. GIDDENS et al. (No. 11,481.)
(Supreme Court of Louisiana. May 30, 1894.)

Appeal from district court, parish of Red River; W. Pike Hall, Judge.

Action by A. S. B. Pior against D. M. Giddens and others. Judgment for plaintiff. Defendants appeal. Reversed.

J. F. Pierson, for appellants. S. A. Hull, for appellee.

On Application for a Rehearing.

NICHOLLS, C. J. For the reasons assigned in the case of Rawlins v. Giddens (No. 11,480) 15 South, —, the judgment heretofore rendered by us in this case is set aside, and it is now ordered, adjudged, and decreed that so much of the judgment appealed from as adjudges and decrees "that the demand in recognition of Robert A. Giddens and Albert S. Giddens to have the mortgage given upon the property described in the judgment and petition of plaintiff by D. M. Giddens, in favor of plaintiff, erased and canceled of record, be rejected, and that the sale, transfer, or settlement of December 28, 1892, between the defendants be revoked and set aside in so far as same affected plaintiff's mortgage as recognized and made executory in the judgment," be and the same is hereby annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that the rights of plaintiff under the mortgage claimed by him herein be restricted to the interest of D. M. Giddens in the community between himself and his deceased wife, Mary J. Armistead, to be ascertained by proper proceedings. It is further ordered and decreed that this case be remanded to the district court for further

proceedings according to law, with the right of the plaintiff fully reserved to take all such proceedings in order to make effectual for the satisfaction of his mortgage, according to law, the interest of his debtor, D. M. Giddens, in said community. Rehearing refused.

WATKINS, J., recused.

(46 La. Ann. 577)

STATE v. DUPAQUIER. (No. 11,320.)¹
(Supreme Court of Louisiana. March 26, 1894.)

INSPECTION OF MILK—CONSTITUTIONAL LAW—POLICE POWER.

1. The ordinance of the city of New Orleans requiring (under penalties in case of refusal) vendors of milk to the public to furnish gratuitously, on application of sanitary inspectors, samples of milk, not exceeding one-half pint, for inspection and analysis, is not unconstitutional, as forcing dairymen to furnish evidence against themselves; as taking private property for public use without compensation, and without due process of law; as depriving them and their property of the equal protection of the laws, and denying them protection in person and property from unreasonable searches and seizures, and authorizing invasion of the same without warrant founded on oath or affirmation.

2. The ordinance is not unreasonable, vexatious, and oppressive, but a legitimate exercise of the police power for the public health.

(Syllabus by the Court.)

Appeal from recorder's court of city of New Orleans; Charles De La Bretonne, Judge.

A. P. Dupaquier was convicted of violating a city ordinance, and appeals. Affirmed.

James C. Walker, for appellant. Frank McGloin, for appellee. Louisiana Board of Health.

NICHOLLS, C. J. The defendant, having been sentenced to pay a fine of \$25, and, on default of payment, to suffer imprisonment for 30 days, on the charge of refusing, in violation of Ordinance No. 6596 of the city of New Orleans, approved August 2, 1892, to furnish the officers of the board of health with samples of the milk he was supplying to his customers, has appealed. The constitutionality of the ordinance was attacked on several grounds, by special plea, in the magistrate's court, and a bill of exceptions reserved to the overruling of the same.

The ordinance violated is as follows: "Section 1. Be it ordained by the common council of the city of New Orleans that the standard by which the adulteration of milk shall be considered to be such under Ordinance No. 6022, A. S., adopted June, 1879, shall be as follows: Normal or pure milk shall be considered to be such milk as will upon the test thereof be found to possess a minimum specific gravity actual density of (1.029) one thousand and twenty-nine thousandths at sixty degrees Fahrenheit (60° F) and shall contain not less than (13) thirteen parts of total solids in one hundred parts of milk as follows:

¹ Rehearing refused April 23, 1894.)

Butter fat ($3\frac{1}{2}$) three and one-half per centum, solids not fat ($9\frac{1}{2}$) nine and one-half per centum, and water not more than (87) eighty-seven per centum. Sec. 2. Be it ordained," etc., "that any milk falling below the test above described or any milk from which the cream has been removed or to which water, foreign fats, coloring matter or any other foreign or extraneous substance has been added shall be considered as adulterated under said ordinance. Sec. 3. Be it ordained," etc., "that every vendor or establishment or person who sells milk shall be obliged to furnish to any sanitary officer or inspector of the board of health of the state for inspection and analysis on application therefor, a sample of the milk sold by said vendor or establishment or person from the can or other vessel from which it is sold to the public. Said sample shall not exceed one-half pint and there shall be no charge therefor. Sec. 4. Be it ordained," etc., "that any person who shall be found guilty of selling milk below the standard hereinbefore fixed or otherwise adulterated or modified as provided under section two of this ordinance or refusing to furnish the samples as hereinbefore provided, shall be subject to a fine of not more than twenty-five dollars for each and every offense and in default of payment thereof to imprisonment in the parish prison for a period of not over thirty days. Said fine or imprisonment to be enforced by any court of competent jurisdiction within the corporate limits of the city of New Orleans."

Appellant contends (1) that the ordinance deprives dairymen of their milk without compensation, and without uniform rule or regulation; (2) it compels dairymen to be witnesses against themselves, and to furnish samples of milk to be used as evidence against themselves, under penalty of fine or imprisonment; (3) it denies them the equal protection of the laws; (4) it denies them protection in the enjoyment of their property; (5) it denies them protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant founded on oath or affirmation; (6) it subjects them to an odious, oppressive, and unreasonable exaction, which interferes with their vocation, which is lawful and industrial, and not injurious to the community; (7) it deprives dairymen of their property without due process of law; (8) it establishes a rule of evidence and mode of proof legislative in its character, and makes the same conclusive evidence against parties accused thereunder. His counsel additionally maintains that the ordinance is not within the scope of the police power of the city; that, considered as a health law, it bears no substantial relation thereto; that it delegates arbitrary power to health officers, without restraint or uniform rule or regulation.

We think that the objection raised to the ordinance in question, as establishing a rule

of evidence, is not an issue in this case. Defendant was not on trial for having sold and adulterated milk, and therefore no question arose in the lower court upon the admissibility or effect of evidence against him based upon an analysis made from a sample of milk taken from him under protest, or by compulsion, under the provisions of the ordinance. We find in Tiedman's Limitations of the Police Power a note on page 292 to the effect that the legislature has the power, in an act forbidding the sale of impure or adulterated milk, to fix a standard by which it shall be judged, and, as supporting this proposition, the following citation of authorities: *People v. Clipperly* (N. Y., Jan. 19, 1886) 4 N. E. 107; *State v. Smyth*, 14 R. I. 100; *Com. v. Waite*, 11 Allen, 264; *Com. v. Farren*, 9 Allen, 489; *Polinsky v. People*, 73 N. Y. 65. In *State v. Fourcade*, 45 La. Ann. 717, 13 South. 187, we held that, under the powers delegated to the city of New Orleans on the subject of the regulation of the milk traffic, the city council had the legal right to adopt a standard. Referring to the adoption of a standard, Parker and Worthington, in their work on Public Health and Safety, say, in section 301: "In some of the states the statutes upon this subject provide that in all prosecutions under the act, if it be shown, upon analysis, that the milk sold, or offered for sale, contained more than a certain percentage of watery fluids, it shall be deemed, for the purposes of the act, to be adulterated. These provisions are valid, as they merely regulate and control the quality of an article of food, in the interest of the public health, and fix a standard of quality. The clause does not establish a rule of evidence to the prejudice of the accused, but creates and defines a new offense. It is the purpose of the statutes to prohibit, not merely dealing in milk which has been adulterated, but also the dealing in milk of such inferior quality as to fall below the standard required;" citing numerous authorities. We will postpone a discussion of the correctness of these statements until a case comes before us in which the rights of the appellant are claimed to have been illegally affected through the ordinance, as "a rule of evidence."

Most of the questions raised in this litigation were directly passed upon in the case of *Com. v. Carter*, 132 Mass. 12, from which we shall quote freely later on, and the whole subject of the regulation of the milk traffic is discussed in Parker and Worthington's Public Health and Safety, on pages 345 to 349, under the sections from 299 to 304. The last section (section 304) is as follows: "It is said milk dealers may be required to supply, from time to time, samples of milk to milk inspectors, for analysis, and the inspectors may be authorized to take samples for that purpose, and to condemn, and pour upon the ground, or return to the person who supplied to the dealer, any milk which, upon inspection, he finds to be adulterated, or below the

prescribed standard. *Shivers v. Newton*, 45 N. J. Law, 469; *Blazier v. Miller*, 10 Hun, 435."

The question of the general powers of the city of New Orleans over the subject of the regulation of the sale of milk within its limits has been several times presented to, and passed upon by, this court. The present suit does not involve an issue upon the general power, but upon the special applications of the power, as attempted to be made through the ordinance whose constitutionality upon the specific grounds urged is herein attacked.

We do not think the attack upon the ordinance, on the ground that it forces a man to furnish evidence against himself, is well made. On this point, plaintiff's counsel, in his brief, contends as follows: "The object of the ordinance was not to secure evidence against violation of the law, but simply to secure means for proper examination of the milk which is being sold, upon the public streets and places, to inhabitants of New Orleans. The milk cannot possibly be produced before the courts, being necessarily destroyed by the very chemical process for which the ordinance provides. No law can prevent the chemist of the board of health from chemically analyzing the milk which vendors are selling, and from testifying to the result of the analysis. Whether the sample analyzed was acquired by purchase or seizure would render the effect of the chemist's testimony neither more favorable nor unfavorable to the one accused. The object of the ordinance is rather (if it can be considered as contemplating the furnishing of evidence) the obtainance of satisfactory evidence of the vendor's innocence, than of his guilt. *State v. Davis*, 108 Mo. 666, 18 S. W. 894. In this instance the municipal authorities have licensed the vendors to sell, and waived inspection previous to the taking out of the wares, and as a precaution, to the end of ascertaining that the privilege given is not being abused, required the vendors, when occasionally called upon, to furnish a trifling sample from their stock. This is, emphatically, to gather assurance of their good faith, and right to continue in the calling they are pursuing, and not for the purpose of extorting evidence against wrongdoers. It was not presumed the vendors were intending to violate the law. It is not to be presumed that the present appellant has declined to give a sample, in this case, because of the fear that his milk would be found to be adulterated, had the samples been furnished. If the original seizure or taking was justifiable, the fact that it is possible that the thing may serve to subsequently fasten criminal guilt upon the possessor cannot render the taking unlawful. *Langdon v. People*, 133 Ill. 382, 24 N. E. 874. Indeed, the courts have held that, even though the original taking were a trespass, the results of the taking were admissible in evidence. *Gindrat v. People* (Ill. Sup.) 27 N. E. 1085. The city having a right

to license the selling of milk, and the parties having availed themselves of that privilege under the conditions stated, the wares they sell become property in which the public has an interest. It is that public interest alone in the foods generally sold which justifies the public examination of private property. If the public have such interest in the wares of this character, to be disposed of to them, that same public have a corresponding right of access to such wares, to the extent necessary for the preservation of their rights or interests. The milk sold by the milkmen in the city of New Orleans, therefore, is public property, as well as private, to the extent that the public have the right to effectively provide for its purity, and, to that end, to view and analyze it." In *Com. v. Carter*, 132 Mass. 12, the supreme court held that a statute of that state authorizing inspectors of milk to enter all carriages used in the conveyance of milk, and, whenever they have reason to believe any milk found therein is adulterated, to take specimens thereof, for the purpose of analyzing or otherwise satisfactorily testing the same, was constitutional. Taking up the particular objection we are now considering, it said: "Neither is the power granted in violation of the provisions of article 12 of the declaration of rights,—that no man shall be compelled to give evidence against himself. If the seizure is such as is authorized by the constitution and a law passed in pursuance thereof, the fact that the thing seized may be used in evidence against the person from whose possession it is taken does not render the seizure itself a violation of the declaration of rights. *Com. v. Dana*, 2 Metc. (Mass.) 329, 337." In *State v. Davis*, reported in 18 S. W. 894, the supreme court of Missouri held that statutes of the state prohibiting a druggist from selling liquor, except on the prescription of a physician, and declaring that such prescriptions shall be carefully preserved, and produced in court, or before any grand jury, whenever required, and that, on the failure of the druggist to produce the same, he shall be deemed guilty of a misdemeanor, were not in conflict with the article of the constitution providing that no person shall be required to furnish evidence in a criminal case against himself. Referring to the claim that they were, the court said: "We think not. The right to sell intoxicating liquor is not a right or privilege accorded to every citizen. The state has the right to control, regulate, or altogether prohibit, its sale. It has, therefore, the undoubted right to enforce such conditions, upon those whom it may authorize to sell such liquors, as it may deem necessary to properly regulate and control its use. *Anstin v. State*, 10 Mo. 591. Druggists are not given an unlimited right to sell intoxicating liquors. * * * There can be no doubt that the legislature had the right to impose its own conditions in authorizing such sales. It undertook to do so by

the provisions of section 4621, which limits sales to those made under the written prescription of a regularly registered and practicing physician. To prevent abuse of their authority to sell as a covering under which to make unlawful sales, section 4622 requires the druggist to preserve all such prescriptions, and produce them in court, or before the grand jury, when lawfully required. This duty was imposed as a condition upon which a sale was authorized. The prescriptions thus become the license or justification to the druggist for making sales which would otherwise be unlawful. As evidence of authority to make particular sales, they would constitute private papers of the druggist, but could not be regarded as evidence of crime, but rather of innocence. The chief purpose of their preservation, however, was evidently that they might be used in giving aid to courts and grand juries, in their proper and lawful endeavors to control and regulate the sale of intoxicating liquors within the limits prescribed by the legislature, and in the investigation of matters of public concern. In these respects, all the prescriptions become public, and not private, papers, and the druggist merely their custodian. It could not be insisted that the production of the official books of a collector, treasurer, or other public officer could not be required in the investigation of his accounts, or used in evidence against him, in a prosecution for official misconduct. The obvious reason is that the books are not the private property of the citizen, but the public records required to be kept by the officer. The law imposing the duty upon druggists of preserving the prescriptions of physicians left with them, and of producing them before the grand jury, is as clearly required as the duty imposed by law upon any public officer to keep an account of the public money which passes through his hands. Our conclusion is that section 4622 is constitutional, and all its requirements may be lawfully enforced." This decision was referred to in *State v. Davis* (Mo. Sup.) 23 S. W. 759, and the principle enunciated therein was reaffirmed.

We do not think that the objections urged by appellant to the ordinance, that it deprives him of the equal protection of the law; that it denies him protection in the enjoyment of his property; that it denies him protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant founded on oath or affirmation; and that it deprives him of property and liberty without due process of law,—are well founded. Defendant has selected as a business one which, improperly conducted, in the hands of unscrupulous men, would seriously affect the health of the public. It is no longer a debatable question whether callings of that character can be legally brought under reasonable restraints and

regulations through the exercise of the police power. The object of the ordinance in question is to protect the general public against dishonest vendors of milk. Its effect will be, not only not to injure appellant, but to protect him, as a member of the public, from that class of persons, and, incidentally, to save him, as an honest vendor in that business, from injurious competition through fraudulent devices and ill practices. Honest vendors could certainly see nothing to flow from the ordinance but proper and beneficial results. They certainly should raise no complaint at having their own actions brought to a test, when, in so doing, they purge the business of disreputable characters. We do not think the ordinance was beyond the scope of the police power of the city, nor that, considered as a health ordinance, it bears no substantial relation thereto.

We are of the opinion that, in delegating to the common council the powers it did, the legislature contemplated that it would adopt a reasonable system to render the power effective. We agree with plaintiff's counsel that a reasonable method of inspection of the milk offered for sale to the public falls legitimately under the grant of power. There are two methods of inspection: The first is to compel the vendor to exhibit the articles he proposes to dispose of to a public officer, as a condition precedent to their sale; but inasmuch as there are certain cases where the prior inspection would fail of accomplishing its purpose, by reason of the facility offered for subsequently tampering with the goods inspected, a second system is often had recourse to. Under this system the vendor is permitted to proceed with his sales without prior inspection, but with the obligation to submit his commodity to inspectors when the latter think it necessary to demand an examination. The penalty is laid upon the sale, not of uninspected wares, but of improper ones. We are of the opinion that the liability at any moment to a call for inspection, together with the dread of the penalty following detection, operate strongly, by way of prevention, against the perpetration of frauds, and, as counsel well says, "are the most effective of checks against the sale of adulterated food, and the object of the law, otherwise unattainable, is accomplished."

We have already referred to the case of *Com. v. Carter*, 132 Mass. 12, as presenting issues almost identical with those presented here, in respect to a statute closely resembling the ordinance we are now considering. In that case the court said: "It is said that the provision is unconstitutional because it authorizes the taking of property without consent or compensation, warrants unreasonable searches and seizures, compels one to furnish evidence against himself, and is not within the police power of the common-

wealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this commonwealth. In the case at bar the can of milk was taken from a carriage used in the conveyance of milk, and it is unnecessary to consider whether the words of the section, 'place where milk is stored or kept for sale,' may or may not include a dwelling house, and whether, if construed to include a dwelling house, they do not purport to give a power which the legislature could not give, because the clause authorizing an entry is separable from that which authorizes an entry into all carriages used in the conveyance of milk." *Com. v. Dana*, 2 Metc. (Mass.) 329, 337. "If the statute had required that all milk offered for sale should first be inspected, it would be hardly contended that the trifling injury to property occasioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights for the common benefit; and, in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. *Bancroft v. Cambridge*, 126 Mass. 438, 441. Instead of requiring all milk offered for sale to be first inspected, the legislature, for obvious reasons, has permitted licensed dealers to sell milk without inspection; has imposed penalties for selling adulterated milk; and has provided that, when the inspector of milk has reason to believe that any milk may be adulterated, he may take specimens thereof, in order that, by analysis, he may determine whether the milk has been adulterated. Such a seizure of milk for the purpose of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision, under the laws of the state, by a public officer, of a trade which concerns the public health, and it is within the police power of the commonwealth. *Com. v. Ducey*, 126 Mass. 269; *Jones v. Root*, 6 Gray, 435. There is nothing in this case which requires us to determine the rights of the defendant if the inspector had attempted to take a larger quantity of milk for analysis than was reasonably necessary for the performance of his duties. We have not found it necessary to consider whether the defendant, by voluntarily accepting a license to sell milk, has not assented to the conditions and regulations which the legislature has seen fit to impose upon the exercise of the trade licensed. See *Pitkin v. Springfield*, 112 Mass. 509; *Bertholf v. O'Reilly*, 74 N. Y. 509, 517."

Appellant complains that the ordinance is

vexatious and oppressive, in that the inspectors are subjected to no special and uniform rules to control and govern their action. He claims that it opens the door to favoritism, and to the gratification of personal spite and prejudice; that the inspectors may harass the vendors of milk by unnecessary and repeated demands for samples. The mere fact that powers under an ordinance may be abused does not make the ordinance itself illegal, unreasonable, or oppressive. It is very difficult to so hedge in power conferred as to withdraw from it opportunities for wrongdoing. If such wrongdoing as appellant anticipates were to occur, we think that there are ample remedies at hand to correct and punish it. The efficiency of the inspection referred to in this case rests, to a great extent, upon the very uncertainty as to the times and places of inspection of which counsel complains. It would be an easy matter to prepare for inspections, if parties knew in advance precisely when and where they were to be made. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and it is now, affirmed.

(108 Ala. 96)

WRIGHT v. STATE.

(Supreme Court of Alabama. June 22, 1894.)
CRIMINAL LAW—JUDGMENT ENTRY—SUFFICIENCY.

An entry, purporting to be a judgment, as follows: "The State v. G. W., charge C. C. W. Fall term 1893. Plea not guilty. Jury and verdict. Guilty and fined \$50. Judgment confessed with W., F. and E. sureties,"—is wholly inoperative as a judgment.

Appeal from circuit court, Perry county; John Moore, Judge.

Goliath Wright was convicted of a crime, and appealed. The state moves to dismiss the appeal. Motion granted.

W. F. Hogue, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. This cause was submitted on a motion by the attorney general, to dismiss the appeal upon the ground that the judgment rendered will not support the appeal.

The only entry purporting to be a judgment contained in the record in this case is as follows: "The State v. Goliath Wright, charge C. C. W. Fall term 1893. Plea not guilty. Jury and verdict. Guilty and fined fifty dollars. Judgment confessed with T. H. Weld, C. W. Ford and W. M. Eiland sureties." It requires neither argument nor citation of authorities to show that this statement is wholly inoperative as a judgment. It appears to be no more than a mere repetition of the entries by the court upon a trial docket,—data for the judgment. In *Speed v. Cocke*, 57 Ala. 209, it is said: "The judgment, decree, or order of any court, to be op-

erative, must be certain and complete in itself, without reference to anything else by which to ascertain its meaning." Every verdict of a jury should be followed by a judgment of the court. The usual form observed, after the verdict, is, "It is therefore considered and adjudged that the defendant is guilty as charged in the indictment" (or not guilty, according to the verdict). We would not be understood as declaring that it is necessary to observe the form given, but there must be some words to show that there has been a judgment upon the verdict. Where there is a confession of judgment for the fine, or fine and cost, it is equally imperative that a judgment be rendered upon the confession. If the conviction be for a felony, after the defendant has been adjudged guilty, as indicated above, the sentence of the law must be pronounced. This may be done at the time of the rendition of the verdict, after judgment upon verdict, or may be continued to any suitable time during the term. The sentence can be pronounced only in open court, with the defendant present, and should be preceded by inquiring of the defendant if he has anything to say why the sentence of the law should not be pronounced. The sentence is not the act of the court. It is the judgment of the law, pronounced by the court; and some expression or words should be used, importing that it is the sentence of the law. This is generally shown by the use of the term, "It is therefore considered and adjudged that the defendant," etc., followed by the sentence of the law. *Gray v. State*, 55 Ala. 86. We have been thus particular in this case because of the numerous appeals which have been dismissed out of this court for the reason that no judgment was rendered sufficient to support the appeal. See the following cases, which were in all respects like the one under consideration: *Nichols v. State* (Ala.) 14 South. 538; *Ayres v. State*, 71 Ala. 11; *Thomas v. State*, 70 Ala. 20. The motion of the attorney general must be granted, and the appeal dismissed. Dismissed.

(103 Ala. 104)

Ex parte NICROSI.

(Supreme Court of Alabama. May 4, 1894.)

ATTACHMENT—AMENDMENT—NAME OF DEFENDANT.

Since Code, § 2908, permits the affidavit bond and writ in attachment to be amended to cure "any defect in form or substance," the entity of defendant being unquestioned, it is no error to allow an amendment as to the name from "the R. Grocery Company, a corporation" to "E. R., a married woman, doing business" by the duly-recorded consent of her husband, "under the name and style of the R. Grocery Company."

Petition for mandamus ex parte D. M. Nicrosi to Hon. John R. Tyson, judge of the circuit court of Montgomery county, to permit amendments to attachment papers. Petition granted.

Tray & Watts, for petitioner. John G. Winter and Tompkins & Troy, for respondent.

MCLELLAN, J. The petitioner, D. M. Nicrosi, made and filed in the circuit court of Montgomery an affidavit for an attachment against the Roswald Grocery Company to enforce a landlord's lien for rent. In said affidavit, the attachment bond, and in the writ of attachment the said company is described as a corporation,—i. e. in each of these papers that company is referred to as "The Roswald Grocery Company, a corporation." It having developed that the Roswald Grocery Company was not in fact a corporation, nor even a partnership, but the name under and by which Esther Roswald, a married woman, having the right to engage in business, carried on a grocery business in the house rented from plaintiff, and which, through her agent, she signed to the notes for the rent sought to be recovered, the plaintiff moved for leave to file an amended affidavit and bond, and to amend the attachment writ, so that the words, "Esther Roswald, a married woman, doing business by the written consent of her husband, filed and recorded in the probate court of Montgomery county, under the name and style of 'The Roswald Grocery Company,'" should appear in each in lieu of the words, "The Roswald Grocery Company, a corporation." The court denied this motion, and we are now asked to issue a writ of mandamus to the judge thereof, directing the allowance of the proposed amendments.

From this statement of the facts it is clear that the Roswald Grocery Company, whatever it was, whether a partnership, a corporation, or an individual, assuming the name for the purposes of trade, was the party against whom or which the suit was instituted, has all along been prosecuted, and will be continued if and after the amendments moved for are allowed. There is, in other words, no question here as to the identity of the defendant, throughout all the proceedings which have been or may, in any proposed event, be had, being originally and at all times the same in the mind of the plaintiff. The entity which entered into the rental contract, which has enjoyed the shelter of plaintiff's house, which has failed to pay the agreed price therefor, and which is sought in this action to be coerced into payment thereof, is one and the same, whether it be a contractual entity (a partnership), an artificial entity (a corporation), or a personal entity (an individual); and, whether one or another of these entities, its name is the same,—"The Roswald Grocery Company;" and its liability is the same, and enforceable by the same remedies. That entity, whatever its character, or the source or manner of its being, was proceeded against originally in this case, and brought before the court by attachment of its property,

Once there, it was found that a mistake had been made; not as to the entity itself (not as to the party sued), but merely in respect of describing what kind of an entity the party defendant was. The motion to amend stated and confessed this mistake of description. The plaintiff averred and showed this mistake, and he asked to correct it. He, in effect, said to the court that, while he had sued the proper party, and had levied on the goods of the proper party, he had misdescribed that party, not, indeed, in respect even of the name of the defendant, but in respect solely of the status of that proper party, as being an artificial, instead of a personal, entity; for, surely, the averment that the Roswald Grocery Company was a corporation is no part of the name of that company. It might as well be said that to aver that Jones & Smith is a partnership is to make the averment of partnership a part of the name "Jones & Smith;" or that to sue "John Smith, a man," is to make the defendant's name not John Smith only, but "John Smith, a man." And to omit such averments no more changes the name of the corporation than of the partnership or the individual. It is not a question of name, and cases like *Railway Co. v. McCall*, 89 Ala. 375, 7 South. 650, have no bearing upon it. But it is a matter of description, a change of which does not affect the identity of the party sought to be described, but only gives accuracy and certainty to it. The case of *Railway Co. v. Sistrunk*, 85 Ala. 356, 5 South. 79, is, on principle, in point. The averment that a defendant is a corporation is there held to be descriptive of a named defendant, and not a part of the name itself; and that, where this description had been omitted, it might be added without offense to the limitations upon our very broad statute of amendments. Its addition did not change the party sued. Being merely descriptive when it is at first stated by mistake, it is not conceivable how its elimination could make of that thing which it was incorrectly supposed to describe a different thing. To add it does not change the name, being no part of the name; and, it being already stated, to strike it out cannot. Being stricken out in this case, the suit is against the Roswald Grocery Company. The further amendment is that this company is Esther Roswald, and that she is engaged in business, rented this house, executed these notes, and owes this debt under the name and style of the Roswald Grocery Company; or, in other words, that she is, and all along has been, the Roswald Grocery Company, for all the purposes of this suit. Obviously this part of the amendment, so far from operating a change of the sole party defendant, on its face demonstrates that she is the identical party originally sued under the name which she had assumed and borne throughout the transactions involved in the suit. The amendments should have been allowed. We feel

that a different conclusion would be to emasculate our very liberal and to be liberally construed statute on the subject, which requires the allowance of amendments to cure "any defect of form or substance" in attachment affidavits, bonds, and writs (Code, § 2908), and to do violence to the principles declared in *Railway Co. v. Sistrunk*, supra, and to the analogies furnished by the cases cited in the brief of petitioner's counsel having reference to amendments as to parties in actions involving partnerships. The application for mandamus will be granted.

(103 Ala. 124)

ALABAMA G. S. R. CO. v. LINN et al.

(Supreme Court of Alabama. May 2, 1894.)

RAILROAD COMPANIES — ACCIDENT AT PRIVATE CROSSING — NEGLIGENCE — WANTON NEGLIGENCE — WHAT CONSTITUTES — OPINION EVIDENCE.

1. In an action against a railroad company for injury to a team at a crossing, where the evidence shows no more than that defendant's servants failed to give the signals required by statute, it is error to submit to the jury the question of wanton negligence and willful injury.

2. Where a railroad company acquiesces in the use of a private crossing, persons using it are mere licensees, and all that can be required of the company at such place is to look out for obstructions, and to use due care to avoid injury after being conscious of impending peril.

3. In an action for injury to a team at a crossing, it is error not to permit an expert engineer, who has testified to all the acts done by the engineer in charge of the engine at the time of the accident in his endeavor to stop the train, to state whether or not the train was stopped as soon as it could be done after the signal was given.

4. A witness testified that he was standing behind the team when it started across the track; that he heard the train coming, and looked up and saw it; that he called to the driver, and told him not to attempt to cross, but the driver seemed excited, and whipped up the team; and that he did not stop before crossing, nor appear to look or listen. Held, that it was error not to permit the witness to state whether the driver could have seen the cars in time to have avoided the accident.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by George W. Linn & Son against the Alabama Great Southern Railroad Company to recover damages for injuries to a team of mules, wagon, and harness, caused by defendant's negligence. There was a judgment for plaintiffs, and defendant appeals. Reversed and remanded.

The negligence complained of was in the failure of defendant's employees to give the proper signals while passing a crossing at which the accident occurred; their failure to stop the train after discovering the peril of plaintiffs' team, and the running of said train at a high rate of speed where the accident happened. Defendant pleaded the general issue, and in several different forms the contributory negligence of plaintiffs; and upon these pleas issue was joined. One B. Mason testified that he was on the engine at the

time of the accident; that the whistle had been blown for the crossing, and that he himself was ringing the bell as they approached the crossing; that, when the signal to stop was given by one of the brakemen on the train (which signal the brakeman testified he gave immediately upon discovering the peril of plaintiffs' team), the engineer blew for brakes, put on the brakes of his engine, reversed the engine, and sanded the track; that he himself had been working on an engine as engineer and fireman for about 11 years, and knew all about the management of locomotive engines. Defendant then asked him "whether or not the train of cars was stopped as soon as it could be done after the signal was given." Plaintiffs objected to this question. The court sustained the objection, and defendant excepted. One T. H. Wright, a witness for the defendant, testified that he was standing behind the wagon just before it started across the track; that the Alice furnace was making a good deal of fuss, but he heard the train coming, and looked up and saw it; that, as the driver of plaintiffs' wagon started across the track, the witness hallooed to him not to attempt to go across the track, but that the driver seemed excited, and not to apprehend the danger he was in, and whipped up his mules, and started across the track; that the driver did not stop before he started across the track, nor did he appear to look or listen for the train. The defendant then asked this witness the following question: "Could the driver of this wagon have seen the cars in time to have prevented the accident if he had looked up and down the track before attempting to cross?" The court sustained an objection by plaintiffs to the question, and defendant excepted. The court, in its oral charge to the jury, among other things, instructed them as follows: "You must decide under this evidence whether or not the defendant was guilty of wanton, reckless, or intentional negligence." The defendant objected to the giving of this portion of the court's general charge, and also separately excepted to each of the following portions of the court's general oral charge: (1) "It is a question for you to decide whether or not it was negligence for the railroad to run its train at the rate of speed which is complained of." (2) "If you should decide that the speed of the train was dangerous, and that they failed to ring the bell or blow the whistle, then it is left for you to say what was the degree of negligence; and, if you decide that this negligence amounted to willful or wanton or reckless negligence, then the plaintiffs will be entitled to recover, notwithstanding the servant of plaintiffs may have been guilty of contributory negligence which contributed proximately to his injury." (3) "If you should find from the evidence that the defendant's action amounted to wanton, reckless, or intentional negligence, then you can assess as damages, not only the value of

the property, but also can give punitive damages by your verdict." Among the written charges which were asked by the defendant, and to the refusal to give each of which the defendant separately excepted, were the following: (2) "Neither the running at a high rate of speed at this crossing, nor the failure to give the statutory signals on approaching it, nor the failure to keep a proper lookout, nor any other mere omission of duty on the part of the defendant, amounts to such gross negligence, recklessness or wantonness as will overcome contributory negligence." (3) "If the jury believe from the evidence that the servant of the plaintiffs was guilty of such negligence in this case as contributed proximately to the injury complained of, then they must find a verdict for the defendant." (4) "The court charges the jury that in this case the defendant is not shown to have been guilty of such gross negligence, recklessness, or wantonness as will overcome contributory negligence on the part of the plaintiffs, if they believe from the evidence that the plaintiffs' servant was guilty of such contributory negligence as contributed proximately to the injury." (6) "If the jury believe from the evidence that the manifestations of the peril of the wagon and team and driver of the wagon, and the collision between them and the train, were so close in point of time that the train could not have been stopped in time to avoid the collision, then the defendant's agents in charge of said train cannot be deemed guilty of wanton, reckless, or intentional misconduct." (7) "Neither the failure to ring the bell of the engine or blow the whistle, nor the speed of the train before the peril of the team and wagon and driver became manifest, or ought to have been manifest, under the evidence, is evidence of wanton, reckless, or intentional misconduct on the part of defendant's servants." (8) "Wanton, reckless, or intentional wrong cannot be inferred, unless the employees actually knew of the peril of the plaintiffs' team and wagon, and failed to make reasonable effort to avert it." (10) "If the jury believe from the evidence that the servants of the defendant kept a proper lookout, and, when the danger to the property of the plaintiffs was discovered, they acted promptly in trying to avert it, and did what they could to avoid the accident, then they must find a verdict for the defendant." (12) "The court charges the jury that in this case they cannot render a verdict for punitive or exemplary damages in favor of the plaintiff, if they should find a verdict in his behalf." (13) "The court charges the jury that, if they should find a verdict in favor of the plaintiff, they can only render a verdict for actual damages."

A. G. Smith, for appellant. B. L. Thornton and J. W. Bush, for appellees.

COLEMAN, J. The appellees, Linn & Son, brought the present action to recover dam-

ages sustained by them by the loss of one mule, injury to another mule, and the destruction of a wagon and harness. The proof shows that the injury was the result of a collision by a train of cars operated by the defendant. The proof also shows that the collision occurred at a private crossing; that is, according to the proof in this case, at a place used for crossing the railroad track, as a matter of convenience, and not as a matter of public right, nor a matter of private right. The proof is that, as a crossing, at times it was closed for weeks and months without objection or protest; that, when it was unobstructed, any and every body who saw proper to avail themselves of its accessibility and convenience used the crossing without interference or objection, and sometimes as many as 20 wagons a day, hauling slag and cinders from the Alice furnace, crossed there. The proof shows that scattered along on both sides of the railroad track there were 40 or 50 dwelling houses, and the place was a village known as "Alice Furnace." The train was being backed at the time of the collision, and the speed is placed by the witnesses at from 6 to 25 miles an hour. The evidence was in conflict as to whether or not signals of the approach of the train were given, and also whether the plaintiffs' servant, who was driving the wagon, stopped and looked or listened before driving upon the track.

In its instruction to the jury, and in refusing instructions requested, the trial court proceeded upon the theory that there was evidence of willful and intentional injury, or negligence so wanton and reckless as to be its equivalent. This is the first question for consideration. We have examined the record, and have discovered no fact from which it could be inferred that defendant's servants were negligent in the use of preventive effort after the discovery of the perilous position of plaintiffs' team, or had any actual knowledge of the presence and peril of plaintiffs' team in time to have prevented a collision by the use of preventive effort. Neither does the evidence show such conditions or attending circumstances as would justify the imputation of such knowledge to those operating the train. The place was not a public crossing. It was not a street or a public thoroughfare. At times a good many wagons crossed there, engaged in hauling slag and cinders from the Alice furnace; at other times, for weeks, it was closed. At no time was it used as a matter of right, but only of convenience. The principles which apply under such circumstances are stated in the case of *Railroad Co. v. Webb*, 97 Ala. 308, 12 South. 374, and authorities cited; *Stringer v. Railroad Co. (Ala.)* 13 South. 75.

We think the court erred in submitting the question of wanton negligence and willful injury to the jury. The statute (Code, § 1144) requires the engineer "to blow the whistle

or ring the bell, at short intervals, on entering into, or while moving within, or passing through, any village, town, or city;" and by section 1147 of the Code it is declared that "a railroad company is liable for all damages done to persons, or to stock or other property, resulting from a failure to comply" with these requirements. We are of opinion that the Alice Furnace is a "village," within the meaning of section 1144, *supra*. The failure to observe these requirements, per se, is no more than simple negligence. *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Railroad Co. v. Sampson*, 91 Ala. 560, 8 South. 778. We have held that, under some circumstances, a person may cross over a railroad track, wherever he may be at, on its line, without being a "trespasser," in the sense in which that term is usually understood. *Stringer v. Railroad Co. (Ala.)* 13 South. 75; *Glass v. Railroad Co.*, 94 Ala. 587, 10 South. 215. This rule would be especially applicable in cases like the present, where it has been acquiesced in without objection. The person undertaking to cross a railroad under such circumstances is entitled to no other privileges or protection than a mere licensee. He cannot thereby impose the additional duties upon a railroad to know he is there, or to keep an especial lookout for him. All that can be required of a railroad company, operating its trains over its own track, under such circumstances, is to perform its duty in looking out for obstructions, and to use due care and reasonable diligence to avoid inflicting an injury to persons after being conscious of the peril. When the railroad has done this, it has discharged its duty to the person undertaking to cross its track at such crossings. *Iron Co. v. Davis*, 79 Ala. 308; *Tanner v. Railroad Co.*, 60 Ala. 621. These principles of law embrace all questions arising from instructions given, and those refused, to which exceptions were reserved.

The court erred in not permitting the witness Mason to answer the questions propounded to him. This witness had testified to all the acts done by the engineer in order to stop the train. He was an expert. Whether we regard the answer as a shorthand rendering of facts, or as the opinion of an expert upon facts stated, in either view, it was admissible.

The court should have allowed the question to the witness Wright. This witness had shown he was in a position to see both the railroad track and plaintiffs' servant. If his testimony was credible, he knew how far off the train was, and plaintiffs' servant's position. He could testify as a fact whether one looking could have seen the approaching train, and whether, by looking, the driver could have seen it, before venturing across the track. The opportunity and means of knowledge, and the credibility of the witness, and the weight to be given to his testimony, could have been tested by a cross-examina-

tion. *Tesney v. State*, 77 Ala. 33; *McVay v. State* (Ala.) 14 South. 862. Reversed and remanded

(103 Ala. 160)

LOUISVILLE & N. R. CO. v. MARKEE.
(Supreme Court of Alabama. May 1, 1894.)

MASTER AND SERVANT — ACTION FOR PERSONAL INJURIES—SUFFICIENCY OF COMPLAINT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

1. A complaint in an action against a railroad company for the alleged negligent killing of plaintiff's intestate, a section foreman, containing two counts,—the first charging that the engineer ran the engine without due care around a curve, and on the intestate, and that his death was the result of the engineer's negligence, and the second count charging defects in the use, works, and machinery of defendant,—is sufficient.

2. A plea to such complaint alleging that intestate himself was guilty of negligence in and about the way he was discharging his alleged duties, which negligence contributed proximately to his alleged injuries, is too general.

3. Contributory negligence is no bar to an action for the killing of a person by the wanton and willful act of the defendant company's engineer.

4. Deceased, a section foreman, riding on a hand car, was struck by a train and killed. The hand car was emerging from a cut where persons in charge of the train could not see the hand car until within 150 yards of it. As soon as deceased's presence was discovered, the brakes were put on, and the engine reversed. There was evidence that, on account of the speed of the train, no effort could have prevented the collision. *Held* not to show negligence on the engineer's part after discovering plaintiff's presence.

5. Failure of the engineer to blow the whistle before reaching the curve, as required by the rules of the company, he having no knowledge of the presence of decedent, would be simple, not wanton, negligence.

6. The rules of the company required foremen to use the utmost care in running their hand cars over the road, and that curves should be flagged, and a constant lookout kept. Deceased knew the rules, and failed to put out a flag at the curve, as required; and it was shown that, if the curve had been flagged, the engineer would have had time and space within which to stop the train before reaching the place of collision. *Held*, that deceased was guilty of contributory negligence.

7. Where it took all decedent's wages to support himself and family, a charge that if the case was one where the deceased would, in addition to assisting in the support of the next of kin, have accumulated an estate, that might be taken into consideration in measuring the pecuniary loss, was misleading.

Appeal from city court of Birmingham;
H. A. Sharpe, Judge.

Action by Annie E. Markee, as administratrix of the estate of John S. Markee, deceased, against the Louisville & Nashville Railroad Company, to recover damages sustained by the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant. There was judgment for plaintiff, and defendant appeals. Reversed.

The complaint as originally filed contained three counts. On motion of the plaintiff, the second count was stricken out. The

first count of the complaint, after alleging the existence of the corporation as a common carrier, and the duties incident thereto, and the employment of the plaintiff's intestate by the defendant as a section foreman, and the running by the defendant of an extra freight train, then alleged the negligence complained of in the following language: "The plaintiff avers that the engineer in charge of said freight engine, and who, as plaintiff alleges, was in the service of defendant, ran said engine without due care, and negligently, through said cut, and around said curve, and on the said John S. Markee, and then and there, on, to wit, October 1, 1891, killed him; and that, as plaintiff avers, the death of said John S. Markee was the result of the negligence of said engineer." The third count of the complaint, after averring in its primary allegations that it was the duty of the defendant to use due care and diligence, and have the engine which drew the freight train, and which caused the accident in the present case, in a reasonably safe condition, so that it could be easily controlled by the engineer in charge of the same, alleged the negligence in the following language: "And the plaintiff avers that the engineer who was then in charge of said engine failed to check or stop said engine so as to enable said John S. Markee to get off defendant's track; and that, as plaintiff avers, said failure to so check or stop said train was caused by reason of a defect in said engine and the brakes on said train." There were demurrers interposed by the defendant to each of these counts of the complaint, the principal grounds of which were that the averments of negligence in each of the counts were too uncertain and indefinite. These demurrers were overruled, whereupon the defendant excepted. The defendant pleaded the general issue, and, by several special pleas, contributory negligence of the plaintiff. The first plea of contributory negligence was in the following language: "The defendant, for further answer to the complaint, says that the plaintiff's intestate himself was guilty of negligence in and about the way he was discharging his alleged duties, which negligence contributed proximately to his alleged injuries." To this plea the plaintiff demurred, on the ground that it failed to show any acts by the plaintiff or other facts which constituted the contributory negligence averred in said plea. This demurrer was sustained. The remaining pleas, wherein the defendant set up the plea of contributory negligence, averred the facts on which the defendant relied to show such contributory negligence, and the demurrers thereto were overruled.

The court, in its oral charge to the jury, among other things instructed them as follows: "You have heard the rules which have been admitted in evidence read, and it will be a question for the jury to deter-

mine whether the intestate was guilty of negligence in a violation of those rules." The defendant duly excepted to this portion of the court's oral charge, and also separately excepted to each of the following portions of the court's oral charge to the jury, which are numbered for convenient reference: (1) "It would be for the jury to judge of the conduct of the intestate, and say whether or not, in view of all the circumstances, he contributed to his own death by his own negligence or want of due care." (2) "If the case should appear to be one where the deceased would have, in addition to assisting in the support of the next of kin, accumulated an estate which would have gone to them at his death, that might be taken into consideration in measuring the pecuniary loss. If the jury can tell by the evidence that the deceased would have accumulated an estate if he had not been killed, which would have gone to the next of kin at his death, then that fact is to be taken into consideration, as well as the pecuniary assistance which he would have given them during his life." (3) "If the evidence, however, does not show that he would have made any such accumulation from his net earnings during his lifetime, if the evidence merely shows that he would only have contributed to their support during his lifetime, then only that loss should be considered in determining the pecuniary loss to the next of kin." At the request of the plaintiff, the court gave the following written charge to the jury: "Plaintiff's intestate assumed the risk incident to the service in which he was employed; yet, if the injuries resulted from superadded risk occasioned by the negligence of the engineer in charge of the engine that did the killing, he could recover, unless he in some way contributed proximately to the injury by a failure to exercise such reasonable care as the occasion required." The defendant duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following written charges, requested by it: (1) "If the jury find for the plaintiff, they can only assess nominal damages." (2) "A mere failure on the part of the engineer of the defendant to use the utmost expedition or to select the most effectual means to stop his train after he discovered the peril of the intestate would not constitute willful, wanton, or intentional negligence, which would overcome the intestate's contributory negligence, if the jury find from the evidence that he was guilty of contributory negligence, unless the jury believe that such failure evinced on the part of the defendant's engineer a willingness to inflict the injury complained of." (3) "If the jury believe from the evidence in this case that the more effectual means for stopping defendant's train would be to first reverse the engine and then apply the brake, and if the jury further believe from

the evidence that the defendant's engineer first applied the brake and then reversed the engine, and if the jury further believe from the evidence that the defendant's engineer in good faith believed that the more effectual means to stop the engine was to first apply the brake and then reverse the engine, then the jury cannot find that the defendant's engineer was guilty of willful, wanton, or intentional negligence in first applying the brake and then reversing the engine." (4) "The jury are not authorized to find from the evidence that the engineer of defendant allowed his train to get beyond his control, or that he was engaged in chatting to the conductor, or that the conductor was not in his proper place, when in the engine, at and before the time of the accident." (5) "If the jury believe the evidence in this case, they must find that no preventive effort upon the part of defendant's servants in charge of the train would have availed to prevent the intestate's death after his peril became manifest to them." (6) "It was the duty of the plaintiff's intestate, under the evidence in this case, to protect his hand car while it was being operated on the track of the defendant from extra trains of defendant on said track; and the defendant owed plaintiff's intestate no duty to warn him of the approach of such train until his presence on the hand car on the track was discovered by defendant's servants on its train." (7) "It was not the duty of the defendant's servants to give the plaintiff's intestate any notice of the approach of the extra train, which struck the hand car he was operating, until defendant's servants discovered, or would, by the exercise of reasonable diligence, have discovered, the presence of the hand car on the track." (8) "It was not the duty of the defendant's servants to give the plaintiff's intestate any notice of the approach of the extra train, which struck the hand car he was operating, until defendant's servants discovered the presence of the hand car on the track." (9) "It was not a duty which the defendant owed plaintiff's intestate to blow the engine whistle at the whistle post north of the public road crossing, which was north of the curve." (10) "The jury cannot find from the evidence that the defendant was guilty of willful, wanton, or intentional negligence." (11) "If the jury believe the evidence, they must find for the defendant under the first count."

On this appeal, prosecuted by the defendant, there is assigned as error the overruling of the defendant's demurrer to the first and third counts of the complaint, the sustaining of the plaintiff's demurrer to the first plea of contributory negligence, and the giving and refusing of the several charges.

Hewitt, Walker & Porter and J. M. Falkner, for appellant. Bulger & Altman, for appellee.

COLEMAN, J. This is an action under the employer's liability act, to recover damages sustained by the death of plaintiff's intestate, averred to have been caused by the negligence of the defendant railroad company. The case was tried upon two counts. The first count charges that the engineer in charge of the engine "ran said engine without due care, and negligently, through said cut, and around said curve, and on the said John S. Markee," etc., and that his death "was the result of the negligence of said engineer." The other count charges a defect in the ways, works, and machinery: The real contest was upon the first count.

Under former decisions of this court, the complaint was sufficient, and the court did not err in overruling a demurrer to the first or third count of the complaint. *Railroad Co. v. Thompson*, 62 Ala. 494; *Leach v. Bush*, 57 Ala. 145; *Railroad Co. v. Chewning*, 93 Ala. 24, 9 South. 458; *Railroad Co. v. George*, 94 Ala. 199, 10 S. W. 145; *Railroad Co. v. Meadors*, 95 Ala. 144, 10 South. 141.

The defendant pleaded the general issue, and also several pleas setting up contributory negligence as a defense. The first plea of contributory negligence was too general, and the demurrer to it was properly sustained. *Railroad Co. v. Herndon* (Ala.) 14 South. 287. The trial proceeded upon issue joined upon the plea of the general issue and the pleas of contributory negligence. After the close of the evidence, the court, among other charges, instructed the jury, as matter of law, that the plaintiff was guilty of contributory negligence. For the defense it is contended that under the instructions of the court, holding as matter of law that the plea of contributory negligence was sustained, the defendant was entitled to a verdict, and this on the principle, often decided, that when issue has been joined upon a plea, even though it be an insufficient plea, the defendant has the right to support it by evidence, and, if sustained, he is entitled to a verdict. *Railroad Co. v. Graham*, 94 Ala. 545, 10 South. 283; *Farrow v. Andrews*, 69 Ala. 97; *Mudge v. Treat*, 57 Ala. 1. On the other hand, it is contended by the plaintiff that under many decisions of this court, although a defendant may show contributory negligence, yet the plaintiff may prove, if he can, that, after the discovery of his danger, the defendant was culpably negligent in not using proper preventive effort to avoid the injury, and upon such proof the plaintiff may still recover, notwithstanding he may have been guilty of contributory negligence. The authorities relied upon to sustain this latter contention are collected in the cases of *Railroad Co. v. Webb*, (Ala.) 12 South. 374; *Hurt's Case* (Ala.) 13 South. 130; *Tanner v. Railroad Co.*, 60 Ala. 621. It has also been held that where the plaintiff counts upon willful or wanton negligence, and the proof shows only simple negligence, there is that variance between the allegata and probata which will defeat a recovery.

Railroad Co. v. Johnston, 79 Ala. 436; *Railroad Co. v. Jacobs*, 92 Ala. 187, 9 South. 320; *Railroad Co. v. Crocker*, 95 Ala. 412, 11 South. 262; *Railroad Co. v. Winn*, 93 Ala. 308, 9 South. 509. It would also seem on principle that, if there is that variance between simple negligence and wanton or willful injury, proof of the former will not sustain a complaint charging the latter; that a replication to a plea of contributory negligence, averring willful and intentional injury, would be a departure from a complaint charging simple negligence. *Ditmar's Case*, 51 Ala. 245. It has also been decided that a plea of contributory negligence is no answer to a complaint counting upon willful or wanton negligence. *Railroad Co. v. Frazier*, 93 Ala. 45, 9 South. 303; *Railroad Co. v. Watson*, 90 Ala. 68, 8 South. 249; *Railroad Co. v. Stewart*, 91 Ala. 421, 8 South. 708; *Crocker's Case*, 95 Ala. 412, 11 South. 262. There is not necessarily that inconsistency in these several principles of law which will prevent their proper application in a single suit, if the complaint and pleas are properly framed. Their improper application to the pleadings has led to confusion. The practice which has obtained in this state, and to some extent justified by adjudications of this court, of proving willful injury, or wanton negligence, as its equivalent, under a complaint averring only simple negligence, should no longer prevail. It is not correct in principle or practice, and leads to confusion or injustice. This court does not generally review assignments of error not properly raised and excepted to during the trial, and which are not necessary to a determination of the case. We think it very clear that a plea of contributory negligence is no answer to a charge of having intentionally or wantonly caused the death of another. If an engineer saw or knew that a person had placed himself upon a railroad track for the very purpose of being run over and killed, he could not be justified in running his engine upon such person, because of the willful or intentional misconduct of such person. The proper plea to such a charge is the general issue, and not contributory negligence; for if the plaintiff counts upon such a charge, and proves it, he is entitled to recover, in cases where the principal is liable for such acts of its agents, notwithstanding the deceased intentionally contributed to his own death. A plaintiff is presumed to know his cause of action when he brings his suit, and has the right to state it in as many counts as he may deem necessary to meet the varying phases of the evidence; and it is his duty to fully inform the defendant by his declaration of all the grounds of complaint relied upon for a recovery. Having done this, the defendant is in a condition to prepare his pleas in defense. It is not just for the parties to go to trial, and after having entered upon the trial, upon issues shaped by the pleading, to permit either party, against the objections of the other, unless specially

authorized by statute, to inject a new issue, and allow the plaintiff to recover upon a cause of action not stated in his complaint; or the defendant to avail himself of a defense of which his adversary is not apprised by the plea. If, however, the parties go on without objection, this court will not consider the objection, if first raised here. If, during the trial, it is developed that the pleadings are not suitably framed to meet the evidence, under our liberal system of pleadings, it is the duty of the court to permit, if desired, an amendment of the pleadings, the court taking care to see that no undue advantage is obtained thereby, nor injustice done, and that the amendment does not go to the extent of changing "the form of the action, nor an entire change of parties, nor the substitution or introduction of an entirely new cause of action." These are the only limitations on the right of amendment. *Mahan v. Smitherman*, 71 Ala. 565; *Johnson v. Martin*, 54 Ala. 271; Code 1886, § 2833. A declaration or complaint may in one count aver simple negligence, in another willful and intentional wrong, and proper issues may be made up under the pleas to each count; or if the complaint charged either the one or the other, and the proof was such as to require an amendment of the pleadings, by adding a new count this should be allowed, and a plea to the complaint as amended filed. Justice might require a continuance under some circumstances, but the question of a continuance, to prevent injustice or undue advantage, would depend greatly upon the circumstances of each case.

We think what we have said will suffice on the questions considered. One material question in the case is as to whether there was any evidence tending to show negligence on the part of the engineer after the discovery of plaintiff's danger. We do not think a failure to do an act, which, if done, might or would have avoided the injury, necessarily constitutes it an intentional or such a willful or wanton wrong as to be the equivalent of intentional wrong. Such a rule would require infallibility in the selection of the means used to prevent the injury. No employer owes such a duty to his employee. Due care and reasonable diligence is all that the law requires. *Railroad Co. v. Sampson*, 91 Ala. 563, 8 South. 778. If the person charged with the duty consciously fails or refuses to exercise reasonable care to prevent an injury after the discovery of peril, or under circumstances where he is chargeable with a knowledge of such peril, and injury results, he will be guilty of willful injury, or such wanton negligence as to be its equivalent. If an employee or agent charged with the duty, after the discovery of the peril of a coemployee, in good faith exercises due diligence and care to prevent an injury, and injury results notwithstanding, it cannot be said he is guilty of simple negligence or of intentional and willful wrong. The evidence

shows that the deceased was a section foreman, riding on the track on a hand car, in the discharge of his duties, and at the time going south. The train which ran over him was also going south, heavily loaded with pig iron. The hand car was about emerging from a cut in which there was a curve, which so obstructed the view that persons in charge of the train could not see the hand car or deceased until they were within 150 yards of him. The train was running 25 miles an hour, schedule time, and down grade. The evidence shows without conflict that, as soon as the presence of the deceased was discovered, the alarm was given, the brakes were put on, and then the engine reversed. The engineer and the witness Rosser, who was an expert, testified that this was the most effective method of stopping the train. The conductor, who had never acted in the capacity of an engineer, but, from his long employment as conductor and familiarity with the manner by which engines are controlled, had acquired sufficient knowledge to render him competent to give expert testimony, testified that, in his opinion, the most effective way to stop a train is by first reversing the engine, and then to apply the brakes. Whether the one or the other be correct, we think it very clear that if the engineer, after discovering the peril of deceased, adopted the means he believed best adapted to stop the train, and in good faith did all he could to prevent the collision, it cannot be said he was guilty of intentional injury, or such wanton or reckless negligence as to be its equivalent, even though the jury might believe the conductor was right in his conclusion. There was evidence tending to show that, on account of the speed of the train, its load, and the down grade, no preventive effort could have prevented the collision with the hand car, after it was seen. If the jury should believe this phase of the evidence, the engineer was not chargeable with simple negligence or willful or wanton injury for a failure of duty arising after the discovery of the peril of plaintiff's intestate.

It is contended that the engineer was guilty in not blowing the whistle before reaching the curve. It would have been better pleading to have charged this negligence in the complaint, but we will consider the question upon its merits, as the court was requested to give instructions on this point. There was some evidence tending to show that a sign post with the letter W stood on the right of the road, just before reaching the curve, which required engineers to blow the whistle before entering the cut and curve. This fact was controverted. The proof showed also that there was a public crossing of the road about one-half mile north of where the injury occurred. The evidence was in conflict as to whether the whistle blew at the public crossing. The defendant requested the court to instruct the jury that it owed

deceased no duty to blow the whistle at the public crossing, which was refused. It has been decided that section 1144 "was intended to protect and warn persons who at a public crossing pass across and directly on the track," "and for the benefit of the traveling public, who have a right to be warned of approaching trains, for their personal protection." *Railroad Co. v. Hall*, 87 Ala. 718, 6 South. 277; *Railroad Co. v. Hembree*, 85 Ala. 481, 5 South. 173; *Railroad Co. v. Hawk*, 72 Ala. 112. The defendant owed plaintiff's intestate no duty to blow the whistle at the public crossing. If the post with the letter W was at the place testified to by some of the witnesses, and required the engineer to blow before entering the curve, his failure to blow would be negligence. The failure to blow at the public crossing or at the post, having no knowledge of the presence of the defendant, would be simple negligence, no more. *Railroad Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Railroad Co. v. Sampson*, 91 Ala. 560, 8 South. 778.

Was the plaintiff's intestate guilty of contributory negligence? On this point the following rules of the company were introduced in evidence: "As no signals are carried for extra trains, foremen must use the utmost care in running their hand cars over the road. Curves and other dangerous places must be flagged. A constant lookout must be kept." "Extra trains may be expected at any moment, and section foremen must always be prepared to meet them." These rules were known to deceased, and without contradiction it is shown that the train was an "extra train;" that deceased did not observe the rule, and put out a flag at the curve, as required by the rule; that, if the curve had been properly flagged, the engineer would have had time and space within which to stop the train before reaching the point of collision. Under this evidence, the deceased was guilty of negligence himself. *Railroad Co. v. Hammond*, 98 Ala. 181, 9 South. 577.

Thus far we have not referred to the evidence by the witnesses for the plaintiff and defendant, which shows that there were five persons on the hand car, all of whom jumped safely off the hand car. If it be true, as testified to by some of the witnesses, both for plaintiff and defendant, that the deceased escaped the peril of a collision by jumping from the hand car, and was in a safe position, and voluntarily returned to the hand car, and, in an endeavor to get the hand car from off the track, was caught by it and held until the freight train collided and ran over deceased, and it was not possible, by the use of all reasonable preventive effort, to stop the train so as to prevent a collision after the deceased returned to the hand car, under no principle of law can the defendant be held liable for a neglect of duty by the engineer. The trial court cannot be put in error for not charging upon the effect of evi-

dence *ex mero motu*. The statute is positive (Code 1896, § 2754), and certainly the defendant cannot complain of a charge given at its request. *Hurt's Case* (Ala.) 18 South. 130.

The evidence shows that deceased left a wife and two children. That he was receiving \$40 a month. "That he appropriated his wages to the comfort and support of his family." "It took all his wages to support himself and his family." "That it took about five dollars a month to clothe himself, and about ten or twelve dollars a month to feed himself." We believe this to be all the evidence on this point. We are of opinion that the case is brought fairly within the principle declared in the *Trammell Case*, 93 Ala. 350, 9 South. 870; that it involves a dependent relationship, and no pecuniary interest, except by way of support and maintenance. In the oral charge the court instructed the jury as follows: "If the case should appear to be one where the deceased would have, in addition to assisting in the support of the next of kin, accumulated an estate which would have gone to them at his death, that might be taken into consideration in measuring the pecuniary loss," etc. The principle of law here stated may be correct, but we fail to find any evidence to which it could be referred. It was abstract and misleading; and though this court will not reverse a case for an abstract charge asserting a correct principle, unless it is manifest that injury resulted, it is the safe rule to omit or refuse instructions of this character.

Where there are so many exceptions as appear in the present record, we can do no more than declare general principles of law which govern them, and leave their application to the trial court. This, in our opinion, has been done with sufficient care in the case before us. Reversed and remanded.

(108 Ala. 143)

RICHMOND & D. R. CO. v. BIVINS.

(Supreme Court of Alabama. May 2, 1894.)
INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

In an action by a brakeman against a railroad company for injuries received by his clothes catching in a switch, and throwing him under a car, as he was boarding the caboose after throwing the switch, the court should have directed a verdict for defendant, where the evidence showed the switch was well designed, and that no accident ever before happened from it, and that brakemen were not required to board passing trains at the switch, and that there were other safe ways of boarding a train than the one he chose.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

This was an action brought by the appellee, R. R. Bivins, against the Richmond & Danville Railroad Company, to recover damages for personal injuries, alleged to have been sustained by the plaintiff, who was an employe of the defendant, through the alleged

negligence of said defendant. Upon the trial of the case there were verdict and judgment for the plaintiff for \$15,000, from which judgment the present appeal is taken. Reversed and remanded.

The circumstances of the accident, which resulted in the injury to the plaintiff, and as shown by the bill of exceptions, were substantially as follows: The plaintiff was a brakeman on a freight train which was being operated by the defendant on its road. At one of the stations along the line of the defendant's road, the conductor gave to the plaintiff the following order: "Go set up your switch, catch your caboose, hold the cars, cut them loose, and run them on the side track, and get away as quick as possible." In obedience to these directions of the conductor, the plaintiff went to the switch, and after setting it in order to let the freight train back from the main track onto the side track, he stood by the switch and waited for the train to back down, and as the rear platform of the caboose reached a point opposite to the switch, and while the train was still in motion, he grasped the rails of the rear platform with both hands, put his left foot on the last step of the platform, and was in the act of drawing up his other foot to place it also on the said step, when his pants leg was caught in some way by some part of the machinery of the switch, and his right foot was drawn back, and his left foot slipped from the step, and both legs were drawn one after the other under the cars, and were cut off just below the knees. It was contended by the plaintiff, supported by the tendency of his evidence, that the switch where the accident happened was not properly constructed, and that on account of said negligence in failing to construct it properly, and to keep it in proper repair, the accident was caused. The testimony for the defendant on this point tended to show that the switch in question was such as was ordinarily used by prudently conducted railroads, and that there was no defect in the same, and it could be operated without any difficulty. The plaintiff testified in his own behalf that he had many times, after setting a switch, boarded the train while it was in motion, and that he had also at other times gotten on the train after it had stopped. There was some evidence for the plaintiff tending to show that it was a custom of brakemen on the defendant's road to get on and off a train when in motion after setting up switches. The defendant's evidence tended to show that there was no such custom, but that brakemen got on and off trains, while performing their duties as switchmen, as often while the trains were still as when in motion. The defendant's evidence also tended to show, without dispute, that the switchmen, if they chose to do so, could have a train stopped, and make them wait until they had gotten on them. In view of the decision of this court,

in holding that the general affirmative charge should have been given for the defendant, it is unnecessary to make a more detailed statement, as such other facts as are necessary to a full understanding of the decision, are sufficiently stated in the opinion.

James Weatherby, for appellant. Bowman & Harsh, for appellee.

HARALSON, J. 1. On January 1, 1889, the defendant, the Richmond & Danville Railroad Company, acquired and took exclusive possession and control of the Georgia Pacific Railroad Company, and was operating it by and through its own officers and employees. On the day following, the 2d of January, 1889, the accident happened to the plaintiff, for which he instituted this suit. Prior to January 1, 1889, and since September 5, 1888, the plaintiff had been in the employment of the Georgia Pacific Railroad Company; and on the transfer by the latter company, of its railroad and appurtenances to the defendant company, the plaintiff went into the service of defendant as flagman and switchman on one of its trains,—the same employment he had under the former company. He brought suit, first, against the Georgia Pacific Company; and, on substantially the same essential facts as are presented in this record, the court below gave the general charge in favor of the defendant, and the judgment in its favor, on appeal to this court, was affirmed. From the report of the case, it does not appear that the fact of the transfer of the railroad and its appliances from the Georgia Pacific to the defendant company, was shown. *Bivins v. Railway Co. (Ala.)* 11 South. 68. In that case we said, there was no proof that the machinery as constructed was dangerous. That was left to inference; and, it was not explained, nor attempted to be, how the brakeman's apparel became entangled with the handle of the switch, or that there was anything in the nature of the structure of the switch calculated to produce such results; that the natural inference from the testimony was, that it was the result of a misstep, was accidental, and would not be likely to occur again; and there was no testimony from which the jury could infer negligence on the part of the railroad company. The plaintiff, in bringing suit against this company, has sought to supply the deficiency of proof which disentitled him to a recovery against the other company, in that suit. He attempted to prove in this case, by his own testimony and that of an expert witness, that the switch, as constructed, was dangerous or unsafe for use by switchmen in boarding passing trains.

2. There are many questions raised for review in the record, which we will not consider, since, according to our view of the case, it is unnecessary to do so. We confine ourselves to the simple inquiry,—if the case for the defendant is not made out on its plea

of the contributory negligence of the plaintiff. A switch is a mechanical device by which engines and cars may be run from one track to another. It is not in its design intended or built, for the purposes of a step or platform, for one to mount from the ground, or from the cross-ties on which the switch is constructed, on to a moving train. Its highest design is reached, when constructed in such a manner, as that a switchman whose duty it is to operate it, can do so, for the purposes for which it was intended, with safety to himself. Ray, Neg. 583. The question in such cases is, not whether the machinery was the best known in use on railroads; but, it is regarded as a sufficient fulfillment of the company's duty, to adopt such as is in ordinary use by prudently conducted roads, engaged in like business and surrounded by like circumstances. Wilson v. Railroad Co., 85 Ala. 272, 4 South. 701; Railway Co. v. Propst, 83 Ala. 518, 3 South. 764; Railroad Co. v. Allen, 78 Ala. 494.

3. The evidence in this case fails to show that the switch was not a proper one, and did not perform its duty well; but, on the contrary, it appears to have been well adapted to its designs, and no accident had ever before this happened to any one from operating it. It may be conceded, if the switch was a proper place, at which to board a passing train, and at which the defendant expected its switchmen to do so, that a platform might have been constructed in connection with it, making it a less dangerous undertaking; but, it is not shown that the company required or even expected its employees to undertake such a risk. If the company did not make such a requirement, if no accident had ever before this happened there to any one operating the switch, and if the company could not reasonably anticipate an accident such as plaintiff suffered, as a natural sequence from the ordinary use of the switch, it is difficult to see on what principle it would be required to provide a platform in connection with such a structure. A company is not bound to its employees to take precautions against all possible dangers, especially when assumed by them, at their own convenience and risk. Its duty is performed by guarding against those reasonably probable. If one, for instance, in the service of a railroad, as a switchman in its yard, gets his foot caught in a frog, connecting the converging tracks, and is run over and killed by a near approaching train, the company has been held not to be responsible, although if it had caused the opening of the frog to be filled in with a block of wood, the accident would not have occurred. Or, if one attempt to cross or run along in front of an engine, on a side track used for the purpose of stowing cars, and stumbling on the cross-ties, falls, and is injured by the engine before it can be stopped, the company cannot be held responsible for not ballasting the side track, although if it had done so, the accident would

probably not have happened. Bivins v. Railway Co. (Ala.) 11 South. 69; Finnell v. Railroad Co., 129 N. Y. 669, 29 N. E. 825; Pennsylvania Co. v. Hankey, 93 Ill. 580; Appel v. Railway Co., 111 N. Y. 550, 19 N. E. 93; Ray, Neg. 187, 138.

4. It is common knowledge, that brakemen and other employes on railroads, assume, of their own accord, many and unnecessary risks in the performance of their duties. Cautious at first, when unskilled and under instructions and warnings, they gradually become less timid and careful; and as their experience and skill increase, they become expert and seemingly reckless, undertaking feats of skill self-imposed and unnecessary, which are fraught with very great peril to life and limb. But, on what just principle is it, that the consequences of such risks can be visited upon an employer, when accident and personal injury befall the employee? If no rule of the company and no emergency made it necessary for the plaintiff to undertake to board the train as it passed him at this switch, how can he hold the company responsible for so hazardous an undertaking as to attempt it, especially when he was well acquainted with the switch and how it was constructed, and knew the peril he was encountering in such a reckless attempt as he made?

5. There were two comparatively safe ways for him to have taken, and another absolutely so, besides the one he chose. The engineer, for the time, was under his control. The engine moved at his beck. He might have set his switch for the train to back, and have stepped a few feet to the eastward, where he would have been on level ground, or, he might have gone just across the track from him, where there was a smooth, firm place between the main and switch tracks, from either of which places, he would have been free from any possible entanglement with the switch. Or, to have avoided any danger whatever, he might not have boarded the train at all, until it had backed down onto the main track and returned thereon, to where he was standing, at which point, with the loss of only a moment or two, he might have brought it to a standstill, to enable him to board it. As has been stated, plaintiff knew it was a hazardous undertaking to attempt to mount the steps of this train, as it passed him. He establishes this by his own evidence and that of his expert witness. He makes out a case where an effort to do so was accompanied with such danger that no prudent man ought to undertake it. It is a familiar principle, which common sense, as well as the rules of law, ought to teach any one, that where one in the employ of a railroad, knowingly selects a dangerous way, when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence. Railroad Co. v. Orr, 9 Ala. 548, 8 South. 360; Railway Co. v. Holborn, 84 Ala. 187, 4 South. 146.

6. There is no pretense that the engineer was at all in fault, and the court so charged the jury. It was attempted to be shown, that plaintiff was ordered by the conductor to board the train. The precise order by him to plaintiff as shown was,—"Set up your switch; catch your caboose; hold the cars; cut them loose; run them on the side track, and get away quick." What is meant by this order, we are not given exactly to understand. But, certainly, it does not mean, that the plaintiff was to do an unsafe thing in complying with it. If the conductor meant, by catching the caboose and holding the cars, that the plaintiff was to get on the caboose and hold the cars after getting on, the order surely did not mean that he should get on at the switch, or at any other particular place, and unless the order implied to the contrary by its terms, we are to presume it was intended he should comply in a manner safe to himself. *Pennsylvania Co. v. Hankey*, 93 Ill. 583.

7. There is more or less danger and liability to personal injury connected with the service of operating a railroad train at any time. All employees contract with the company with that understanding, and assume the risks incident to the service. If the company is without fault, or even if guilty of mere negligence, and one who is injured, contributed proximately by his negligence to bring about his injury, the company is not responsible. From any standpoint, at which we have been enabled to view this case, the accident which befell the plaintiff, so calamitous to himself, was one of those unfortunate occurrences which the railroad company cannot be held to have reasonably anticipated, and which plaintiff, by his own imprudence and want of care, contributed proximately to bring upon himself. The general charge should have been given for the defendant. Reversed and remanded.

(103 Ala. 122)

PARKER et al. v. McFERRIN.

(Supreme Court of Alabama. May 3, 1894.)

SALE—PLEA OF WARRANTY—SUFFICIENCY.

A plea of warranty in the sale of a chattel need not allege that the warranty was in writing.

Appeal from circuit court, Butler county; John R. Tyson, Judge.

Action by James McFerrin against Samuel Parker and another on a promissory note. From an order sustaining a demurrer to certain of defendants' pleas they appeal. Reversed.

J. M. Whitehead, for appellant.

MCLELLAN, J. This action is prosecuted by McFerrin against Parker and another on an instrument under seal executed by the defendants, wherein they promised to pay the amount sued for to the plaintiff. The

pleas were: (1) Nonassumpsit. (2) Failure of consideration in this: "That the note sued on was given for a horse, which said horse was at the time of said sale unsound and worthless, which was not known to the defendants at the time of said purchase and the giving of said note." (3) Failure of consideration in this: that the note sued on was given for a horse which was warranted by the plaintiff to be sound, but which was in fact, at the time of the purchase, unsound and worthless, which was not known to the defendants at the time of the giving of said note." Plaintiff interposed a demurrer, which is as follows: "Comes the plaintiff by attorney, and demurs to defendants' pleas of warranty, and assigns for demurrer the following ground: that defendants in said plea fail to allege that said warranty was in writing." The court sustained this demurrer to the second and third pleas. That is the only action of the court now presented for review. Counsel says that the second plea is one of implied warranty. This cannot be. The law raises no implication of a warranty of soundness on the facts averred in it. This plea was clearly insufficient as a defense to the action, but neither that nor the third plea was open to the one objection taken by the demurrer to both of them. It is not essential to a warranty of soundness of chattels that it be in writing. See *Thompson v. Harvey*, 86 Ala. 519, 5 South. 825. The demurrer should have been overruled. A judgment to that effect will be here entered, and the cause will be remanded. Reversed, rendered in part, and remanded.

(103 Ala. 140)

EUREKA LUMBER CO. v. BROWN et al.
(Supreme Court of Alabama. May 3, 1894.)

DEEDS—EXECUTION.

Code, § 1789, requires deeds to be attested by two witnesses unless acknowledged, section 1790 dispensing with witnesses in that case. *Held*, that a sheriff's deed, subscribed, but neither witnessed nor acknowledged, is merely an agreement to convey.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Ejectment by the Eureka Lumber Company against J. H. and B. F. Brown. There was judgment for defendants, and plaintiff appeals. Affirmed.

This was a statutory action of ejectment, brought by the Eureka Lumber Company against J. H. Brown, seeking to recover a certain specifically described lot in the city of Birmingham, and the house situated thereon, and was commenced on December 15, 1892. By motion of Benjamin F. Brown, reciting that J. H. Brown, the defendant in said cause, was the tenant of said Benjamin F. Brown of the property sued for, the said B. F. Brown was made a party defendant. To this ruling the plaintiff duly excepted. The plaintiff based its title to the property,

and its right to recover in the present action, upon a deed from the sheriff of Jefferson county to it. This deed was executed under the following circumstances: The Eureka Lumber Company brought an action against J. H. Brown and O. M. Stansell to enforce a material man's lien on the house and lot in controversy, for material which was furnished to the contractor, O. M. Stansell, who was building the house, under contract with J. H. Brown, and for which material the Eureka Lumber Company was never paid. Judgment was recovered in this suit by the Eureka Lumber Company, and the lien declared in its favor, and the property was ordered to be sold for the satisfaction of said lien. Execution was accordingly issued, and the house and lot in controversy were sold as the property of J. H. Brown, and bought at said sale by the Eureka Lumber Company. In obedience to this sale and purchase, the sheriff of Jefferson county executed the deed referred to, conveying to the Eureka Lumber Company "all the legal right, title, interest, and claim which the said J. H. Brown had and held in and to" the property bought at said sale, and now sued for in this action. This deed by the sheriff was never attested or acknowledged. The record of the proceedings in the suit to enforce the material man's lien and the deed of the sheriff were introduced in evidence. The testimony for the defendants was to the effect that B. F. Brown was the owner of the property in controversy, and J. H. Brown had no interest, claim, or title to said property, and that B. F. Brown had never parted with the title to said property. The cause was tried without the intervention of a jury, and, upon the introduction of all the evidence, the court rendered judgment for the defendants. The plaintiff now appeals, and assigns as error, among other rulings, the rendition of the judgment for the defendants.

Wm. M. Bethae, for appellant. Wade & Vaughan, for appellees.

HEAD, J. Statutory real action by the appellant. It claims title only by virtue of a sheriff's deed purporting to convey to it all the right, title, and interest in the premises of the defendant J. H. Brown. The judicial proceedings leading up to this deed all appear to have been regularly and properly introduced; but, fatal to any recovery by the plaintiff in this action, the execution of the deed was neither attested nor acknowledged. It was merely subscribed by the sheriff, and was therefore not a legal conveyance. Code, §§ 1789, 1790, and authorities there cited. It was nothing more than an agreement to convey. Authorities *supra*. We have, however, looked into the whole case, and find, without stating the particulars, that if J. H. Brown had any interest in the premises which was condemned by the judgment in the proceeding to enforce a material man's lien, and sold

under the execution, it was, under the undisputed evidence, an equitable interest only, not recoverable in an action of ejectment. Affirmed.

(103 Ala. 241)

WOLF et al. v. SHEPHERD, Sheriff.

(Supreme Court of Alabama. May 4, 1894.)

TROVER—LIABILITY OF SHERIFF—ILLEGAL SEIZURE.

A vendor who has shipped goods to another on credit, and who notifies the railroad company not to deliver them, may maintain trover against a sheriff who takes them from the railroad company on attachment against the vendee.

Appeal from circuit court, Walker county; James J. Banks, Judge.

Action by Henry H. Wolf & Co. against James W. Shepherd, sheriff of Walker county, for conversion. Judgment for defendant, and plaintiffs appeal. Reversed.

This was an action of trover to recover damages for the wrongful conversion of certain goods. The defendant pleaded the general issue, and, by special plea, that he took possession of the goods under a levy of an attachment, which was sued out against the firm of Enls, Morton, Roby & Son at the instance of some of their creditors, and which was put in his hands for levy. Issue was joined upon these pleas. On the trial, as is shown by the bill of exceptions, the evidence tended to show that the plaintiffs, who were wholesale merchants, doing business in the city of Louisville, in response to an order previously sent them, shipped by rail, on September 12, 1891, to Enls, Morton, Roby & Son the goods alleged to have been converted. That, at the time of said shipment, the consignees were wholly insolvent. Their place of business was closed, but the fact of their insolvency was not known to the plaintiffs until September 21, 1891. That, upon the receipt of information as to their insolvency, the plaintiffs telegraphed one Cary, who was the railroad agent at Carbon Hill, Ala. (the railroad depot for the consignees), instructing him to hold said goods for plaintiffs, and not to deliver them to said Enls, Morton, Roby & Son. That said Cary received this telegram about 8 p. m., September 21, 1891, and immediately took possession of and held said goods for plaintiffs. That about 10 o'clock on the morning of September 22, 1891, the defendant, as sheriff, came to the railroad station for the purpose of levying upon said goods in obedience to the writ of attachment, but the said Cary informed him he had taken possession of and was holding said goods for the plaintiffs and under their instruction, and showed the sheriff the said telegram, which authorized him to do so. That the defendant went away, and returned about 12 o'clock of that day, and took possession of said goods, carried them away, and afterwards sold them. That, soon after the defendant

had so taken possession of said goods, the plaintiffs demanded possession of them, but the defendant refused to give them up. It was also shown in evidence that the firm of Enis, Morton, Roby & Son had never paid for said goods, or any part of them. The defendant's testimony tended to show that he, as sheriff of Walker county, Ala., took possession of and sold said goods by virtue of the attachment against the said firm of Enis, Morton, Roby & Son, and that he took possession of said goods as the property of the defendant firm in attachment. At the request of the defendant, the court gave to the jury the following written charge: "If the jury believe the evidence, they must find for the defendant." To the giving of this charge the plaintiffs duly excepted. There was judgment for the defendant, and the plaintiffs now appeal, and assign as error the giving of the general affirmative charge for the defendant.

Appling & Lamar, for appellants. Coleman & Sowell, for appellee.

HEAD, J. When the seller of goods lawfully exercises the right of stoppage in transitu, the possession is thereby restored to him, with the right to detain the goods until the price is paid. Upon the exercise of the right, the possession of the carrier becomes the possession of the seller, and the latter may maintain trover against the sheriff who, with notice of his rights, takes the goods from the custody of the carrier, and converts them, under attachment against the purchaser. Hutch. Carr. § 420, and cases cited. Reversed and remanded.

(103 Ala. 130)

WADSWORTH v. MILLER.

(Supreme Court of Alabama. May 2, 1894.)

RIGHT TO DOWER—SEPARATE ESTATE.

Under Code 1876, § 2715, barring dower where a wife's separate estate exceeds her dower interest, a wife will be barred of dower where she receives from an insurance policy taken out in her name by her husband an amount in excess of her dower interest. Williams v. Williams, 68 Ala. 405, followed.

Appeal from probate court, Jefferson county; M. T. Porter, Judge.

Appeal by Bessie J. Wadsworth from a decree of the probate court against her in the settlement of her husband's estate. Affirmed.

Upon the hearing of the settlement, Bessie J. Wadsworth, the widow of F. L. Wadsworth, deceased, introduced evidence showing that he was seised of certain real estate during his coverture with her, and, at the time of his death, the annual rental value of which was \$840; that the personal property of said decedent, after paying all his debts and the costs and expenses of the administration, amounted to the sum of \$28,-

771.92, all of which was in money; that, besides the said widow, the decedent left, surviving him, four children, all of whom were minors; that, at the time of her husband's death, the said Bessie J. Wadsworth had a statutory separate estate, amounting to \$1,000; that, during the lifetime of said F. L. Wadsworth, he took out a policy of insurance upon his life, which was made payable at his death to the said Bessie J. Wadsworth; that said policy was for \$10,000; and that, after the death of said F. L. Wadsworth, this amount of money was collected by the said Bessie J. Wadsworth. Upon this evidence, the said Bessie J. Wadsworth moved the court to allow her out of the decedent's estate an amount which, together with the said sum of \$1,000 (which was the amount of her statutory separate estate), would equal her distributive share in her husband's estate and her dower interest in his lands, estimating the said dower interest at seven years' rent of such dower interest. This motion was overruled and refused by the court, and to this ruling the said Bessie J. Wadsworth duly excepted. The court rendered a decree that, as the said \$1,000 and the amount collected by the said Bessie J. Wadsworth on the policy of insurance were in excess of her distributive share and of her dower interest in her husband's estate, she was not entitled to receive anything in the settlement of said estate.

Code 1876, § 2715, is as follows: "If any woman having a separate estate survive her husband, and such separate estate, exclusive of the rents, income, and profits, is equal to or greater in value than her dower interest, and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in, or distribution of her husband's estate."

Tompkins & Gray, for appellant. T. L. Kennedy, for appellee.

BRICKELL, C. J. The single question the case presents, it is conceded, was decided adversely to the appellant in Williams v. Williams, 68 Ala. 405. We have carefully considered the able and elaborate argument submitted by the counsel for the appellant in opposition to the correctness of that decision, but we are not convinced there ought to be a departure from it. The statutes then of force, and which were of force at the death of the husband of the appellant, defining the separate estates of married women, have been superseded by a new system, essentially different; and, if that decision is erroneous, whatever of injury or inconvenience could result from it is past rather than prospective. While the former statutes were of force, the decision was a rule of property, entering into and controlling the settlement, descent, and distribution of the estate of deceased husbands, and defined statutory

separate estate, as distinguished from the equitable separate estate, of married women. In no event and at no time could the decision be disturbed, except upon very clear manifestation of error and injustice. *Bennett v. Bennett*, 34 Ala. 53. Upon its authority, the decree of the court of probate is free from error, and must be affirmed. Affirmed.

(103 Ala. 223)

SMITH v. HUDDLESTON.

(Supreme Court of Alabama. May 2, 1894.)

SHERIFFS — RIGHTS AND DUTIES — PAYMENT OF RENT—PROTECTION OF PROPERTY LEVIED ON.

1. Under Code, § 3069 et seq., giving a landlord a lien for his rent on the goods of the tenant, superior to all liens, other than those for taxes, and entitling the landlord to an attachment, it is the duty of the sheriff levying an attachment on goods found on leased premises, after notice of the landlord's lien, to pay the rent from the sale of the goods, if he proceeds to a sale under the levy.

2. A sheriff levying an attachment on a stock of goods is entitled to a reasonable allowance from the proceeds of the sale for a guard of the merchandise in the nighttime.

3. The sheriff cannot take insurance on the goods levied on, and deduct the cost from the proceeds of their sale.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by George Huddleston against Joseph S. Smith for money had and received. There was judgment for plaintiff, and defendant appeals. Reversed.

Hewitt, Walker & Porter, for appellant. Cabaniss & Weakley, for appellee.

BRICKELL, C. J. The appellee was plaintiff in the court below, suing the defendant for money had and received. The facts, as shown in the bill of exceptions, are that the appellee is the assignee in an assignment made by a mercantile firm for the benefit of their creditors, which, on its face, was made subject to the liens of three attachments. The appellant, as sheriff, had levied on a stock of merchandise which was in a storehouse rented by the assignee for the year 1891; and, of the rent, there was accruing, at the time of the levy of the attachments, three monthly installments, of \$40 each. The landlord being about to sue out, and cause to be levied on the merchandise, an attachment to enforce the statutory lien for the payment of the accruing rent, the defendant promised, if he would forbear, to pay him the rent from the proceeds of the sale of the merchandise. Under the attachments, the defendant made sale of the merchandise, and after satisfying the debts on which the attachments were founded, the costs of each suit, and the commissions allowed him by law, there remained in his hands \$308.35, which is the money appellee sues to recover. The appellant claimed to deduct from the sum remaining in his hands \$120, the rent paid the landlord; \$96, paid guards for watch-

ing the merchandise from the levy of the attachments to the day of sale; \$17, paid for insurance he had taken on the goods; and \$27, paid for assistance in invoicing them. The cause was tried by the court without the intervention of a jury, and a judgment rendered against the appellant for \$211, from which this appeal is taken.

1. The statute (Code, §§ 3069-3074) confers on the landlord renting any storehouse, dwelling, or other building, a lien, for the payment of the rent for the term, on the goods, furniture, and effects of the tenant, found on the premises, which is declared superior to all other liens than liens for the payment of taxes; and in certain events, of which one is the making an assignment by the tenant for the benefit of his creditors, the landlord is entitled to an attachment for the enforcement of the lien, whether the rent, or any installment thereof, be due or not. The lien enters into, and forms part of, every lease or contract of renting, as if it was in express terms incorporated therein, and does not depend for its existence upon the suing out, or a cause for the suing out, of an attachment to enforce it. *Ex parte Barnes*, 84 Ala. 540, 4 South. 769; *McKleroy v. Cantey*, 95 Ala. 295, 11 South. 258. As assignee of the tenant, the appellee cannot be deemed a bona fide purchaser. He is not, in any sense, a purchaser. His relation is that of an assignee, succeeding only to the rights of the tenant; taking the goods subject to all liens binding them in the hands of the tenant at the time of the assignment. *Burrill, Assignm.* (6th Ed.) p. 478, § 349; *Walker v. Miller*, 11 Ala. 1087; *Insurance Co. v. Kampfer*, 73 Ala. 325. Succeeding only to the rights of the tenant; taking the goods as the tenant held them, subject to the lien for the rent,—it is not readily conceivable of what injury it was to him that the appellant paid the rent, rather than suffer the goods to be burdened with the cost of an attachment to enforce the lien. But we regard it as the duty of the sheriff levying an attachment or other legal process upon goods found on leased or rented premises, after notice of the lien of the landlord for rent, to pay the rent from the sale of the goods, if he proceeds to a sale under the process he has levied. In *Thompson v. Merriman*, 15 Ala. 166, it was held that a sheriff having notice of the lien of a landlord for rent, who levied and made sale of goods subject to the lien, converting them into money, was liable for the rent to the landlord, in an action for money had and received. In *Denham v. Harris*, 13 Ala. 465, it was held that the landlord could apply by petition to the court from which the process issued, under which the levy and sale were made, for an order compelling the sheriff to pay the rent from the proceeds of sale. These decisions were made under a statute (Clay's Dig. p. 210, § 45) which did not, in express terms, confer upon the landlord a lien for rent. The lien was deduced from the

prohibition of the removal of goods seized under legal process, from rented premises, without payment to the landlord of the rent due at the time of the seizure or levy. The principle underlying the decisions is that a removal and sale of the goods, with notice that the rent was unpaid, was tortious. The principle may now be applied when the landlord has an express lien for the payment of rent due or accruing, having priority over any lien which can be acquired by the issue and levy of any legal process. Having notice of the lien, if the sheriff proceeded to a sale, converting the goods into money, he would commit a tort, for which he would be liable to the landlord, in an action on the case, for whatever injury resulted to him. *Hussey v. Peebles*, 53 Ala. 432. The payment of the rent to the landlord was properly made, and must be deducted from the money remaining in the hands of the appellant.

2. In *Kahn v. Locke*, 75 Ala. 332, it was said that it is the duty of the sheriff "to safely keep goods levied on, and a strict measure of accountability rests on him if he fails therein. He must employ such diligence as an ordinarily prudent man employs about his own, taking into the account the nature of the chattel to be preserved. A stock of merchandise requires more labor and care in its levy, preservation, and sale than ordinary chattels. * * * We think, too, that so movable and tempting a commodity as ordinary merchandise will frequently, if not generally, justify the presence of a guard or watchman at night, to guard it against theft and incendiarism." And the sheriff levying an attachment on a stock of merchandise was held to be entitled to a reasonable allowance—to be charged on the product of the sale—for a guard of the merchandise in the nighttime. The stock of merchandise on which the appellant levied was in a storehouse situated on one of the main streets in the city of Birmingham; and it would have approached negligence, imposing liability on the appellant if, for the want of a guard or watchman during the nighttime, the goods had been lost by theft or incendiarism. The rule is, as insisted by the counsel for the appellee, that whatever care, labor, or expense the condition of personal property on which a levy is made may require, the sheriff is bound to provide, and the fees expressly allowed him by law are the measure and extent of his compensation. The nature of the property is to be considered, and its situation; and, when these require extraordinary labor and care for its preservation, we are not willing to say that the sheriff is not entitled to a reasonable allowance for expense incurred in bettering it. Adhering to the rule laid down in *Kahn v. Locke*, supra, the appellant was entitled to a deduction for the expenses of a guard of the goods during the nighttime, while the goods were in his possession. He was not entitled to a deduction for a guard

during the day. The sum claimed by him was \$2 per night, and its reasonableness was not controverted. The aggregate is \$48. The expense of invoicing the merchandise cannot be charged on the proceeds of the sale. Without an invoice or inventory, the levy could not have been made the subject of a proper return of the attachments, and in no sense was the invoice an extraordinary service. *Kahn v. Locke*, supra.

3. A sheriff, having levied on, and having the custody of, goods, may have therein an insurable interest. *White v. Madison*, 26 N. Y. 126. If he takes insurance, it is only for his benefit and indemnity; and he must bear its expense, without charge on the property or the proceeds of its sales. The measure of his duty, as is said in *Kahn v. Locke*, supra, is the exercise of the care and diligence, in the preservation of the property, a man of ordinary prudence exercises in the care and preservation of his own property of like kind. Losses occurring without his fault, by fire or other accidents, the subject of insurance, do not involve him in liability. It is not material that one or more of the attaching creditors requested that the insurance be taken. If this be the fact, the appellant could have retained the expense of the insurance from the moneys to which they were entitled, but it cannot entitle him to charge the property, or the proceeds of the sale, with the expenses. *Croft v. Brandt*, 58 N. Y. 111.

4. Making the deduction of the rent paid the landlord, and of the expense of the guard or watchman, from the money remaining in the hands of the appellant, there was a balance due from him of \$140.35. The judgment of the circuit court must be reversed, and a judgment here rendered, as of the day of the judgment of the circuit court, in favor of the appellee, for the sum of \$140.35, and for the costs of suit in that court. The appellee must pay the costs of the appeal in this court, and in the court below. Reversed and rendered.

(102 Ala. 173)

Ex parte SIKES.

(Supreme Court of Alabama. May 3, 1894.)

INTOXICATING LIQUORS—EXCESSIVE LICENSE.

An ordinance imposing a \$2,000 yearly license was within a charter power "to license and regulate," and was not prohibitory, where it did not appear that the business was unprofitable to those engaged in it.

Application by J. D. Sikes for a writ of habeas corpus. Denied.

Hubbard, Wilkerson & Hubbard and Worthy & Foster, for petitioner. Wm. L. Parks, for respondent.

COLEMAN, J. By an ordinance of the city of Troy, dealers in spirituous liquors were required to pay \$2,000 for a license. For a violation of this ordinance, the defendant was arrested and fined, and, refus-

ing to pay the fine, imprisoned. He sued out a writ of habeas corpus before the probate judge, who, upon the hearing of the case, refused to discharge the petitioner, and remanded him to the custody of the marshal. From this judgment the petitioner prosecutes his application to this court. All the facts are agreed upon, and the only question is as to the legality of the ordinance. The prisoner contends that it is prohibitory in its character and effect, and that such an ordinance is not authorized by the municipal charter of the city of Troy. The act of the legislature of 1890-91 (page 724) declares that "the mayor and councilmen shall have power and authority * * * to license and regulate the retailing and the wholesale of liquors within the corporate limits, and to provide for the annulling and revoking such license for good cause being shown; * * * to license and regulate commission merchants, dry goods and grocery merchants, keepers of hotels and eating houses; * * * to prohibit the sale of liquors on any election day; * * * to restrain and prohibit gambling; to prohibit all unlawful assemblies; to prohibit violations of the Sabbath; to prevent stock from running at large; * * * to prohibit all breaches of the peace; * * * and to fix the price or tax on all licenses." We think it very clear that the authority "to license and regulate" a business does not include the authority to prohibit it absolutely. We have so held many times, *Ex parte Burnett*, 30 Ala. 461; *Miller v. Jones*, 80 Ala. 89; *Ex parte Cowert*, 92 Ala. 94, 9 South. 225; *Ex parte Mayor of Anniston*, 90 Ala. 516, 7 South. 779. Independent of the judicial construction given to a statute which merely confers the power to license and regulate a business, a reading of the act in question clearly demonstrates that the intention of the legislature was to authorize the mayor and councilmen to "license and regulate," and not to "restrain and prohibit," the sale of spirituous liquors. Whenever it was intended to confer such power, the words used are "restrain," "prohibit;" but these and similar words are not used when the power in regard to the sale of liquors was conferred. We are of opinion the legislature has the constitutional right to prohibit or to authorize any community or municipality absolutely to prohibit the sale of spirituous liquors. *Intendant of Marion v. Chandler*, 6 Ala. 899; *Ex parte Burnett*, supra; *Ex parte Cowert*, supra; *Harris v. Intendant of Livingston*, 28 Ala. 579. Having the power to prohibit, the legislature undoubtedly could fix the price of a license to sell liquor at any sum, and, had it seen proper to exercise the right, could have conferred on the mayor and councilmen of Troy, by express provision, the power either to prohibit entirely, or fix the price of the license at \$2,000. It has, however, declared that the "mayor and councilmen shall

have the power to license and regulate the retailing and the wholesale of liquors within the corporate limits," and "to fix the price or tax on all licenses." The only limitation on the power and discretion of the mayor and councilmen in fixing the "price of the license" is contained in the words "license and regulate the sale," and this limitation is that the price fixed shall not be prohibitory. What is the test by which it shall be determined whether a "price for a license" is or is not prohibitory? Upon what principle is it to be held that a price of \$200 is not prohibitory, and \$2,000 is prohibitory? What rules and facts must guide the mayor and councilmen in fixing the price of a license, so that the ordinance will be an exercise of power within their granted authority "to fix the price," and not transgress the boundary fixed by the term "to license and regulate," so that it shall not be prohibitory? No one unvarying price will suit for all places and all circumstances. It seems to us the populousness of the municipality, the profitableness of the business, the character of the business proposed to be licensed, and its effects upon the community, the additional expense necessarily entailed by a police supervision of the business, and perhaps other matters might be mentioned, are all proper subjects of inquiry in arriving at a legal and just conclusion in fixing a price which will not be prohibitory. In the case of *Ex parte Burnett* the town council of Cahaba required, by ordinance, a license of \$1,000, and it was pronounced prohibitory in its character. There were no facts in evidence in the case except the ordinance, and the act of the legislature granting charter rights, and the conviction of the petitioner for a violation of the ordinance; and in that case it was said: "Neither is it our purpose to limit the price of a corporation license to the sum fixed by the general law on a license to retail. As one of the incidental powers of a corporation, the council may *certainly transcend that limit, provided their ordinance is not in its nature prohibitory.*" (We italicize.) The authority granted to the mayor and councilmen of Troy is more specific and enlarged than that under which the town council of Cahaba acted. In the case of *Ex parte Marshall*, 64 Ala. 266, the rule was recognized that the "license may be graduated by the populousness of the community in which the privilege was to be exercised, and the profitableness of the employment;" and in *Van Hook's Case*, 70 Ala. 361, the additional expense for a faithful enforcement of police superintendence should be considered.

Under these rules and principles of law, we cannot say the ordinance is void upon its face. What are the agreed facts? The city of Troy has a population of about 4,000 inhabitants. That in the years 1890, 1891, 1892, and 1893, there were three separate retail liquor dealers in Troy, who paid a license of \$2,000; and each did a business of about

\$38,000 in the year 1890, and the business of each in 1891 amounted to \$35,000, and in the year 1892 to about \$24,000, and in the year 1893 each did a business of \$20,000,—an aggregate for the four years of \$351,000. The capital invested upon which this business was transacted is not stated, but it is stated "that the profits on the amount of business were about one-fourth of these amounts, out of which were paid all licenses, besides house rent, clerk hire, and other current expenses." It is also stated that the expenses of petitioner Sikes for the year 1893 approximated \$6,000. What these expenses were for, whether confined solely to the business of selling liquor, or whether family expenses were included, is not stated, and the expenses of the two other dealers are not given. It is also stated that "the other dealers, for the year 1893, did an unprofitable business after paying their licenses and other expenses." It also appears that the other two dealers have paid the license for the year 1894, and are continuing in the business. The profits at 25 per cent. on total sales of spirituous liquors in Troy for four years, not exclusive of current expenses, were about \$88,000. We do not think there is anything in this showing which reasonably satisfies the mind that the license required is prohibitory in a business view. Again, it is agreed in the statement of facts that there is an average of "seven hundred and fifty violations of the city ordinances during each year, and that two-thirds of them are the results of whisky sold in Troy." It is further agreed that the present necessary expenses of the city for a marshal and police force exceed \$3,100, "and, if there were no saloons and no sale of whisky in Troy, this expense could be reduced to \$1,000." Confessedly, then, two-thirds of all the violations of the ordinances of the city, and two-thirds of the entire expense required to police the city, are traceable solely to the sale of liquor within its corporate limits. Certainly, municipal officers charged with the "protection of the lives, health, and property of the citizens, the maintenance of good order and quiet of the community, and the preservation of the public morals," and to this end intrusted with the police power, are justified in the exercise of all the authority granted when they undertake to regulate business productive of such results. It is contended that, as the sale of liquor increases the violation of the city ordinances, the revenues of the city are proportionately increased; and this, it is said, must be considered in estimating the evil results of the traffic, and the extra expenses of policing the city. The peace of a community, the quiet and happiness of the family, the influence of example upon the young and old, the public morals, have no money value. The argument leads to the conclusion that, however much a business may increase violations of the law, if the revenue therefrom is proportionately increased, the less it is to be con-

demned as an evil. We need say no more on this point.

It is further argued that the amount required for a license shows that the purpose was to raise a revenue for the city, and not for police purposes. It is manifest that, if the purpose of the ordinance was to raise revenue, then it was not intended to be prohibitory. A business which is prohibited cannot yield a revenue from licenses. We do not think there is any foundation for the argument, and the facts of the case, without repeating them, justify this conclusion. Doubtless, in providing for the necessary expenses of the city, and in fixing the assessments of taxes upon the property, the income anticipated from licenses, as well as fines, entered into the computations; but this alone would not determine that the licenses were for revenue, as distinguished from a license tax for police purposes. There are some dicta in our own court, and declarations of principle by high authority, not altogether in harmony with all that we may have said; but our construction of the act of the legislature conferring municipal power upon the mayor and councilmen of the city of Troy is that there is a full grant of power "to fix the price of licenses," limited only by the grant to "license and regulate the sale of liquor;" and the only qualification of power contained in this grant, construed in connection with the unqualified power "to fix the price of licenses," is that it shall not be prohibitory. In our opinion, the facts of the case show that the ordinance is within the power granted. This was the conclusion reached by the trial judge, and, in our opinion, it was correct. Petition denied. Affirmed.

(103 Ala. 183)

Ex parte KING.

(Supreme Court of Alabama. May 8, 1894.)

HABEAS CORPUS—DISCHARGE OF PETITIONER—SUFFICIENCY OF EVIDENCE—CONSTITUTIONAL LAW—ACT FOR PROTECTION OF LANDLORDS—VALIDITY.

1. In habeas corpus proceedings instituted February 1, by a person committed January 8, 1894, for violation of Act Feb. 21, 1893, "for the protection of landlords, proprietors or keepers of hotels and boarding houses," it appeared that petitioner, having no baggage, put up at a certain hotel, and told the proprietor that he was a member of a certain detective agency, and the proprietor testified that such statement was the cause of his letting him have board and lodging, for which he never paid. Two witnesses testified that petitioner told them he was not a member of a detective agency, was "broke," and was trying to "beat his way." Petitioner denied making such statements, and testified that he was a member of such agency. *Held*, that petitioner was properly remanded.

2. Such Act Feb. 21, 1893, does not violate Const. art. 1, §§ 21, 23, which forbid imprisonment for debt, and the making of laws giving special privileges or immunities.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Petition by M. B. King for a writ of habeas corpus for the purpose of obtaining his dis-

charge from the custody of the sheriff, to which he had been committed for a violation of the act for the protection of landlords, etc. From a judgment refusing to discharge petitioner, and remanding him to the custody of the sheriff, the petitioner appeals. Affirmed.

W. S. Reese, for petitioner. Wm. L. Martin, Atty. Gen., for respondent.

HARALSON, J. The petitioner put up at an hotel in Montgomery, and having no baggage, and being interrogated by the proprietor before going to his room, stated that he was a member of the Wells-Fargo Detective Agency, and thereupon the proprietor allowed him to board and lodge in the hotel. The defendant asked the proprietor, being examined as a witness for the state, if the fact of defendant saying he belonged to said detective agency was the cause of his letting the defendant have board and lodging, and the witness stated it was. He also testified that defendant owed three dollars for board and lodging, which he has never paid, and was arrested about 10 days after making said misrepresentations. Two other witnesses for the state testified that they knew the defendant, and he told them he was not a member of a detective agency, was "broke," and was trying to "beat" his way on the railroads. The defendant testified that he was a member of the Wells-Fargo Detective Agency, had received his commission while in Mexico, in January, 1894, and had never told Murphy and Jordan, the two state witnesses, that he was not a detective. He gave the same account as that deposed to by the proprietor of the hotel as to what passed between them at the time he came to the hotel and registered. In answer to the solicitor, he stated that he was in Florida on the 1st of January, 1894, and remained there four weeks. The mittimus of the justice of the peace committing defendant to jail bears date the 13th January, 1894, and the writ of habeas corpus the 1st of February, 1894. On this evidence the judge of the city court refused to discharge the petitioner. In this there was no error. On the evidence, there was probable cause to believe him to be guilty, and, a jury so finding, a court would not disturb their verdict.

There is nothing in the point raised in the application that the act "for the protection of landlords, proprietors or keepers of hotels and boarding houses," approved February 21, 1893 (acts 1892-93, p. 1089), is violative of sections 21 and 23 of article 1 of the constitution, which forbid imprisonment for debt, or the making of laws giving any special privileges or immunities. The act is in line with our other statutes against false pretenses, frauds, cheats, acts to injure, and the like. One who violates the act is imprisoned, not for the debt he owes the proprietor, and not to make him pay it, but to punish him for a wrong he has perpetrated,

which is made a crime. And this is no more of a special privilege to the hotel-keeper than the statute against burglary from a store or a dwelling is to the merchant who owns the store, or to the owner of the dwelling. Habeas corpus denied.

(103 Ala. 285)

SMITH v. HALL et al.

(Supreme Court of Alabama. May 4, 1894.)

CREDITORS' BILL—PLEADING.

A bill to subject to a judgment land belonging to defendant, the legal title to which is held by another, that alleges that in 1867 and 1874 defendant, being indebted, conveyed, without consideration, the land to T., with intent to defraud such creditors and future creditors, and that T. should hold the legal title for the sole benefit of defendant, and subject to his directions; that in 1889 plaintiff obtained judgment against defendant; and that in 1891, T., at defendant's request, and without consideration, conveyed said land to another, who holds it as the property of defendant and for his benefit,—is not demurrable.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

Bill by Mariah L. Smith against Fred Hall and Louisa Hall to subject land, the legal title to which is held by Louisa Hall, to the satisfaction of a judgment held by plaintiff against Fred Hall. From a decree sustaining a demurrer to the bill, plaintiff appeals. Reversed.

The bill in this case was filed by the appellant, Mariah L. Smith, against the appellees, on March 24, 1893, and prayed to have certain real estate subjected to the payment of a judgment which was held by the complainant against Fred Hall. The facts of the case, as averred in the bill, are sufficiently stated in the opinion. The respondents demurred to the bill on the grounds: (1) That the debt sought to be collected by the complainant was barred by the statute of limitations of six years; (2) that the complainant's right to set aside the conveyance to Amanda Taylor was barred by the statute of limitations of ten years; (3) that the bill does not sufficiently allege that Fred Hall had, at the time of making the conveyance to Amanda Taylor, any existing indebtedness upon which said conveyance could operate as a fraud; (4) because the bill shows that the indebtedness to complainant was not contracted upon complainant's faith in the ownership of the property by Fred Hall; and (5) because the complainant is debarred of her equity by laches in enforcing her rights. This demurrer was sustained, and the complainant brings this appeal, and assigns as error the decree of the chancellor in sustaining said demurrer.

Gregory L. & H. T. Smith, for appellant. L. H. Faith, for appellees.

COLEMAN, J. The appellant, as a judgment creditor of Fred Hall, filed the present

bill to subject certain real estate, the legal title to which is held by Louisa Hall, to the payment and satisfaction of the judgment. The court sustained a demurrer to the bill, and from this decree the appeal is prosecuted. According to the averments of the bill, Fred Hall became indebted to complainant in the year 1881 for borrowed money, for which he executed his obligation, and this claim was reduced to judgment in July, 1889, for \$2,807.11. This judgment is the foundation of the bill of complaint. The following facts, averred in the bill, are relied upon to support the prayer for relief: In October, 1867, Fred Hall purchased and paid for a lot or parcel of land, and had the title conveyed to one Amanda Taylor. In June, 1874, he conveyed to Amanda Taylor, without consideration, another parcel of land. These conveyances are absolute in form, and recite a valuable consideration as paid to the grantor. The bill avers that at the date of these several conveyances there were existing creditors of Fred Hall, and that the conveyances were made to Amanda Taylor to injure, delay, and defraud such existing creditors, and for the purpose and with the intent to defraud such other persons as he might thereafter become indebted to. The bill avers that when these conveyances were made to Amanda Taylor there was a secret agreement between Fred Hall and Amanda Taylor that she was to hold the legal title for the sole use and benefit of Fred Hall, and subject to his direction, "and that said conveyances were received by said Amanda Taylor under an agreement, expressed or implied, that she should hold said property for the benefit, use, and enjoyment of said Hall, and subject to any disposition that he might thereafter request her to make; and she did so hold said property, and said Hall did so use and enjoy said property, and receive the benefit thereof, until the 14th day of August, 1891, when said Amanda Taylor, at the request of said Hall, conveyed said property to one Louisa Hall, as hereinafter stated." The bill then avers the conveyance of said lands on the 14th of August, 1891, by said Amanda Taylor, to Louisa Hall, the widow of an illegitimate son of said Hall and Amanda Taylor, without consideration, and with like agreement and understanding as that averred as existing between Fred Hall and Amanda Taylor; and that the conveyance to Louisa Hall was at the request of Hall, and in accordance with and execution of the secret agreement between Fred Hall and Amanda Taylor; and that both Amanda Taylor and Louisa Hall at all times virtually held the property for Hall as his own. We have, in substance, stated the vital averments of the bill. We are of opinion the bill has equity. Assume, for the argument, Amanda Taylor answers the bill, and admits as true its averments, to wit, that she was the mere depositor of the legal title, that she never paid anything for the

property, and claimed no interest in it under the conveyance, but by agreement held the title solely for the use, benefit, and subject to the control of Fred Hall; was not the property thus held by her liable to the debts of Fred Hall, and that without regard to the time of their contraction? Assume, further, that by her answer she admits that the legal title to the property thus held by her at the request of Fred Hall, and in pursuance of the agreement under which she held it, was conveyed to Louisa Hall, without consideration, in June, 1890, after the rendition of the judgment against Hall, and assume that Louisa Hall admits these facts to be true; would not the conveyance to Louisa Hall be at least constructively fraudulent as against the judgment of complainant? This is complainant's case, made by her bill, when considered upon demurrer. The averments of the bill are even stronger as to Louisa Hall than we have assumed. However fraudulent the purpose of a conveyance, it is binding upon the grantor where its benefits are claimed by the grantee, and upon the same principle a fraudulent grantor cannot enforce a secret trust or agreement, or a resulting trust, for his benefit, as against the grantee. "In pari delicto melior est conditio possidentis." *King v. King*, 61 Ala. 479; *Kelly v. Karsner*, 72 Ala. 106. Section 1845 of the Code declares that "no trust concerning lands, except such as results by implication or construction of law can be created, unless by instrument in writing," etc. These principles apply in favor of a grantee claiming the property in his own right, under the conveyance, and adversely to the grantor. A fraudulent grantee is not compelled to invoke or plead the statute of frauds against the grantor, and he may also, if he sees proper, waive any rights received by a fraudulent conveyance, and hold the property conveyed for the benefit and use of the grantor. When thus held, and no claim of ownership is set up to the property by the grantee under the conveyance adversely to the fraudulent grantor, it is subject to the payment of his debts. If the averments of the bill had shown an adverse holding by Amanda Taylor, we do not say that she or her grantee could not invoke the benefit of the statute of limitations of 10 years by a demurrer to the bill. *Proskauer v. Bank*, 77 Ala. 257; *Snedicor v. Watkins*, 71 Ala. 48; *Lockhard v. Nash*, 64 Ala. 385. Under the averments of the bill as framed, such a defense is not available by demurrer. By answer or plea the respondents may become entitled to the benefits of the principles of law invoked in support of the demurrer.

Complainant avers that the purpose and intention of Fred Hall in making the conveyance was to defraud existing and future creditors, but, as we construe the bill, the relief sought is rested, not alone upon these allegations, but upon those averments which, if true, show that the property in fact be-

longed to Fred Hall, and was so recognized and held for him by Amanda Taylor, notwithstanding the legal title was in her name, and that the conveyance to Louisa Hall was for a voluntary consideration. Reversed and remanded.

(108 Ala. 150)

KYLE v. CARAVELLO.

(Supreme Court of Alabama. May 4, 1894.)

TROVER—PLEADING—DAMAGES—AMENDMENT ON APPEAL.

1. The Code form for complaint in trover sets out that plaintiff claims of defendant \$— damages for the conversion by him, on such a date, of the described chattels, the property of plaintiff. A complaint averred that plaintiff, to secure payment of a loan of \$30, pledged to defendant a gold watch and chain worth \$200; that he tendered repayment, and demanded a return, but defendant refused to accept the tender and return the pledge. *Held*, that the complaint, if it did not "conform substantially" to the form (Code, § 2635), "contained a substantial cause of action;" and the judgment could not be assailed on error "for any matter not previously objected to." Code, § 2835.

2. A judgment, on a complaint for conversion, "that the plaintiff have and recover of the said defendant" the property in question, "or its alternate value of \$200," is amendable by reference to the complaint, there being "sufficient matter apparent on the record to amend by" (Code, § 2836), and may be corrected in the supreme court so as to recover the value only.

3. In trover against a pledgee, the money loaned having been tendered only, its amount should be deducted from the value of the property converted, and judgment rendered for the balance. But a finding for the full value being only ground for motion for new trial, and, if made by the court, being corrigible on appeal (Acts 1888-89, p. 797), the judgment may be reversed and rendered for the right amount as of the date of the judgment below.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by Ralph Caravello against J. C. Kyle for damages for conversion. Judgment for plaintiff. Defendant appeals. Reversed.

This suit was brought by the appellee, Ralph Caravello, against J. C. Kyle, the appellant, and was commenced on October 2, 1891. The complaint contained but one count, and was in the following language: "The plaintiff claims of the defendant two hundred dollars, due, for that heretofore, to wit, 1889, he pledged to defendant one gold watch and chain of the value of two hundred dollars for a loan of thirty (\$30) dollars, and defendant, disregarding his agreement with plaintiff, refuses to deliver said watch and chain to plaintiff, though plaintiff has tendered the amount (\$30), with interest thereon, obtained from defendant, and demanded said watch and chain before bringing this, his suit." The judgment entry was in the following language: "This day came the plaintiff by his attorney, and, the defendant saying nothing in bar or preclusion as to plaintiff's right of recovery, it is therefore

considered by the court that the plaintiff ought to recover; but, not being advised as to the just amount of damages sustained, the court proceeds to hear the evidence without the intervention of a jury, according to law, and, after hearing the same, assesses the plaintiff's damages for the property sued for, viz. one gold watch and chain, alternate value assessed at two hundred dollars. It is therefore considered by the court that the plaintiff have and recover of the said defendant the said property sued for, viz. one gold watch and chain, or its alternate value of two hundred dollars, together with all the costs in this behalf expended, for which execution may issue." Within 30 days after the judgment was rendered, the defendant moved the court to set aside the same, and to grant him a new trial, among others upon the following grounds: "(4) Because the damages awarded on the trial are grossly in excess of damages plaintiff is entitled to recover, should he be successful in establishing his cause of action; and (5) because the judgment of the court is contrary to law." In support of this motion the defendant filed two affidavits. One of these affidavits was made by the defendant himself, and was to the effect that he had a good defense to the action, but that, through a mistake, his attorney was not present, and, further, that the watch and chain sued for were not worth over \$100. The other affidavit was that the watch and chain were not worth over \$100. This motion was overruled, and the defendant duly excepted. The present appeal is prosecuted by the defendant, who assigns as error the judgment rendered in the cause, and the overruling of his motion for a new trial.

Garrett & Underwood, for appellant. Sumter Lea, for appellee.

BRICKELL, C. J. 1. The Code prescribes the form of a complaint in an action for the conversion of chattels, intended to be a substitute for the declaration in the common-law action of trover. When employed, the action in practice is denominated trover, and is governed by the rules applicable at common law to that action. The forms of pleading appended to the Code have the force of law, and it is declared that any pleading conforming to these forms substantially is sufficient. Code, § 2635; *Crimm v. Crawford*, 29 Ala. 623. If it be true that the complaint is not drawn formally, and is subject to demurrer, the defects are not now available. The defendant appeared, and, without demurrer or other objection to the sufficiency of the complaint, pleaded the general issue; thereafter submitting to a judgment *nil dicit*. The judgment cannot on error be assailed because of the defects of the complaint, if it contain a substantial cause of action. Code, § 2835; *Stewart v. Goode*, 29 Ala. 476; *Blount v. McNeill*, *Id.*

473; *Mahoney v. O'Leary*, 34 Ala. 97. It avers that the plaintiff, to secure the payment of a loan of \$30, pledged to the defendant a gold watch and chain of the value of \$200; a tender of repayment of the money loaned, a demand of the return of the watch and chain, and the refusal of the defendant to accept the tender and return the watch and chain. However informally pleaded, these averments show a substantial cause of action. A valid tender to a pledgee extinguishes the lien, and the refusal of the pledgee to return the thing pledged is a conversion, entitling the pledgor to enforce redemption by an action of trover. *Jones, Pledges*, § 561; *Lawrence v. Maxwell*, 53 N. Y. 19; *Bryson v. Rayner*, 25 Md. 424; *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773.

2. The judgment *nisi* dicit is informal. It has the form, in some respects, of a judgment in an action for the recovery of chattels in specie. But it must be referred to the complaint, and, so referring it, the error of form is cured by the statute of amendments. 1 *Brick Dig.* p. 776, § 41. The judgment should have been for the recovery of damages simply, and not for the recovery of the watch, or its alternate value. The informality is capable of correction in this court. Code, § 2836.

3. The judgment rendered by the court below exceeded the sum the plaintiff was entitled to recover. The money loaned, having been tendered only, not paid, and the fact appearing from the face of the complaint, it should have been deducted from the value of the watch and chain, and judgment rendered for the remainder only. The error could be corrected only by a motion for a new trial. *Railroad Co. v. Hanlon*, 53 Ala. 70. Prior to the statute of February 16, 1891, the grant or refusal of a new trial rested in the sound discretion of the primary court, and was not revisable on error. The statute authorizes an appeal from the grant or refusal of a new trial, and declares that "the supreme court shall have power to grant new trials or to correct any errors of the circuit or city court in granting the same." Acts 1890-91, p. 779. This cause was tried in the court below without the intervention of a jury, pursuant to the act of February 28, 1889 (Acts, 1888-89, p. 797), regulating the practice and proceedings in the circuit court of Jefferson county, which declares that in such cases, on appeal, this court may render such judgment as the court below should have rendered, or may reverse and remand the same, as may seem right. Pursuing the spirit and policy of these statutes, the judgment of the circuit court will be here reversed, and rendered for \$170 damages, as of the day of the judgment in the circuit court, and the costs of suit in that court; and the appellee will pay the costs of appeal in this court and in the court below. Reversed and rendered.

(102 Ala. 304)

WINSTON v. HODGES.

(Supreme Court of Alabama. Jan. 30, 1894.)

DEED — FAILURE TO RECORD — ACTUAL NOTICE — WHEN ADMISSIBLE IN EVIDENCE — INFORMALITY.

1. Where conveyances of unconditional estates are void as to purchasers for a valuable consideration, mortgagees, and judgment creditors, having no notice thereof, unless recorded within 30 days from their date (Code, § 1810), actual notice to a judgment creditor of a conveyance, within 30 days from its date, does not obviate the necessity of its record, and validate it as to such creditor.

2. A deed written on a sheet of common legal cap paper, of four pages, with the body of the deed on the first page, a certificate of acknowledgment of the wife on the second page, the indorsement of filing, and the certificate as to recording by the probate judge, on the third page, and the signatures of the grantors and witnesses, and certificate of acknowledgment of the grantors, on the fourth page, is admissible in evidence against an objection that it is "not signed at the foot by the grantors, as required by law."

Appeal from circuit court, Marshall county; John B. Tally, Judge.

Statutory action of ejectment by James W. Hodges against John G. Winston, Jr. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff offered in evidence a deed from James G. Coleman and wife to James W. Hodges, the plaintiff. Defendant objected to this deed as evidence "because it was not signed at the foot by the grantors, as required by law." The deed, as described in the bill of exceptions, was as follows: The said deed was written on an ordinary sheet of common legal cap paper, of four pages. On the first page of said sheet, at the customary and proper place for such instrument, and entirely filling said first page, the body of the deed was written in due form; the last line of said first page of the deed being, "Witness hands and seals, this the 20th day of February, 1885." On the second page on said sheet of legal cap, at the top thereof, and immediately following the main body of the deed, was the certificate of acknowledgment of the grantor's wife, made by the justice of the peace. On the third page of the paper upon which said deed was written was the indorsement of the filing of the said deed in the office of the judge of probate of Marshall county, and the certificate of the judge of probate that the deed had been duly recorded. On the fourth page of said sheet was written the signatures of the grantors, and the names of the witnesses to said signatures, and the certificate of acknowledgment of the grantors. The court overruled the objection, and defendant excepted.

O. D. Street and A. A. Wiley, for appellant. Lusk & Bell, for appellee.

COLEMAN, J. James W. Hodges, the appellee, instituted the statutory action of ejectment to recover certain lands, and upon the

conclusion of the evidence the court gave the general affirmative charge for the plaintiff. Prior to the bringing of the present action, the appellant, John G. Winston, Jr., in a similar proceeding, had recovered the lands now sued for from the plaintiff in this suit, and on appeal the judgment was affirmed. *Shubert v. Winston* (Ala.) 11 South. 200.

At common law a judgment in ejectment was never final. Either party failing could bring a new action. *Camp v. Forrest*, 13 Ala. 114; *Boyle v. Wallace*, 81 Ala. 352, 8 South. 194; *Jones v. De Graffenreid*, 60 Ala. 145. The only change in the common law made by statute of this state is that two judgments in favor of the defendant, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the same land, or any part thereof, between the same parties or their privies, founded on the same title. Code 1886, § 2714. Both parties claim title from a common source,—the appellant, Winston, as a purchaser at execution sale, as the property of James G. Coleman, and the sheriff's deed; and the appellee, Hodges, by deed of conveyance from James G. Coleman and wife. The deed of conveyance to Hodges was dated February 20, 1885, filed for record and recorded September 1, 1885, in Book O, pp. 322, 323. This deed was again filed for record on the 13th day of February, 1886, and recorded on the 15th day of February, 1886, in Book O, pp. 453, 454. The cause which led to the second registration will be referred to hereafter. The vendor, James G. Coleman, remained in possession under a rental contract from Hodges until the fall of the year 1885, when he removed to the state of Texas. The judgment against James G. Coleman, under which the land was sold by the sheriff, was rendered on the 23d day of February, 1885, in favor of John G. Winston & Co., three days subsequent to the date of the deed to Hodges, but several months prior to the date of registration. The first execution issued, and was received by the sheriff, on the 22d of March, 1885, and executions were regularly kept up until the levy and sale by the sheriff; the levy on the land being made on the 16th of September, 1885, and the sale on the 5th of November, 1885. The purchaser, John G. Winston, Jr. (the party to this suit), was not a member of the firm of John G. Winston & Co., the plaintiffs in execution, but he had notice on the day of sale of the claim of Hodges. This notice, however, would not affect his rights as a purchaser, if the judgment creditor was not affected with notice. *De Vendell v. Hamilton*, 27 Ala. 156. The evidence on the question of notice is by the plaintiff, Hodges, who testified that he gave the plaintiff in execution personal notice of his purchase from James G. Coleman "a week after, but inside of two weeks" from the date of his deed from Coleman. The

judgment was rendered 3 days subsequent to the execution of the deed, and "inside of two weeks" is less than 30 days. Section 1810 of the Code declares that "conveyances of unconditional estates * * * are void as to purchasers for a valuable consideration, mortgagees and judgment creditors, having no notice thereof, unless recorded within thirty days from their date." The judgment was rendered before notice, but within less than 30 days. It is argued that the purpose of registration is to give notice, and actual notice is always at least the equivalent of constructive notice by registration. The conclusion deduced therefrom is that as registration of the conveyance within 30 days from its date, under the statute, would render it superior to any rights of purchasers, mortgagees, and judgment creditors, acquired at any time during the 30 days before registration, so personal notice given at any time during the 30 days allowed for registration would relate back, and have the same effect as registration. We do not think the statute, in terms or in spirit, admits of this construction. If John G. Winston & Co., on the 23d day of February, instead of obtaining a judgment, had purchased the land from James G. Coleman, and paid him the purchase money, and received a deed to the land, personal notice by Hodges of his prior purchase, subsequently given to John G. Winston & Co., although within the 30 days, would not invalidate their purchase. The statute expressly provides that conveyances not recorded are void, as to purchasers for a valuable consideration, unless recorded within 30 days. Judgment creditors, with or without a lien, by the terms of the statute, stand on the same footing as purchasers for a valuable consideration. This construction better accords with justice, is in harmony with the spirit of our previous decisions, and we believe to be the expressed purpose of the legislature. *De Vendell v. Hamilton*, 27 Ala. 156; *Tutwiler v. Montgomery*, 73 Ala. 263; *Wood v. Lake*, 62 Ala. 489; *Watt v. Parsons*, 73 Ala. 202; *Chadwick v. Carson*, 78 Ala. 116. The trial court held differently, and in this respect erred. This conclusion, upon the facts in the present record, would dispose of the case, if the lands were subject to execution at the time of the levy and sale.

The next question is whether the lands constituted a part of the homestead of James G. Coleman, and, if so, did they pass by the deed to Hodges? The evidence shows that the dwelling house of James G. Coleman was situated on 40 acres of land which belonged to him, and this 40 acres was separated from the land in controversy, about three-quarters of a mile, by lands belonging to other parties. The evidence further shows that James G. Coleman had used and cultivated about 20 acres of cleared land, of the land in suit, in connection with the 40 acres upon which he resided for a great many years, the prod-

uce of which, equally with that raised on his own land, was consumed by him in the support of his family. The evidence shows, however, that at no time prior to the 7th day of February, 1885, did he own, or claim as his own, the land in controversy, but it belonged to his father; and by his license, merely, without any contract of lease, or other right than the mere verbal permission of his father, was the land used and cultivated by James G. Coleman. By the will of his father, who died on the 7th of February, 1885, James G. Coleman became the owner of the land in controversy. On the 20th of February, 1885,—some 13 days after he became the owner,—the sale and deed to Hodges was executed. It is not necessary that a homestead should consist of one entire tract or parcel, all lying contiguous. It is sufficient if the separate tracts are near together, and are used in common as one tract, for the support and comfort of the family, and not in a city, town, or village, which does not exceed in area 160 acres, nor \$2,000 in value. *Dicus v. Hall*, 83 Ala. 159, 3 South. 289; *Shubert v. Winston* (Ala.) 11 South. 200. At one time it was held that a leasehold could not be the subject of a homestead. *Pizzala v. Campbell*, 46 Ala. 35. But, under the law as it now exists, a homestead right may attach to land, whether held in fee, or for life, or a term of years. In fact, one wrongfully in possession, but claiming a right to hold, may impress upon the premises occupied the character of a homestead, not so as to affect the rights of the true owner, but against creditors and all other persons, except the owner of a superior title. *Watts v. Gordon*, 65 Ala. 546; *Weber v. Short*, 55 Ala. 311; *McGuire v. Van Pelt*, Id. 344; *Chambers v. McPhaul*, Id. 379; *McConnaughy v. Baxter*, Id. 367. We have found no case, however, which has gone to the extent of holding that a homestead right, even inchoately, could attach to premises in which the occupant neither owned nor claimed to own any right or interest. The purpose of the homestead law was to protect the right and interest from levy and sale, and where there was no interest subject to process of law the homestead law can have no operation. Such seems to have been the only interest or right of James G. Coleman in the land in controversy during his father's lifetime. There was no act on the part of James G. Coleman, from the time he became the owner of the land,—7th February, 1885,—and the date of his sale, if there was a valid conveyance, on the 20th of February, 1885, which in any manner indicated that he claimed or intended to use the land derived from his father as his homestead. See *Watts v. Gordon*, *supra*. It may not be necessary to decide this question.

Treating the land as a part of the homestead, which of the parties litigant has the superior right? When the deed was first delivered to Hodges, and filed by him for rec-

ord and recorded, the acknowledgment was wholly insufficient as a conveyance of the homestead. The acknowledgment failed to show a separate examination of the wife, and, as a deed of conveyance, was null and void. When it was filed the second time for record, in February, 1886, it was properly acknowledged, and, on its face, was effectual to pass the homestead. This second acknowledgment bears the same date—to wit, February 20, 1885—as the first, and both were taken by the same justice of the peace. The testimony of the justice is very unsatisfactory. It is not characterized with that clearness and candor which should be evinced in the testimony of an officer testifying as to his official acts. There is evidence strongly persuasive to show—we will not say “conclusive”—that the date of the second acknowledgment is not correct. There is no such acknowledgment recorded with the first registration of the deed, in September, 1885. The probate judge was not examined. Hodges, the plaintiff, himself testifies that the second acknowledgment was placed upon the instrument at some subsequent time, the date of which he did not remember. It would seem from his testimony that, when he carried the deed to the justice of the peace the second time, neither the grantor nor his wife was present; and a jury might infer—we do not say “should infer”—that he immediately refiled it for registration when the second acknowledgment was placed upon the deed. The evidence shows that James G. Coleman removed to Texas in the fall of the year 1885, but at what time is not shown. The sheriff's sale was on the 5th of November, 1885. It is very clear, under our decisions, that if the wife of James G. Coleman did not appear before the magistrate, and make the proper acknowledgment before the justice of the peace, during the time the premises were occupied as a homestead, and before they were abandoned as such, and in the meantime, after the premises were abandoned as a homestead; and before the second acknowledgment,—if such second acknowledgment was in fact made,—the plaintiffs in execution, John G. Winston & Co., acquired a lien upon the premises by virtue of the execution in the hands of the sheriff, then no subsequent acknowledgment could relate back, and defeat the right of the judgment creditors, thus acquired. This is the rule as declared in *Griffith v. Ventress*, 91 Ala. 368, 8 South. 312; *Shubert v. Winston* (Ala.) 11 South. 200.

As the case must be reversed and remanded, we will not express any opinion upon the effect of the evidence, so far as it relates to these questions. The fact that James G. Coleman made a verbal contract to rent the land from Hodges for the year 1885 would not invalidate his title to the homestead, or prevent him from asserting his homestead right, if the deed to Hodges was void for want of a proper acknowledg-

ment by his wife. *Smith v. Pearce*, 85 Ala. 264, 4 South. 616. Exceptions based upon the rulings of the court as to testimony of witnesses are immaterial. None of them, whether admitted or excluded, affect the merits of the case. There was no error in admitting the deed from Coleman to Hodges in evidence. It might have been more formally and regularly signed, but, looking at the instrument as a whole, it is sufficient. Reversed and remanded.

(46 La. Ann. 656)

STATE v. BUCK et al. (No. 11,166.)¹

(Supreme Court of Louisiana. Nov. 20, 1893.)

CIVIL DISTRICT COURT — JURISDICTION — PETITORY ACTION — ADVERSE POSSESSION — PUBLIC LANDS — SALE PER AVERSIONEM — ALLUVION — REGISTER OF STATE LAND.

1. Notwithstanding property in dispute in a petitory action be situated in the parish of Plaquemines, the civil district court of the parish of Orleans acquires full and complete jurisdiction *ratione materiae et personae* if the parties claiming ownership be personally cited therein, same being citizens of another state.

2. An exception to the jurisdiction of the court *ratione personae*, to be availing, must be tendered in limine, and disincumbered by any other issue.

3. No one can acquire title to any part of the public domain by the prescription *acquisendi causa*.

4. A patent for public lands, reciting that a named party has purchased all the unsurveyed sea marsh in a certain township and range, west of the Mississippi river, excepting certain surveyed lots situated on the river, containing a certain number of acres, and extending back to a certain named bay according to the official plat of the survey of said lands in the state land office, does not evidence a sale *per aversionem*.

5. The title to alluvion is a purely accessory right, attaching exclusively to riparian proprietorship, and incapable of existing without it.

6. The very object, purpose, and scope of Act 104 of 1888 are to authorize the register of the state land office to cancel the entry last made when there are two conflicting patents outstanding to the same identical land. It does not confer upon him authority to hear and determine such a controversy as this.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by the state of Louisiana against Charles C. Buck and the Plaquemines Tropical Fruit Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Gurley & Mellen, F. B. Earhart, Thomas J. Semmes, and Duane E. Fox, for appellants. E. Howard McCaleb, for appellant warrantor. M. J. Cunningham, Atty. Gen., and Henry J. Leovy, for the State.

WATKINS, J. Claiming as owner certain lands situated in the parish of Plaquemines on the west side of the Mississippi river, being the whole of township 21 south, ranges 30 and 31 east, containing more than 30,000 acres, same being what is commonly denom-

inated as "swamps and overflowed lands," plaintiff's averment is that she "acquired same in its entirety, except the front lots, which were previously sold off by the United States government, and the sixteenth sections, which are dedicated to the public schools, and also excepting a tract of land between said lots and what is known as 'West Bay,' as per plan in the state land office at Baton Rouge; said excepted tract being 1,320 acres, which, it is alleged, was sold by the state of Louisiana, in September, 1869, by patent No. 526, to C. C. Packard, but which, though not claimed in this suit, petitioner does not admit was sold." Petitioner further alleges that she acquired said lands by grant and donation from the United States government by act of congress approved September 28, 1850, entitled "An act to enable the state of Arkansas and other states to drain the swamp lands within their limits," and other laws on the same subject. The further allegation is made that Charles C. Buck, of Baltimore, Md., but at the time of filing suit in New Orleans, and the Plaquemines Tropical Fruit Company, said to have been incorporated under and by virtue of the laws of New Jersey, of which Charles C. Buck is president, have themselves, and through their agents and officers, maliciously and without probable cause denied petitioner's claim of ownership, and have slandered her title thereto, by setting up title in themselves as derived from Robert M. White, who claims to have acquired same through C. C. Packard, who obtained therefor patent No. 526 from the state of Louisiana in 1869, "whereas said patent, to the knowledge of said defendants, shows no such sale or transfer." That they are still continuing to slander and maliciously defame petitioner's title to said land, and have recently stated and represented that said company was the owner of same, and that plaintiff possesses no title to any part of it; and that such statements had recently been made to different parties in the city of New Orleans,—parties who had applied to the land officers of the government for its purchase. That upon this allegation of slander of the petitioner's title, claim is made for \$1,800 damages. Further allegation is made that the defendant Buck has been and now is trespassing on said land, cutting and removing timber therefrom, digging ditches, and otherwise destroying portions of said property, and greatly impairing its value, thus causing petitioner great and irreparable injury, making an injunction necessary for the protection of her rights. Plaintiff's prayer is for citation to and service on each of the two defendants, commanding them to appear and answer her demands in the civil district court in the parish of Orleans; that a writ of injunction issue restraining and prohibiting them from slandering her title, and from trespassing upon her lands, or taking or keeping any part of same in their possession, "and from interfering in

¹ Rehearing refused April 23, 1894.

any manner with the possession of the petitioner and [her] full exercise of ownership over [the whole] of said lands;" and that the defendants be condemned to pay the sum of \$1,800 as damages for the slander of her title. The defendant Buck excepted in limine that plaintiff's petition discloses no cause of action; and, pending trial and final disposition of same, both defendants joined in a further exception to the jurisdiction of the court *ratione personae*, because of their domiciles being in New Jersey and Maryland, respectively, and beyond the reach and authority of the same. Both of said exceptions were taken together, tried, and overruled. In their answer the defendants allege that the company is in full and complete possession of the property in controversy, and that the injunction wrongfully issued, reserving the benefit of their exceptions. Subsequently the plaintiff amended her petition,—first reiterating the various charges of her petition,—averring the falsity of the defendant's claim of ownership as derived through Louque, White, and Packard, declaring that the alleged false and slanderous statements of the defendants constituted a cloud upon her title, and that she had suffered damages to the extent of \$2,000 on account of this trespass, claiming judgment for the total sum of \$3,800. It is concluded by a prayer to the effect that she be recognized as owner of the land described in her original petition, and quieted in possession thereof. There being no prayer in said supplemental petition for citation to the defendants, a second supplemental petition was found necessary for that purpose. To these two supplemental petitions the defendants excepted—though subsequent to default being taken—to the effect that the court was without jurisdiction to hear and determine the cause, because the land alleged to have been trespassed upon, and of which plaintiff seeks to be declared to be the owner and put in possession, is wholly situated in "parish of Plaquemines, of this state, and neither of defendants reside within the jurisdiction of this honorable court, and each one of them has a domicile in the said parish of Plaquemines; and hence [they] specially plead the want of jurisdiction of this honorable court." And subject to said plea, and without waiving the same, the defendants made further answer "that all of the unsurveyed sea marsh in township 21 south, ranges 30 and 31, lying west of the Mississippi river and Grand pass in the parish of Plaquemines, except certain lots of small depth, fronting on the Mississippi river, and sections 16, in range 30 and 31 [school sections], was sold and parted with by plaintiff for a valuable consideration, in 1869, to C. C. Packard; and the right of all accretions passed with said sale." Then follows a delineation of the claim of title as above set forth. Then follows a circumstantial and detailed account of the circumstances under which the defendant company acquired

the ownership of the territory in dispute, and of the care exercised and examinations made antecedent to making the purchase, alleging that it acted in so doing upon the faith it had in the acts and representations of the land officers of the state government. They pray that their vendor, Louque, be cited in warranty, for trial by jury, and on final trial for verdict and judgment in favor of the defendant company decreeing it to be the owner of said lands; or, if there be judgment in favor of the plaintiff, their prayer is for like judgment against their warrantor, Louque, in the alternative. Louque appears, and answers defendants' call in warranty, and disavows having had any personal interest in the land transaction; and alleges that it was made by him at the request of the defendants, and that he purchased said property for them, and, immediately after taking the title, he transferred it to them before the same notary. That he purchased from R. M. White, who is bound to him in warranty, and should protect him in every and all particulars. Thereupon he prays that the call in warranty of the defendant company be dismissed as to him, in so far as it may have, in any manner, a tendency to make him responsible; and that, in the alternative that same should be maintained, he have judgment against his vendor, White, whom he calls in warranty. He also prays that the Mutual National Bank and the Metropolitan Bank be cited, and, after due proceedings, that there be judgment, in the alternative of the plaintiff's recovery, ordering the surrender of certain notes now in their possession that evidence portions of the purchase price of the property, and requiring the same to be canceled as being null and void. The warrantor, White, answered in turn, and pleaded a general denial, and subsequently the banks appeared, and denied liability, and disavowed possession of the notes they were alleged to have. The defendant company pleads the prescription of five and ten years, *acquisitendi causa*, predicated upon its peaceable and undisturbed possession under title, in good faith, as a muniment of its ownership; and both defendants plead various acts and proceedings of the land officers of the state government as an estoppel against the demands and claims of the state. On final trial there was a verdict and judgment against the defendants, recognizing the ownership of the state, reserving the rights of the defendants and Louque against White, warrantor, and making the writ of injunction perpetual. It is from this judgment the defendants have appealed. It awarding plaintiff no damages, and she having made no answer to the appeal, claiming anything on that score, there is nothing for us to decide except the question of title.

Question was made in the lower court, and it was renewed on the argument in this court, to the effect that the civil district

court of the parish of Orleans did not have jurisdiction *ratione materiae et personae* of the defendants, or of the property in controversy, it having been considered untenable by the judge *quo*. After carefully analyzing the pleadings, we have reached the conclusion that the defendants' exception is not well taken. Considering and treating this as a petitory action from its incipency (and this view is the one most favorable to the defendants), we are of the opinion that it was correctly instituted in the parish of Orleans, notwithstanding that the *res* is situated in the parish of Plaquemines; the defendant Buck having been personally served with citation while temporarily abiding in the city of New Orleans, and he being at the time president of the defendant company, and both being citizens of other states than Louisiana. An action in revendication of real estate may be brought within the jurisdiction where the property is situated, or that where the defendant has his residence, as the plaintiff chooses. Code Pr. art. 163. Hence the defendant has no right to insist upon the suit being brought in the parish of Plaquemines, and no cause of objection that it was not. The plaintiff had the choice to locate the suit at the defendants' personal domicile. A further provision of the law is that, "when the defendants are foreigners, or have no known place of residence in the state, they may be cited wherever they are found." Code Pr. art. 165, subd. 5. Considering the question from the standpoint of the defendants' personal domicile, it is that they had no place of domicile or residence in the state that was known to the plaintiff at the inception of the suit. The property in controversy being situated in the state, and the defendant Buck being temporarily present in the parish of Orleans, it was competent for the court of that jurisdiction to cite him to appear and answer therein; and, he being the president of the defendant company, it could be likewise cited into court. But, if this be considered and treated as a question of doubt, we think it should be resolved against the defendants, because the defendant Buck first appeared and excepted that the plaintiff's petition disclosed no cause of action, and thus voluntarily submitted himself to the jurisdiction of the court; and, he being at the same time the president of the defendant company, its right of subsequently excepting to the court's jurisdiction is rendered exceedingly doubtful, particularly as the two defendants united in one exception, and it was ingrafted upon and tried and decided with the plea of no cause of action. The well-defined theory of our jurisprudence is that the exception of want of jurisdiction *ratione personae*, to be availing, must be presented in limine and alone, and altogether disconnected with and disembarassed by any other averment of fact which indicates the

joining of issue. If any other issue be jointly tendered with such exception, it must necessarily fail. In so far as the similar exception that was tendered to the supplemental petition is concerned, we consider it immaterial, for the reason that the plaintiff was not bound to institute the suit in the parish where the property is situated. The plea of prescription that is urged by the defendants is unavailing. Their claim of title is founded upon the Packard patent, as is clearly shown by their answer, their averment being "that all of the unsurveyed sea marsh in township 21 south, ranges 30 and 31, lying west of the Mississippi river and Grand pass, in the parish of Plaquemines," less certain exceptions enumerated, "was sold and parted with by the plaintiff for a valuable consideration, in 1869, to C. C. Packard, and the right to all accretions passed with said sale," etc.; and they claim to have derived title through Packard. Therefore the plea of prescription cannot confer title beyond the calls of the patent, as nothing can conclude the right of the state government other than a bona fide and actual sale, though such accretions as may subsequently accrue may possibly attach thereto. No one can acquire title from the state by prescription. It is a condition precedent to the acquisition of title by prescription *acquiritendi causa* that the property should have been severed from the public domain, and transferred to that of private property, at the date such prescription commenced to run. In *Sanchez v. Gonzales*, 5 Mart. (La.) 207, we find this proposition broadly stated thus: "It is believed that we may safely assume, as a general rule of prescription, that the public domain is not subjected to it by any length of time." But in that case there was no question of title derived from the state government, but one derived from the Spanish crown. In *Pepper v. Dunlap*, 9 Rob. (La.) 283, the Case of *Sanchez* was quoted approvingly, the court declaring that they know "of no law which established the prescription of a grant of any part of the public lands." However, some doubt was created by a dictum of the court in same case as reported on a subsequent trial (9 La. Ann. 137) by the following language of the court, *viz.*: "Prescription is one of the modes of acquiring property by the effect of time and under the conditions regulated by law. Rev. Civ. Code, art. 3420 (old number). There are no other prescriptions than those established by the Code. Article 3433. Prescription runs against all persons, unless they are included in some exception established by law. Id. 3487. * * * Under the Spanish law, property could be acquired by prescription against the crown. At least, we find no exception in its favor, nor any principle which prevents the operation of the law of prescription. * * * Under our Code we find no express exception in favor of the state." But in a later case

(*McCastle v. Chaney*, 28 La. Ann. 720) a contrary opinion is expressed, placing titles derived from the state government upon the same basis as those derived from the United States government. That was a petitory action, plaintiff claiming title from the state of Louisiana under an act of congress of date May 20, 1826, and demanding that the patent issued by the United States to the defendant be declared null and void, as having been issued in error. The court accepted the plaintiff's view of the case, and decided that the patent issued to the defendant was erroneous, but declined to maintain the latter's plea of prescription, employing the following language, viz.: "The United States parted with their title when the selection was made by the state of Louisiana, in 1856, and the title remained in the state until it was vested in the plaintiff. Consequently no title vested in Chaney, the patentee; but we think, while he could not prescribe against the state or United States, he was such a possessor as to require the plaintiff either to reimburse the value of the materials," etc. The question treated of in *Graham v. Tignor*, 23 La. Ann. 570, and *State v. White's Heirs*, Id. 733, was that appertaining to the prescription liberandi causa, as extinguishing an action by the state for the recovery of a debt; and the opinion therein expressed by the court does not militate against that announced in *McCastle's Case*. Those cases were examined and compared in our opinion in *Reed v. Creditors*, 39 La. Ann. 115, 1 South. 784, in which we had occasion to express the following view, viz.: "Prescription proceeds upon the theory that one in whose favor a right once existed had lost recourse for its enforcement judicially by reason of his own neglect for such a length of time that it would be against equity to permit its assertion. Such an equity cannot arise in favor of the subject, as against the sovereign, by reason of the failure of her officers to perform their duties. Certainly not unless the legislature has so declared in unmistakable terms." To this proposition we feel disposed to adhere, as we consider it sound as well as conservative, and in keeping with the views entertained by our predecessors in the *McCastle Case*. Entertaining this view, we must restrict the defendants to the title which is evidenced by the patent of their vendor, and such accretions as may have been added to the land since the date of its issuance.

On the merits the substantial facts in controversy are these:

(a) In 1869 the state, through the register of its land office, issued to one C. C. Packard a patent certificate to certain lands which are in contest, which contains the following recitals, viz.: "Whereas, C. C. Packard * * * purchased per warrant No. 380, N. S. D., dated September 29th, 1869, the following described swamp lands, subject to tidal overflow, viz.: 'All the unsurveyed

sea marsh in township (21) south, ranges 30 and 31 east, in the southeastern land district of Louisiana, west of the Mississippi river, excepting lots fronting on the river, and sections sixteen in both ranges, containing thirteen hundred and twenty acres (1,320), extending back to West bay, according to the official plat of the survey of said lands in the state land office," it being dated 30th of September, 1869. (We have quoted from the certified copy made by Fremaux, register, on the 6th of January, 1882, as the oldest of the three in evidence, and brought up in the original.) This patent bears the signature of the governor and the register of the state land office, and it is thus prefaced, viz.: "The State of Louisiana. [Seal.] Patent No. 526," etc.

(b) An extract from the books of the state land office,—that is to say, the stub from the register's warrant book,—which shows that warrant No. 380, mentioned in the patent, was issued to C. C. Packard on the 29th of September, 1869, and covers the quantity of 1,320 acres of unsurveyed sea marsh back of lots fronting on the river, in township twenty-one (21) south, ranges 30 and 31 east. It also shows that the amount paid therefor was \$330, or 25 cents per acre. This datum corresponds with the recitals of the patent, and is contemporaneous in date therewith, the one fully identifying the other in every particular.

(c) A certified extract, furnished by the register, exhibits the locus in quo as it was in 1836, when surveyed by G. F. Connelly; this exhibit having been taken from an approved map on file in his office. It shows the excepted lots fronting on the river, as well as the area that is covered by the Packard patent, it being thus delineated, viz.: "Certificate No. 380, N. S. D. Sea marsh. C. C. Packard patent No. 526, N. S. D." Immediately east of the sea marsh thus indicated is the outline of the river, while on the west, and in the rear of it, are written the words "West Bay."

(d) A sketch accompanied a certificate from the surveyor general, indicating the original United States surveys as they appear on the map in his office; and they show that township 21 south, ranges 30 and 31, are, in greater part, covered by West bay, which is given the appearance of an arm of the Gulf of Mexico, extending south, on an irregular line, almost parallel with the course of Southwest pass.

On the trial the introduction of evidence took a very wide range, and this necessitated elaborate argument and briefs on both sides of the controversy; but, in our opinion, the greater part of it was unnecessary for the determination of this, a purely petitory, action, depending primarily upon a proper construction of the patent that was issued to the defendant. We think it evident from a fair consideration of the patent, taken in connection with the official data we have referred

to, that it does not evidence a sale per aversionem, but one by measure or quantity. It has been determined that, in order "to constitute a sale per aversionem, there must be certain limits, or a distinct object described, as a field inclosed, or an island, because it is presumed the parties have their attention fixed rather on the boundaries than the enumeration of the quantity." *Innis v. McCrummin*, 6 Mart. (La.) 428; *Boyce v. Cage*, 7 La. Ann. 672. Again: "That the sale of a body of land as a section, which has limits mathematically fixed and established and generally known, is not a sale per aversionem." *Phelps v. Wilson*, 18 La. 185. Again: "A sale in which specific boundaries are given is a sale per aversionem, or a sale from one fixed boundary to another, which includes all the ground between the points mentioned, whether the measure be correctly stated or not; the calls for a boundary controlling the enumeration of quantity." *Harman's Heirs v. O'Moran*, 18 La. 526; *Prejean v. Giroir*, 19 La. 423; *Hoover v. Richards*, 1 Rob. (La.) 34; *Saulet v. Trepannier*, 2 Rob. (La.) 357; *Labiche v. Jahan*, 9 Rob. (La.) 30. Again: "The sale of a certain number of acres between certain limits so as to include the said number of acres is not a sale per aversionem, but of the number of acres specified." *Hoover v. Richards*, 1 Rob. (La.) 34. To constitute a sale one per aversionem, the property should be designated by adjoining tracts, or from boundary to boundary. *Hall v. Nevill*, 3 La. Ann. 326. In case the upper boundary be given with sufficient certainty, yet no lower one is mentioned, it is not a sale per aversionem. *Boyce v. Cage*, 7 La. Ann. 672. Our Code declares that "there can be neither increase nor diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary [to boundary]." Rev. Civ. Code, art. 2495. The sale to the defendants' author was not made by certain and particularly designated fixed, natural, and well-known boundaries of lands included within the boundaries indicated. A careful examination of the patent will show that only two boundaries are given, and those only imperfectly, viz.: "All the unsurveyed sea marsh in township 21 south, ranges 30 and 31 east, * * * west of the Mississippi river, * * * extending back to West bay," etc.; nothing being stated in reference to the north or south boundary. Nor is this all, for there is a further limitation placed upon both of the foregoing limits thus: (1) "All the unsurveyed sea marsh," etc., "west of the Mississippi river, excepting lots fronting on the river," etc.; and (2) "extending back to West bay, according to the official plat of the survey of said lands in the state land office." So it appears that the Mississippi river was not indicated as the eastern boundary, but the surveyed lots fronting on the river were described as intervening between

the river and the land conveyed; and their dimensions are not given. And it also appears that West bay, as it existed at date of patent, was not mentioned as the western boundary, but the western boundary was described as—in general terms—"extending back to West bay, according to the official plat of the survey of said lands in the state land office." It certainly cannot be said that the boundaries given were, in any proper sense, certain limits, definitely fixed. The patent issued to Packard did not convey all the land between adjoining tenements; and it is of no consequence that reference is had to the township and range in which the land is situated, because they are mathematically fixed, established, and well-known limits. The sale was made of all the unsurveyed sea marsh in township 21 south, with certain exceptions, containing 1,320 acres, and which, according to the official plat in the land office, extended back to West bay as it once existed. This is evidently a sale by measure. Considering the fact that this was a sale, or entry of public land, property of the state of Louisiana, made by a public official, in pursuance of special laws governing its alienation, how could it be a sale per aversionem? But the register sold 1,320 acres of land, at 25 cents per acre, and that is the quantity the patent conveyed to Packard, and no more. Consequently the claims of defendants must be restricted to the calls of the patent, unless they have been extended or increased by accretion.

Without entering into the elaborate details of the evidence applicable to the question of accretion vel non, it will be sufficient to state that it substantially shows that the lands are situated in the parish of Plaquemines, on the west bank of the Mississippi river, about 12 miles above the Passes. That anciently the waters of West bay spread over the greater part of said lands, extending up from the Gulf of Mexico as "an arm of the sea;" but that within the past half century they have been increased in elevation, and extended in area, and made comparatively high, by sediment which has been periodically deposited thereon by annual swells of the Mississippi river. That this process of elevation began about the year 1836, when a crevasse occurred in the banks of the river at a fisherman's canal, then known as "Gilbert's Canal," but ever since that time known as the "jump." That one United States surveyor made a survey of the land fronting on the river in 1836, and divided same into lots, and located the sea marsh, as it then existed, in the rear of said lots, in the direction of West bay, same not extending back more than 30 chains (say 2,000 feet) at its greatest depth, and averaging not more than 1,000 feet; that is to say, to the waters of West bay. These facts are in keeping with the recitals of the Packard patent, and the maps, plats, and profiles of the land office we have referred to.

In order to furnish a more accurate idea of the locus, we have made the subjoined extract from one of the briefs of defendants' counsel, quoting from the testimony of E. L. Corthell, a civil engineer of great skill and repute, viz.: "I have a knowledge of the 'jump,' a crevasse leading out of the Mississippi river, and of the lands in said jump. My knowledge is from personal examination and observation, made at sundry times, from May, 1875, to July, 1888. During that time—particularly during the first five years of that period—my business as the resident engineer in charge of the construction of the South Pass jetties, and as superintendent during a large part of this time of said works, required my presence in the jump, where the materials in the shape of willows were obtained for the construction of said works. The land on which the willows grew was formed by deposits of sediment from the Mississippi river. The quantity of the said lands thus formed through this crevasse I cannot state. It must have been more than six thousand acres, for this was the amount of land which Capt. James B. Eads, or a company which he represented, surveyed and obtained for the purposes of cutting the willows for the jetties. From what I consider reliable information, obtained while engaged in my business above mentioned, and particularly while gathering information for writing the history of the Mississippi jetties, the formation of the land being in its recent development, about the year 1835, by the river, at an unusual flood, breaking through a small fisherman's canal, pouring its water through a very large crevasse—estimated to be at that time over 1,800 feet wide and 60 feet deep—into the adjacent shallow bay, which at that time approached near to the banks of the river, and was, in general conditions, very much like other bays still to be seen on either side of the river and its passes, entirely unobstructed by islands, and presenting a smooth sheet of water. The immense amount of sedimentary deposit carried in by the river after the crevasse formed led to an immediate and rapidly growing formation of land. In May, 1875, this tract of land was threaded in various directions by open channels of sufficient depth and width for a large stern-wheel steamboat to navigate, towing barges over 150 feet in length. A main channel, wide, and of considerable depth, led from the river to the waters of the gulf, and subsidiary channels led from this main channel in many directions, and they were several miles in length, bordered on each of their banks by growth, mostly of willows. The land and the channels above mentioned changed considerably during the five years required for building the South Pass jetties. The entrance channel narrowed, and its depth was greatly reduced. The main channel and all the subsidiary channels above mentioned were considerably reduced in length [width, evidently],

so that where it was possible to navigate with the above-mentioned boat and barges in 1875, it was not possible to do so in 1879 and 1880. A great deal of the land above mentioned was during that time subject to overflow during the river floods, and a deposition of sediment continued raising more and more out of the water. The lands through which the said jump and its branches run, and the said jump and its branches themselves, have changed very materially within my recollection. In the line of my professional work I have had occasion to carefully study the physical conditions of the lower Mississippi river, and the result has been that the conditions above described at the jump prevail elsewhere where the river breaks through the narrow banks which separate it from the waters of the bay on either side. At a point about three miles above the head of the pass called 'Cubit's Gap' the river similarly broke through. This occurred not long before the jetties were begun, in 1875. At that time it was a broad expanse of water in the adjacent bay, without any sign whatever of land appearing above the surface. This crevasse was about a half mile in width, and from 60 to 80 feet in depth. The immense amount of sedimentary matter discharged into the shallow bay raised a considerable portion of the submerged land above the water surface before 1880, on which the reeds, grasses, and willows began to grow. The delta formation which took place at the jump took place here. Several channels led in various directions, and between them the land rose above the surface. In 1888, from my own observation, the land had greatly extended in area and in height above the surface, and the vegetation upon it had also greatly increased. Following the general law of such crevasses, this process of land-making will continue rapidly until a great area, like that at the jump, will have been formed. The ultimate, and not very distant, result of the conditions existing at not only these two places, but at others, is the almost entire closing of the outlet. The principal reason for this closing up of crevasses and outlets is that the river water cannot flow to any great distance from the river over the shallow bays on account of the great frictional resistance which the submerged lands present to the flow of the water. This frictional resistance retards the velocity of the current, and the water, charged or loaded to its full capacity when it enters the crevasse, is not able physically to carry its burden, and drops it upon these submerged lands, and thus rapidly raises them to the surface of the ordinary level of the gulf. There are many points which I have observed in the passes of the Mississippi and along the river near them where crevasses took place many years ago, but by the process above described have been entirely closed up, and nothing is left but a 'scar,' as it were, to show where a cut had been made

in the banks of the river at some time long past. It is an accepted axiom among hydraulic engineers of the Mississippi that 'the river heals its own wounds.' The evidence discloses this witness to have been one of the engineers of Capt. James B. Eads, and as such he gave superintendence to the construction of the jetties in 1875, and subsequent years,—a few years after the Packard entry of the land in controversy. It further shows that he subsequently wrote and published the History of the Mississippi Jetties, from which the record furnishes extracts, and we quote the following, viz.: "About forty-five years ago the river broke through its west bank, twelve miles above the head of the passes, at a narrow fisherman's canal that led up to it from the gulf. In a short time a torrent eighteen hundred feet wide and sixty feet deep swept through this crevasse. For a long time the river at flood poured through it with great velocity, and spread its muddy waters far and wide over the shallow bay. The same principles that produced a delta at the mouth of the river formed one here. After the lapse of years there appeared well-marked channels, three or four feet deeper than the adjoining shoals, which gradually rose to the surface by the deposits of successive overflows. These shoals confined the currents still more to the channels, and increased their depth. The seeds of grasses, flags, and reeds that came down with the river found a lodgment on the half-submerged banks, and soon covered them with a rank vegetation. This growth caught the sediment carried into it by the overflowing waters and built up the banks still higher, on which sprang up a dense growing of willows, crowding out the weaker vegetation, and taking possession of the whole district. A richer and more conveniently arranged harvest field for the jetties than this great tract of willows could not have been found. This crevasse is generally known as the 'jump.' The passes of the jump were sufficiently wide and deep to admit a good-sized steamboat, and they ramified this subdelta in every direction."

Taking the testimony of this witness as a guide (and we think it but fair that we should do so), and it appears evident that the alluvial deposits he describes gave greatest elevation to the lands in question during the series of years immediately succeeding 1836,—the year during which the crevasse occurred,—and consequently there must have been a large area of land raised above inundation, as well as tidal overflow, at date of patent issued to Packard, in 1869, more than 30 years subsequently. The precise condition of things existing at date of issuing patent is not clearly ascertainable from the evidence, but it is quite apparent that such elevated area must have extended much beyond the limits of the tract it conveyed to Packard, taking the surveyed lots on the river front as the initial point of calculation;

and presumably the register of the land office was aware of the status of the sea marsh in this locality, and issued his warrant of location, as well as the patent, conformably thereto. Accepting this as the true situation of the land conveyed by the patent, it is quite manifest that it did not constitute a riparian estate, in the sense of the civil law, to which the described accretions attached. In the recent and conspicuous case of *Delachaise v. Maginnis*, 44 La. Ann. 1043, 11 South. 715, this question passed under critical review and analysis, and this court, through Mr. Justice Fenner, as its organ, said: "The principle underlying and determining the title to alluvion in our system is the equitable one expressed in the maxim, '*Qui sentit onus, sentire debet et commodum.*'" As Portalis, in his '*Exposé des Motifs*' of the Code Napoleon, quaintly says, there exists, so to speak, an aleatory contract between the riparian owner and nature, whose action may at any moment despoil or increase his estate, in which sense it may be said that rivers give or take away, like chance or fortune. If it takes away, the owner must bear the loss; if it gives, justice accords him the gain. Another principle is that title to alluvion is a purely accessory right, attaching exclusively to riparian proprietorship, and incapable of existing without it. This is implied in the very name given to the right as a right of accession; and the chapter of the Code under which the provisions relative to alluvion are found is headed thus: '*Of the Right of Accession to What Unites or Incorporates Itself to the Thing.*'" As strongly stated by this court in the leading case on the subject, riparian ownership is of the essence of the right of alluvion. The alluvion is but the accessory. The front tract is the principal. The former cannot exist without the latter." *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 219. *Vide Ruch v. City of New Orleans*, 43 La. Ann. 275, 9 South. 473. But this principle has been incorporated into our Code in the following words: "The accretions, which are formed necessarily and imperceptibly to any soil situated on the shore of a river, or other stream, are called alluvion. The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or stream, and whether the same be navigable or not," etc. *Rev. Civ. Code*, art. 509. Counsel quotes from the early case of *Stephenson v. Goff*, 10 Rob. (La.) 99, as favoring the theory of the defendants, but we do not so consider it. It says: "Where it is shown that the boundary lines of the lands claimed by one holding under a confirmation by the United States and a survey made by a government surveyor were run as near as possible to a bar, the whole of which was subject to overflow at high water, and the greater part of it to an annual overflow, so as to include all the high land susceptible to ownership, the pro-

prietor will be entitled to the alluvion or batture subsequently formed on the site of the bar." But we are of the opinion that the proper construction of the foregoing quotation confirms our view. See, also, *Ferriere v. City of New Orleans*, 35 La. Ann. 200. On the law and the evidence our conclusion is clear to the effect that the defendants are not entitled to the alluvion that has been formed on the rear of the sea marsh their vendor acquired from the state.

During the progress of the trial the defendants set up an estoppel against the demands of the state, the proceedings and decision of the register of the land office in 1889, wherein he recognized the title of the defendants under the Packard patent, and canceled certain entries of other parties of portions thereof as being in conflict therewith, acting under the authority conferred by the provisions of Act 104 of 1888. We do not think this a serious plea, because the law referred to has no application to this class of cases. The act in terms confers upon the register authority, under the circumstances and conditions named, to cancel "dual or double entries" which have been made "by conflicting claimants" to the same identical land. But the lawmaker was so cautious as to place a limitation upon the power conferred, and only authorized him to cancel the last entry made, provided such entry was made through error, mistake, or otherwise; and provided, further, the first or former entry is held to be valid. Section 1, Act 104 of 1888. The following is the text of the register's decision, viz.: "Baton Rouge, April 24, 1889. This matter, having been submitted by R. M. White, upon his evidence filed by him, and the defendant Bayley having been notified by letter of said White's application for a cancellation of his patents, and the said letter having been returned in due course of mail as uncalled for, and the evidence being in favor of said White's application, under and by virtue of Act No. 104 of 1888 I do hereby cancel patents Nos. 2,050 and 2,072, issued to said G. W. R. Bayley, agent, respectively, on 27th April, 1875, and 12th day of June, 1875. This 24th day of April, 1889. John S. Lanier, Register." Now, it appears that the defendants trace title to the lands in controversy through the identical R. M. White upon whose application the patents of Bayley, supposed to be in conflict with his own, were canceled. It also appears that the decision was based solely and exclusively upon the evidence he filed, and that the contestee was never notified of said proceedings at all. Such a proceeding was entirely ex parte, and possesses not a single ingredient of a contestatio litis, the determination of which forms either res judicata or an estoppel against the state; and she is not concluded thereby. After a careful investigation of this case, we have reached

the deliberate conclusion that the judgment appealed from is correct. Judgment affirmed.

PARLANGE, J., takes no part.

(46 La. Ann. 711)

RICE v. RICE. (No. 11,389.)

(Supreme Court of Louisiana. April 9, 1894.)

CONTRACT—CONSIDERATION—SPECIFIC PERFORMANCE.

1. The alleged promise of a mother to her son to lend him money is not supported by the consideration alleged to consist in the acknowledgment that he received certain advances from his father's succession; least of all, if the acknowledgment is charged by the son to have been untrue.

2. Under our laws, damages, and not specific performance, at least in ordinary cases, are the relief for breach of contract for the payment of money. Rev. Civ. Code, arts. 1927, 1934; 1 Story, Eq. Jur. § 714.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Thérard, Judge.

Action by George E. Rice against Mary E. Rice. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry P. Dart, for appellant. Dinkelspiel & Hart, for appellee.

MILLER, J. This is an appeal by plaintiff from the judgment of the lower court dismissing the suit against the defendant, his mother. The basis for the demand is supposed to be furnished by a paper executed by the plaintiff before a notary, acknowledging the receipt by plaintiff of \$3,500 from the succession of his father, and the promise of the defendant in consideration of that paper to lend plaintiff \$2,500 for 10 years without interest. The cause of action is, however, amplified by the allegations in the petition that plaintiff's claim against his father's succession was disputed by his mother and his coheirs; that to settle the dispute he was induced to acknowledge he had received \$3,500, when in fact but \$1,000 had been received by him from the succession; and that he was "enticed" to make the false acknowledgment by the promise of his mother to lend him \$2,500. The relief demanded is a judgment against defendant for the amount stipulated to be paid in the asserted contract, or the annulling of the entire acknowledgment. The defendant filed, among others, the exception of no cause of action. The appeal is by plaintiff from the judgment of the lower court sustaining the exception.

The brief for plaintiff treats the suit as one for specific performance. The relief usually accorded for the breach of contracts is damages. Specific performance is decreed only in exceptional cases. It is difficult to conceive of any injury arising from the breach of contract to pay or lend money that cannot be repaired by damages. Our

Code declares, when the object of the contract is anything but the payment of money, the damages are the loss sustained, or profits of which the party has been deprived; and, as to money obligations, damages for delay in performance are limited to interest. Again, the Code declares, in ordinary cases, the breach of the contract to do entitles the party aggrieved only to damages, but, where this would be an inadequate compensation, specific performance will be constrained if performance is in the power of the party who has contracted the obligation. We think that, if plaintiff had any cause of action, he has no basis to demand specific performance on his supposed contract. Rev. Civ. Code, arts. 1927, 1934, 1935; 1 Story, Eq. Jur. § 714, as to specific performance.

But, beyond the question as to the relief to be awarded for the breach of the contract of loan, there is, in our opinion, no contract in this case. The supposed consideration is the plaintiff's acknowledgment of the advances made him by his father. That acknowledgment is manifestly no basis whatever to support the asserted promise of the mother to lend him \$2,500. If there was any benefit or advantage of any kind accruing from that acknowledgment, that benefit or advantage was not derived by the mother. It might be his coheirs could avail of the acknowledgment, but not his mother, whom he sues. If, as the plaintiff stated in his petition, the acknowledgment is untrue, it is not easy to perceive it would serve any purpose. Our conclusion is there is no cause of action stated in plaintiff's petition, either in respect to the asserted contract or the demand for a decree annulling his acknowledgment. Rev. Civ. Code, arts. 1779, 1893. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

(46 La. Ann. 474)

EGAN v. FUSH. (No. 11,351.)

(Supreme Court of Louisiana. Feb. 12, 1894.)

SEQUESTRATION — DISSOLUTION — VERIFICATION OF SUPPLEMENTAL COMPLAINT.

1. It is more than doubtful whether a sequestration will lie antecedent to the maturity of the debt sued on in any case except that indicated in Code Pr. art. 275, par. 6.

2. Conceding arguendo that the dismissal of an original petition does not necessarily dissolve a sequestration issued under it, and that the status quo of a seizure under it may be saved by a supplemental petition subsequently filed, yet, in order that same be rendered efficacious, it must be sworn to.

3. That, in case the original suit and sequestration have proceeded on the theory that the debt is due at time of filing, a supplemental petition, alleging the new and substantial fact that the debt has become due since the suit was filed, changes the substance of the original demand in an important particular.

(Syllabus by the Court.)

* Rehearing refused March 26, 1894.

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Thomas Egan against Charles M. Fush. Judgment for plaintiff, and defendant appeals. Reversed.

W. S. Parkerson, for appellant. Frank McGloin, for appellee.

WATKINS, J. Suit was filed on the 23d of February, 1893, upon a promissory note maturing on the 18th of March, following, accompanied by a writ of sequestration. On the 27th of February, following, the defendant moved to dissolve the sequestration, upon two grounds, to wit: First, that the allegations of the petition are untrue; second, that the debt sued on was not due at date of suit. On the 2d of March, thereafter, defendant filed an exception of prematurity and no cause of action. On the 9th of March the plaintiff filed a supplemental petition, setting up the maturity of the note sued on since the filing of the original petition. On the 20th of March, 1893, the defendant filed an exception to the supplemental petition, on the ground that it charged the substance of the demand of the original petition, and was consequently inadmissible. On the trial the exceptions were overruled as to the supplemental petition, the original petition was dismissed, and the sequestration allowed to stand; the court a quo treating the supplemental petition, in personam, filed after the maturity of the note, and several days subsequent to the making of the affidavit, as the inception of this suit. Subsequently the defendant filed an answer, reserving the benefit of his exceptions, and the cause went to judgment in favor of the plaintiff for the amount of his debt, sustaining the writ of sequestration, and enforcing the vendor's lien upon the property seized, and the defendant has appealed.

From the foregoing analysis of the pleadings and issues in this case, it is evident that the determinative questions are (1) whether the sequestration should have been dissolved on account of the alleged prematurity of the suit; (2) whether the plaintiff's supplemental petition changed the substance of his original demand. Reference to the petition discloses that suit was filed on the 23d of February, 1893, upon an unconditional obligation of the defendant, bearing date September 1, 1892, and maturing on the 1st of March, following; that the prayer thereof is "that, after due proceedings, there be judgment in favor of petitioner, and against [the defendant], in the full sum of \$2,666.67, with vendor's privilege on the property described, and interest as claimed, at eight per cent.," etc. Alleging his vendor's lien upon certain movable property, described as being in the defendant's possession, and swearing "that affiant fears that [the defendant] will conceal, part with, or dispose of" same during the pendency of the suit, to the prejudice of his vendor's lien, the petitioner claimed and obtained a sequestra-

tion. On this showing, there is no doubt that suit was filed before the debt became due, and that an absolute and unconditional judgment was prayed for, before same went to its maturity. Consequently, the exception of prematurity was well grounded, and the original petition was correctly dismissed by the judge a quo. But just here the two preceding contentions enumerated arose in the court below, the judge maintaining the sequestration, and holding the supplemental petition to be consistent with the original petition and the inception of the suit.

1. Was the sequestration properly issued or correctly maintained, the original petition having been dismissed? The supplemental petition was filed on the 9th of March, 1893, subsequent to the maturity of the debt, and also to the filing of defendant's exception of prematurity. It does not contain the reiteration of all the averments and charges of the original petition, and is unaccompanied by any additional averment, to the effect that the cause for the issuance of the writ of sequestration continued to exist; and no additional affidavit was made, order obtained, or bond given in connection therewith. There is no provision of the Code of Practice which authorizes the issuance of a writ of sequestration before the debt secured becomes due, as in case of attachment and provisional seizure. Code Pr. arts. 275 et seq., 244, 287. But in such case the Code makes special allegations in the petition and accompanying affidavit necessary and essential. For instance, in reference to an attachment its requirement is "that, in case where the debt or obligation is not yet due, such attachment may be granted, * * * and it shall be lawful for any judge * * * to order a writ of attachment to issue whenever said judge shall be satisfied * * * of the existence of said debt, * * * and swears that said debtor is about to remove his property out of the state before said debt becomes due," etc. Id. art. 244. In reference to a provisional seizure, its requirements are "that it shall be sufficient to entitle a lessor to obtain said writ, to swear to the amount which he claims, whether due, or not due, and that he has good reasons to believe that said lessee will remove the furniture, or property on which he has a lien, or privilege out of the premises, and that he may be thereby deprived of his lien," etc. Id. art. 287. But these provisions are restricted to the issuance of the two conservatory writs mentioned, and do not apply to the main demand for the debt of the defendant. Clearly, it is contemplated by these articles that the fact must be set out affirmatively that the debt declared upon is not due at time of filing of the suit, accompanied by the formal and specific allegation of the other facts mentioned therein as rendering the process necessary antecedent to the maturity of the debt. These provisions are exceptional, and to be strictly construed, and

not to be extended to any other cases not covered by them. There is no corresponding provision of the Code applicable, in terms, to the issuance of a writ of sequestration prior to the maturity of the debt sued upon, though this court has so interpreted paragraph 6 of article 275 of the Code as to warrant its issuance prior to the maturity of the debt in an exceptional class of cases, not including the instant case. The language of this paragraph is as follows, viz.: "A creditor by special mortgage shall have the power of sequestering mortgaged property, when he apprehends that it will be removed out of the state before he can have the benefit of his mortgage, and will make oath of the fact which induced his apprehension." (Our italics.) In *Neilson v. Pool*, 17 La. 209, this interpretation was placed upon the provisions of that article: The note sued on in that case became due on the 1st of December, 1839, and suit was commenced on the 3d of September preceding; plaintiff alleging that his debt was not then due, and that same was secured by a mortgage and privilege on the defendant's crop, which he verily feared and believed it was his intention to "remove beyond the jurisdiction of the court, and out of the state, before his debt becomes due, and deprive him of the only security he has for the payment of his debt;" and his prayer was that the crop be sequestered, and that he have judgment for the amount of his note when same fell due, recognizing his mortgage and privilege. The court states that "on 1st of February, 1840, a supplemental petition was filed, setting forth the same facts, and containing the same allegations, except as to the sequestration, which has been already obtained, praying for judgment on the note, with a privilege or lien on the crop," etc. On these averments a judgment by default was taken upon the original and amended petitions, and subsequently the defendant filed an answer, one averment of which was to the effect that the suit was premature, and the sequestration without cause. But these defenses did not prevail, and judgment went against the defendant on his note and mortgage, recognizing and enforcing the plaintiff's lien on the crops sequestered.

In the instant case no mortgage is alleged, and neither the plaintiff's petition nor affidavit contains any averment that the defendant's intention was to remove the property on which he claims a privilege "out of the state, before his debt became due." The case of *Gardner v. Shipley*, 4 La. Ann. 184, was predicated upon allegations quite similar to those quoted from *Neilson v. Pool*, and therefore a similar exception of prematurity was urged, and with like results; and the court, in its opinion, said: "The argument presented by the opposite party is that the debt, being unmaturing, should not be sued for; and the right to a sequestration, being a mere accessory right, must follow the fate of the prin-

cial demand. The text of the law does not require, in terms, that the debt secured by the mortgage or privilege should have matured; [but] certainly its spirit is conservative, and, in our opinion, embraces the present case,"—citing with approval the case of *Nelson v. Pool*. But it is necessary, in order to sustain a writ of sequestration under the cited article of the Code, that its requirements be rigidly and closely pursued; for it was held in *Clark v. Glover*, 14 La. 286, that an affidavit stating that the plaintiff "fears [that] the defendant may remove the mortgaged stock out of the jurisdiction of the state" is insufficient to obtain an order of sequestration; that it "should state the facts which induce his apprehension." In that case the property sequestered was a slave, and "the alleged ground for obtaining this order was their apprehension that the slave would be removed out of the state;" and the sequestration was dissolved because of the insufficiency of the affidavit. The court adhered to the doctrine of the above-cited cases, and quoted them approvingly, in *Bres v. Booth*, 1 La. Ann. 307, and held that "to entitle a plaintiff to sequester mortgaged property, on the ground of his apprehension that it will be removed out of the state before he can have the benefit of his mortgage, he must make oath to the facts which induced his apprehension. It is not sufficient to swear that he apprehends the removal." Code Pr. art. 275, par. 6. It is evident that while maintaining writs of sequestration issued under the provisions of that particular paragraph, prior to the maturity of the debt, for the reason that such is believed by the court to be the spirit of the law, it intended to require of litigants the strictest adherence to the requirements thereof in procuring same, and not to extend that relief to any other class of cases arising under other provisions of that article, because the court was evidently not unmindful of the safe and conservative rule that has constantly been adhered to,—that a sequestration can only issue when a party is clearly entitled to it, and it is expressly allowed; that it is a harsh remedy, and not to be extended by implication to cases not contemplated by law. *Talamon v. Ytasse*, 4 Rob. (La.) 462; *Shropshire v. Russell*, 2 La. Ann. 961; *Beck v. Brady*, 6 La. Ann. 444; *Barrier v. Feste*, 9 La. Ann. 535; *Crawford v. Jones*, 2 La. Ann. 828; *Wilson v. Churchman*, 4 La. Ann. 452; *Pasley v. McConnell*, 37 La. Ann. 552. The rule announced in the foregoing cases was again recognized in *Catlett v. Heffner*, 23 La. Ann. 578, in which the court held that a sequestration may issue in accordance "with article 275, Code Pr., but the suit cannot be instituted before the maturity of the obligation." In that case suit was filed on the 26th of November, 1868, to enforce the collection of a note maturing on the 1st of January following. The petition alleged the existence of a mortgage to secure the debt, and the prayer of the petition

demanded the issuance of a sequestration at date of filing suit, and an absolute judgment for the amount of the debt. To this petition the defendant tendered the exception of prematurity, and moved to dissolve the writ of sequestration, but same were overruled. This court was of opinion that the plea of the prematurity should have been sustained, and the court said: "Because the plaintiff, under the state of facts contemplated by article 275, Code Pr., may sequester the mortgaged property to prevent its removal from the state 'before he can have the benefit of his mortgage,' whether the same be due or not due, does not give him greater rights than the mortgage gave or the debtors have consented he should have as to the time at which he may enforce payment." A like opinion was entertained in *Duncan v. Wise*, 39 La. Ann. 74, 6 South. 13. An attentive examination of adjudicated cases has not enabled us to discover one in which a writ of sequestration was permitted to stand, when issued prior to the maturity of the debt, in any other class of cases than the one mentioned in the cases cited, and then only on compliance with the requirements pointed out in the statute; and it is evident that the plaintiff has not brought his case within those requirements, the averments of his petition not definitely fixing the date his debt went to maturity, though his prayer is for an absolute, unconditional judgment; and there is no allegation that his debt was secured by mortgage, or that he apprehended that the property on which he has a privilege was about to be removed out of the state during the pendency of the suit. The case of *Warfield v. Oliver*, 23 La. Ann. 612, is relied upon as containing the proposition that the filing of a supplemental petition is the real commencement of the suit, and relates back to date of filing the original suit, and will maintain a writ of sequestration in statu quo, notwithstanding the original petition be dismissed on an exception as premature. That case is not, however, in point, because the suit was brought upon a series of notes for rent, a part of which were due, and a part not due; and the defendant's exception was directed at those not due, and the same was only to that extent sustained. Consequently the writ was not dissolved as to the notes that were already due at time suit was filed; but in the instant case suit was brought on a single note, which was not due, although absolute judgment is demanded on it. This allegation and accompanying prayer rendered defendant's exception necessary, and caused the dismissal of the suit in its entirety. That such is the fate of a suit prematurely filed is attested by the opinion of our predecessors in *State v. Judge*, 31 La. Ann. 120. The case of *Catlett v. Heffner*, 23 La. Ann. 577, is somewhat similar to the *Warfield Case*, though instituted upon a single note not due, and secured by a special mortgage, thus relegating it to the exceptional class above men-

tioned. In that case the exception of prematurity was sustained, the suit dismissed, and the sequestration dissolved. In the case of *Barriere v. Feste*, 9 La. Ann. 535, a sequestration was obtained of goods on which the plaintiff's claimed a vendor's lien, but no mortgage, the suit being founded on two notes thereafter to become due. To this suit and sequestration the defendant excepted, "on the ground that no case had been made by the pleadings and affidavits to authorize such remedy, and they also excepted on the ground of its prematurity." The exceptions were sustained, the suit dismissed, and the sequestration dissolved. On appeal to this court the judgment of the district court was affirmed, the court simply stating that "the district court took a correct view of all the questions raised by the appellants." That case is exactly in point. Like the instant one, it was brought on notes not due, and secured by a vendor's lien. Upon the defendant's exception of prematurity, the suit was dismissed, and the sequestration dissolved. This is the same exception and relief that is demanded on the part of the defendant. The two cases—that of *Barriere* and the instant one—are exactly parallel. After diligent search, we have been unable to find any decision of this court wherein that case has been overruled or a contrary doctrine maintained.

But while there seems to be no escape from the conclusion that the defendant's exception was well taken, and should, in keeping with our jurisprudence, be maintained in toto, yet, without pledging this court unalterably to this view, we are of opinion that we may safely place our decision upon a different footing, equally as fatal to the plaintiff's sequestration. It is that the plaintiff made no oath to his supplemental petition, procured no additional order, and obtained no new writ of sequestration. On the authority of *Lemann v. Truxillo*, 32 La. Ann. 65, an affidavit accompanying a supplemental petition is a *sine qua non* to the maintenance of a writ of sequestration issued under the original petition, and for the preservation of the status quo after the dismissal of the original petition; for "the supplemental petition," say the court, "set up the new and important fact that some \$400 more were due plaintiff than the amount claimed in the original petition. These petitions should therefore have been sworn to, new orders and new writs granted under them." Inasmuch as no affidavit was made to the supplemental petition, the sequestration was dissolved. The same view was entertained and enforced in *Gumbel v. Beer*, 36 La. Ann. 487,—a case of sequestration in the enforcement of a vendor's lien securing a debt past due. In the last case there was an affidavit accompanying the supplemental petition, but no new order was obtained, and the court held that it was unavailing and superfluous. In the instant case the supplemental petition simply alleges the fact of the debt

sued upon having reached maturity since the suit was filed, entitling the plaintiff to judgment. This averment was of far greater importance to the plaintiff than that of the supplemental petition in the *Lemann Case*, claiming only an additional sum of \$400; but it was not accompanied by any new or additional affidavit, order, or writ, and no averment is made of the continued existence of the causes for which the original writ was issued. Considering the well-grounded and ancient rule of our jurisprudence that sequestration is a harsh remedy, and must be construed and determined by the condition of things existing at date of issuance, the conviction is clear that the writ issued in the instant case must be dissolved at plaintiff's costs, for the reason that the plaintiff has failed to observe some of the essential requisites for its maintenance.

2. But, in any event, we regard the defendant's exception to the supplemental petition good, same being that it changed the substance of his original demand by alleging that the note sued on had become due since the institution of the suit, whereas the demand of his original suit was predicated upon an obligation as already due, and upon which demand prayer was made for an unconditional judgment. In *Bank v. Moss*, 41 La. Ann. 232, 6 South. 25, a case of attachment on a debt not due is presented, and to which the defendant tendered an exception of prematurity. Pending the trial of the exception, the plaintiff tendered and caused to be filed a supplemental petition, setting out the fact, as alleged in the supplemental petition in the instant case, of the debt having become due since the suit was filed. Of this suit and exception the court say: "The motion to dissolve was filed on the 8th of November, 1887, and plaintiff's right to its attachment was therefore at issue when the amended petition was filed. It then follows that it cannot be considered if it contains any substantial averment on the issue of the attachment which was not to be found in the original petition. By referring to the latter, it will appear that neither of the drafts had matured at the date of attachment or of the filing of the petition, while in the amended petition it is distinctly alleged that all four of the drafts had matured. * * * The state of things thus disclosed is as widely different from the position contained in the original pleadings as light differs from darkness. In other words, everything which, under law and jurisprudence, was lacking to justify the proceedings by attachment in the original pleadings, is supplied by the lapse of time and by the happening of subsequent events, through the proposed amended petition. * * * From the very nature of things, the events and proceedings therein described would not have a retroactive effect, so as to make it appear, on the 23d of September, that maturities to occur in October and November and December, following, had already taken

place. To argue against the allowance of such amended pleadings, under the restricted issue to be herein discussed, is, after all, labor to prove a self-evident proposition. *Hart v. Bowie*, 34 La. Ann. 325." On the theory of that opinion, there can be no doubt of the supplemental petition in the instant case changing the substance of the demand in the original petition, for the stronger reason that the debt is alleged to be due in the original petition, and absolute judgment is prayed for while in the supplemental petition the allegation is made that the debt became due since the filing of the suit; the two substantial and necessary allegations being in conflict. Hence the defendant's exception to the supplemental petition was well grounded, and should have been sustained.

A very careful consideration of this case in all of its bearings has led us to the following conclusions, viz.: First, that it is more than doubtful whether in this class of cases a sequestration is at all permissible antecedent to the maturity of the debt; second, that conceding arguendo that the dismissal of an original petition does not necessarily dissolve the sequestration, and that the status quo of a seizure under it may be saved by a supplemental petition subsequently filed, yet, in order that same may be rendered efficacious, it must be sworn to; third, that, in case the original suit and sequestration have proceeded on the theory that the debt is due at time of filing, a supplemental petition, alleging the new and substantial fact that the debt has become due since the suit was filed, changes the substance of the original demand in an important particular. Being satisfied of these propositions, the plaintiff's sequestration cannot stand; the supplemental petition must be dismissed. It is therefore ordered and decreed that the judgment appealed from be reversed, and it is further ordered that the plaintiff's suit and sequestration be dismissed, at his costs in both courts.

(33 Fla. 661)

EVERETT et al. v. STATE.

(Supreme Court of Florida. May 22, 1894.)

INDICTMENT — ALLEGATIONS AS TO ONE AIDING AND ABETTING—COMPETENCY OF WIFE AS WITNESS.

1. A joint indictment against two persons, charging by proper averments the commission of crime by the one, and that the other was present, aiding, abetting, and assisting in the commission of the said crime, is sufficient as to the latter without repeating in the allegations as to him the acts that constitute the crime charged.

2. Section 1094, Rev. St., as adopted and now in the office of the secretary of state, contained the following provision, viz.: "Married persons shall be competent witnesses for or against each other in civil cases wherein either of them is a party and is allowed to testify." This provision was not in the Revised Statutes as published, but in the construction of said statutes, in connection with the legislation of 1891, such provision must be considered as a part of said revision.

3. Chapter 4029, Acts 1891, on the subject of married persons testifying in civil cases, not only includes the provisions of section 1094, as contained in the Revised Statutes as adopted, but is more extensive as to permitting such persons to testify in such cases; and, according to the rule of construction prescribed by the legislature in section 1, c. 4055, Acts 1891, must be regarded as superseding said section 1094 when the Revised Statutes went into effect.

4. Chapter 4029, Acts 1891, providing that in the trial of civil actions neither husband nor wife shall be excluded as witnesses where either of them is an interested party to the suit pending, and section 2863, Rev. St., that "the provisions of law relative to competency of witnesses in civil cases shall obtain also in criminal cases," do not conflict with each other, and should be construed in harmony as parts of one and the same body of statutory law enacted by the same legislative body at the same session.

5. Under chapter 4029, Acts 1891, and section 2863, Rev. St., the rule as to the competency of husband and wife to testify for or against each other in civil cases will apply also to criminal trials. As to the application of said rule between husband and wife in civil cases to criminal trials, *Raney, C. J.*, dissented. (Syllabus by the Court.)

Error to circuit court, Alachua county; *W. A. Hocker, Judge.*

William H. Everett and *Madison Everett* were convicted of murder, and bring error. Affirmed.

R. W. & W. M. Davis, for plaintiff in error.
W. B. Lamar, Atty. Gen., for the State.

MABRY, J. The plaintiffs in error were jointly indicted in May, A. D. 1893, for the murder of *J. Fletcher Tillman*, and, after arraignment and trial, *William H. Everett* was convicted of murder in the first degree, and recommended to the mercy of the court, and *Madison Everett* was convicted of murder in the third degree.

William H. is indicted as principal in the first degree, and *Madison* as being feloniously present, aiding, inciting, abetting, and assisting the commission of the murder.

One of the assignments of error here is that "the court erred in admitting, over the objections of the defendants' counsel, any testimony against *Madison Everett* under the indictment, he being charged as principal by being feloniously present, aiding, abetting, inciting, and assisting, it not being charged or alleged how he aided, abetted, incited, and assisted." After the usual formal allegations in indictments for murder, the one here charges that *William H. Everett* and *Madison Everett*, on a certain day and year, in the county and circuit mentioned, "with force and arms, at and in the county of Alachua aforesaid, did, without authority of law, willfully, feloniously, of their malice aforethought, and from a premeditated design to effect the death of one *J. Fletcher Tillman*, make an assault upon the said *J. Fletcher Tillman*, and a certain pistol which then and there was loaded with gunpowder and leaden bullets, and by him, the said *William H. Everett*, had and held in his

hand, he, the said William H. Everett, did then and there unlawfully, willfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said J. Fletcher Tillman, shoot off and discharge at and upon the said J. Fletcher Tillman, thereby, and by thus striking the said J. Fletcher Tillman with two of the leaden bullets aforesaid, inflicting on and in the head of him the said J. Fletcher Tillman, two mortal wounds, of which said two mortal wounds the said J. Fletcher Tillman then and there instantly died; and that the said Madison Everett, at the time and place of the commission of the said murder and felony aforesaid, was feloniously present, then and there aiding, inciting, abetting, and assisting the said William H. Everett the said murder and felony to do and commit; and so the said William H. Everett and the said Madison Everett did, in manner and form aforesaid, without authority of law, willfully, feloniously, of their malice aforethought, and from a premeditated design to effect the death of the said J. Fletcher Tillman, kill and murder the said J. Fletcher Tillman." No attack was made on the indictment before trial, and the objection urged, under the assignment of error mentioned, is not to any designated part of the evidence introduced by the state against Madison Everett, but it is contended that no testimony of any kind should have been admitted against him, because the indictment does not allege how he aided, abetted, incited, and assisted in the commission of the offense. The manner in which the killing was effected by William H. Everett, it will be seen from the part of the indictment copied, is alleged, and Madison Everett, it is charged, was feloniously present, aiding, assisting, and abetting in the commission of the felony. The defendant Madison Everett pleaded to this indictment, and went to trial on it, and we think it is entirely sufficient to authorize the admission against him of all competent evidence bearing on the case.

Another assignment of error discussed by counsel for plaintiffs in error is that "the court erred in allowing the wife of William H. Everett, defendant, to testify against him." After the testimony for the state in chief had been introduced, and the defendants had made voluntary statements in their behalf to the jury, Mrs. Ellen Everett, wife of the defendant William H. Everett, was called as a witness on the part of the state to testify in rebuttal of the statement made by her husband. An objection was made by defendant that she was not a competent witness, and, this objection being overruled, an exception was duly noted. It appears that for several months before the deceased was killed, and up to the time of the trial, William H. Everett and his wife had lived separate and apart from each other, and this separation, according to his statement before

the jury, was brought about by reason of improper relations between his wife and the deceased. The defendant William H. Everett stated that his wife had made to him certain admissions and confessions of such improper relations, and Mrs. Everett was permitted in her testimony to contradict her husband's statement in the particulars mentioned. The exception taken and urged here is confined entirely to the competency of the wife to testify at all in the case. Acts 1891, c. 4029 (page 968, Append. to Rev. St.), provides "that an act entitled 'An act to allow married women to testify in all civil cases where their husbands are parties and not disqualified,' the same being chapter 3124 of the Laws of Florida, approved March 7th, 1879, be amended so as to read as follows: 'Section 1. That in the trial of civil actions in this state, neither the husband nor the wife shall be excluded as witnesses where either the said husband or wife is an interested party to the suit pending. Sec. 2. That all laws or parts of laws in conflict with this act be and the same are hereby repealed.'" Section 2863 of the Revised Statutes reads as follows: "The provisions of law relative to the competency of witnesses in civil cases shall obtain also in criminal cases." For plaintiffs in error it is contended that Acts 1891, c. 4029, is not in force, for the reason that it is an amendment of chapter 3124, Acts 1879, and that this latter act was entirely omitted from the revision of the statutes submitted to the legislature. It is provided in the latter part of the first section of the act of 1891 adopting the Revised Statutes, c. 4055, that "statutes passed at this session of the legislature shall not be repealed or affected by said revision, but shall have full effect as if passed after the enactment of said revision, except those acts passed at this session which are amendatory of laws omitted from the said revision." Counsel insist that chapter 4029 is amendatory of law omitted from the revision, and is therefore expressly repealed by the latter when it went into effect. This contention is based upon a mistaken view of the provisions contained in the Revised Statutes submitted by the commissioners and enacted by the legislature in reference to the subject-matter of chapter 4029, Acts 1891. By referring to the Revised Statutes that accompanied the bill adopting them, and now in the office of the secretary of state, we find that section 1094, as therein arranged, reads as follows, viz.: "Married persons shall be competent witnesses for or against each other in civil cases wherein either of them is a party and is allowed to testify." This provision we do not find in the Revised Statutes as published, and its omission may be accounted for on the theory that the commissioners considered it repealed or superseded by chapter 4029, Acts 1891, as reference is made to this act under the number of the section mentioned. The facts stated make it entirely clear that the act of 1891 referred to cannot be considered

as repealed because it was amendatory of laws omitted from the revision. Section 1094 of the Revised Statutes as adopted was, it is evident, a revision and an enlargement of the act of 1879, c. 3124, and the provisions of this act were still further extended by the act of 1891 so as to make both husband and wife competent witnesses in civil cases where either is an interested party to the suit pending. The history of the legislation in this state on the subject of husband and wife testifying in civil cases, up to the passage of the act of 1891, and the construction of such legislation by this court, will be found in the cases of *McGill v. McGill*, 19 Fla. 341; *Schnabel v. Betts*, 23 Fla. 178, 1 South. 692; *Storrs v. Storrs*, 23 Fla. 274, 2 South. 368; *Haworth v. Norris*, 28 Fla. 763, 10 South. 18; *Railway Co. v. Lockwood* (decided at this term) 15 South. 327.

It was held under the act of 1879, which provided that, in the trial of civil actions in this state, married women shall not be excluded as witnesses in cases wherein their husbands are parties and allowed to testify, that the wife could testify in civil cases wherein her husband was a party and allowed to testify, but the like privilege had not been extended to the husband where the wife was a party and could testify. But Acts 1891, c. 4029, removes the disability of husband and wife to testify in civil cases to an extent far beyond both the act of 1879 and the provisions of section 1094 of the Revised Statutes as adopted. They shall not be excluded, under the act mentioned, as witnesses in civil actions where either is an interested party to the suit pending, and the right to testify here given is not dependent upon the fact that either does testify, or is allowed to testify, but where either is a party to the suit pending. If the provisions of this act are to obtain in the trial of criminal cases there can be no question about the right of the wife to testify in the case now before us. But does chapter 4029, Acts 1891, obtain also in criminal cases? The determination of this question involves a construction of both the said act of 1891 and section 2863 of the Revised Statutes. In the division of the Revised Statutes in reference to the organization and proceedings of civil courts, and under the head of "Competency of Witnesses," we find that section 1094 deals with the competency of witnesses as affected by marriage, section 1095 deals with them as affected by interest, and sections 1096 and 1097 deals with them as affected by crime. These sections contain special provisions in reference to the competency of witnesses in civil cases, and, when considered alone, confine themselves expressly to civil cases. There are no special provisions in the Revised Statutes in reference to the competency of witnesses in criminal proceedings as in civil cases, but section 2863, under the criminal division, provides in general terms that "the provisions of law rela-

tive to the competency of witnesses in civil cases shall obtain also in criminal cases." It is evident that the purpose as disclosed by the Revised Statutes was to make the competency of witnesses the same in both civil and criminal cases, and that section 2863 was intended to accomplish this general purpose. It is true that the extension of the provisions of section 1094 to the trial of criminal cases would not make the wife a competent witness for or against her husband in such cases, because she was thereby only authorized to testify when her husband was a party and allowed to testify. But this section, although a part of the Revised Statutes as adopted, never became operative as law. Acts 1891, c. 4029, occupied all of its space and more, and the act adopting the revision expressly provides that statutes passed at that session not amendatory of laws omitted from the revision shall not be repealed or affected by it, but shall have full effect as if passed after its enactment. In construing chapter 4029, then, in so far as it is affected by any provision in the Revised Statutes, we must consider it as passed after the revision took effect, although in point of time it became law first. So construing the act of 1891, section 1094, as incorporated into the revision, could never become operative as law, and we must accept the rule established in said act as the law on the subject of the competency of husband and wife to testify for or against each other in civil cases. In construing section 2863 in connection with the legislation of 1891, the same rule of construction requires that, if any conflict be found to exist between them, the former must yield to the latter as being the latest expression of the legislative will on the subject. We do not perceive, however, any conflict in the provisions of the section mentioned and chapter 4029, Acts 1891, as both can exist together without any curtailment or limitation of the provisions of either. The section referred to does not undertake to prescribe in any particular the competency of witnesses in civil cases, but provides in general terms that the provisions of law relative to the competency of witnesses in such cases shall obtain also in criminal cases. If there had been no general revision of the statutes in 1891, and the legislature had by a separate act enacted the provisions contained in section 2863, and on a subsequent day of the session amended the law so that husband and wife could testify in civil cases where either was a party to the suit pending, both provisions would have to be construed together, and would have the effect to make the rule of competency as to husband and wife the same in both civil and criminal cases. The fact that the amendatory act in terms related to the law fixing the competency of certain witnesses in civil cases would not of itself limit the full effect of the other provision passed at the same session extending all the provisions of law as

to the competency of witnesses in civil cases also to criminal trials.

The first session of the territorial legislature of Florida in 1822 passed an act regulating descents, and in 1828 an act was passed for the distribution of personal property. The last-mentioned act provided that, after all debts and legacies had been paid, the personal property in the hands of an administrator or executor should be distributed according to the provisions of the law regulating descents. At the following session, held in 1829, a new act regulating descents was passed embodying substantially the provisions of the former one on the subject, but containing additional provisions. It was held in *Jones v. Dexter*, 8 Fla. 276, that the act of 1828 which adopted the provisions of the law regulating descents as furnishing the rule for the distribution of personal property was intended to refer to any law of descents which might be in force at the time the right to the distribution became vested. This rule of construction, applied to the act of 1828 in the case mentioned, was not disapproved in the subsequent case of *Bushnell v. Dennison*, 13 Fla. 77, though the former case was disapproved in other respects. This rule of construction need not be carried so far here. The provision of section 2863 is general, its purpose being, as we have stated, to make the competency of witnesses the same in both civil and criminal cases, and its natural and reasonable construction would embrace all the provisions of law existing, certainly, when it went into effect in reference to the competency of witnesses in civil cases. It is conceded, of course, that the legislature of 1891, in amending the law as to the competency of husband and wife to testify for or against each other in civil cases, could limit their right to testify to such cases. The question before us is, has this been done by chapter 4029? and we must determine it by the rules of legal construction. When the act of 1891, enlarging the competency of husband and wife to testify in civil cases, was passed, there was no general provision of law then in force making the competency of witnesses the same in both cases, but the Revised Statutes enacted at the same session, to take effect as soon as they could be printed, and promulgated, did contain such a provision as we find in section 2863. We must assume, of course, that the legislature knew of and understood the provisions of this section when chapter 4029 was enacted. Both of these provisions had their origin in the same legislative body, as there never was, before the Revised Statutes were adopted, any general enactment making the competency of witnesses the same in both civil and criminal cases, and no legislation, prior to 1891, had, to such an extent, enlarged the competency of husband and wife to testify for or against each other in civil cases. If these two provisions conflicted with each other, we would have to consider the act of 1891 as having

been passed last, and give to it such consideration as it would be entitled to from that fact. But, as they do not conflict, it seems to us that they should be construed in harmony with each other as parts of one and the same body of statutory law, enacted by the same legislative body at the same session. We must assume that they were both in the legislative mind at the same time, and there are evidences of a purpose on the part of the legislature to have the statutes passed in 1891 considered in harmony with and as forming a part of the general system of revision and consolidation of the public statutes then adopted, and to take effect as soon as they could be printed and promulgated. The absorbing subject of legislation at that session was the revision and consolidation of the statutes of a general nature in force in this state into one harmonious body of statutory law. The legislature of 1889 had provided for an entire revision, consolidation, and arrangement of all the statutes of a general nature in force in the state into the form of one act with suitable divisions and headings, and the work as provided for was before the session of 1891 for adoption. The revision submitted, with certain omissions, alterations, and additions from, of, and to the same, was declared to be statute law under the title of "The Revised Statutes of the State of Florida," and to go into effect on the thirtieth day after the date of the governor's proclamation announcing the publication of the same. The adopting act expressly repealed every statute of a general and permanent nature enacted by the state of Florida or by the territory of Florida, not included in the revision, or recognized and continued in force by reference therein. And then, in the provision saving the legislation of 1891 from repeal by the revision when it should take effect, there is an exception as to statutes amendatory of laws omitted from the revision. The laws or statutes not contained in the revision had been expressly repealed, and declared, in effect, to form no part of the system of statutory law as therein arranged, and hence any amendment of the omitted statutes might be entirely out of harmony with the revision. We further find that the commissioners who prepared the revision were directed to have printed, under their supervision, along with the Revised Statutes, "an appendix containing the acts of the present session (1891) of the legislature which are general and permanent in their nature, rejecting superfluous verbiage and reducing them to concise form, with head lines according to the form of the said Revised Statutes." Although the adopting act says that statutes passed at that session, and not amendatory of laws omitted from the revision, shall not be repealed or affected thereby, but shall have full effect as if passed thereafter, it was not intended, we think, that such statutes, when not in conflict with the revision, should be construed as entirely separate and

independent legislation. In such case we are to look upon the revision and the acts of 1891 as the product of the same legislative mind, and designed to go together in the accomplishment of any clear purpose expressed in either. They should have the same effect upon each other as statutes passed at the same session. As before stated, we must assume that the legislature fully comprehended the provision of section 2863, and knew it would soon take effect when chapter 4029 was passed, and, as both can be given full effect and stand in harmony with each other, it seems to us that this is the proper way to construe them. Potter, Dwar. St. pp. 189, 190. Applying this rule of construction to section 2863, in connection with chapter 4029, Acts 1891, the rule as to the competency of husband and wife to testify for or against each other in civil cases, as well as to the competency of witnesses in other civil cases, will apply also to criminal trials. Such, we think, is the effect of the legislation on the subject, and we cannot say that the legislature did not intend such a result. From this it follows that the circuit judge did not err in permitting Mrs. Everett to testify in the case. It may be observed that the relation of husband and wife was always an additional disability to testify for or against each other in any case, and that the removal of the disability of interest would not of itself permit them to testify for or against each other.

It is also argued here by counsel for plaintiffs in error that the testimony does not sustain the conviction against either of them. This contention cannot be sustained on this record. An examination of it leaves no room for doubt as to its sufficiency to sustain the verdict.

There are many other assignments of error here, but they are not alluded to in the brief of counsel for plaintiffs in error, and hence are abandoned.

The judgment is affirmed, and an order will be entered accordingly.

RANEY, C. J. (dissenting). I am unable to concur in the conclusion of the majority of the court as to the competency of the wife of William H. Everett to testify against her husband.

The Revised Statutes, as the same were adopted by the legislature, contained the following provisions:

"Sec. 1004. Married persons shall be competent witnesses for or against each other in civil cases wherein either of them is a party and is allowed to testify." See original in the office of the secretary of state.

"Sec. 1005. No person in any court or before any officer acting judicially shall be excluded from testifying as a witness by reason of his interest in the event of the action or because he is a party thereto." There are certain limitations as to an interested party testifying concerning transactions or commu-

nications with deceased persons, which it is not necessary to be noticed here.

The above provisions are under the head, "Competency of Witnesses," in chapter 15 of the second division of the revision, which division is entitled, "Second Division. Of Civil Courts. Their Organization and Proceedings Therein."

In the fifth division, entitled, "Crimes and Procedure," chapter 7, entitled, "Witness," it is provided: "Sec. 2863. The provisions of law relative to the competency of witnesses in civil cases shall obtain also in criminal cases."

In the same division is: "Sec. 2908. In all criminal prosecutions the accused shall have the right of making a statement to the jury, under oath, of the matter of his defense or her defense."

The act approved June 8, 1891, c. 4055, adopting the Revised Statutes, with specified omissions from, alterations of, and additions thereto, and providing for such revision to become operative on the thirtieth day after the governor's proclamation announcing the publication thereof, repeals every statute of a general and permanent nature in so far as the same, or any part thereof, is not included in such revision, or recognized and continued in force by reference therein. This adopting statute also enacts as follows: Statutes passed at this session of the legislature shall not be repealed or affected by said revision, but shall have full effect as if passed after the enactment of said revision, except those acts passed at this session which are amendatory of laws omitted from the said revision.

Among the acts passed at the mentioned session of the legislature is chapter 4029, approved June 4, 1891, entitled, "An act to amend chapter 3124 of the Laws of Florida, so as to authorize both husband and wife to testify in civil actions in which either may be interested." It amends the act referred to, and more fully designated in its body, so that it shall be read as follows: "That in the trial of civil actions in this state neither the husband nor the wife shall be excluded as witnesses where either the said husband or wife is an interested party to the suit pending."

The act so amended (chapter 3124), approved March 7, 1879, reads as follows: "In the trial of civil actions in this state married women shall not be excluded as witnesses in cases wherein their husbands are parties and allowed to testify."

Another act passed in 1891 was chapter 4036, approved June 5, 1891, to the effect that atheists, agnostics, and all persons who do not believe in the doctrine of future rewards and punishments, shall be permitted to testify in any of the courts of this state; and they may solemnly affirm instead of taking an oath, and false testimony by said persons shall be perjury as in cases of other witnesses, and shall be punished as now provided by law.

The question for decision is whether or not a wife is a competent witness against her husband on the trial of the latter upon a criminal charge. In treating this question, we are to concede that the legislature of 1891, when enacting the adopting act (chapter 4055, *supra*), was familiar with each and every provision of the Revised Statutes. It knew, of course, that in adopting the revision it was enacting a system of laws which, as such system or revision, would not become operative until the commissioners should, "as soon as possible after the adjournment of the legislature, amend the Revised Statutes as submitted by them so as to incorporate with the body of the text the amendments made by this act" (chapter 4055), and prefix indexed copies of the constitutions of the United States and the state, and of the sections of chapter 4055 adopting such revision, and add an appendix containing the acts of the session of 1891 of a general and permanent nature, and the same should be printed under the supervision of such commissioners; nor until the thirtieth day after an executive proclamation announcing such publication had been issued (sections 2, 9, 10, c. 4055). Providing, as it did in the first section of the adopting act, that every statute of a general and permanent nature enacted by the state or territory, and every part of such statute not included in such revision, or recognized and continued in force by reference therein, should be repealed by such revision when it became operative, which provision referred to statutes passed prior to the then-existing session of the legislature, the lawmaking power found it necessary to form and declare its will as to the effect which the Revised Statutes should, when they came into effect, have upon the legislation of the session of 1891. The expression of this will is to be found in the last clause of the first of the preceding paragraphs in which the adopting act (chapter 4055) is mentioned. The meaning of this clause, omitting its exception as irrelevant here, is the same as if it were expressed as follows: "Statutes passed at this session of the legislature shall not be repealed or affected by the revision upon its becoming operative, but shall have full effect as if passed after such revision had become operative." The revision could have no effect upon other laws until it became operative. *Sammis v. Bennett*, 32 Fla. 458, 14 South. 90. The purpose of the legislature, then, was that the act of June 4, 1891, c. 4029, should not be repealed or affected by the Revised Statutes upon their becoming operative, but have full effect as if passed after they had become operative. In other words, as between the Revised Statutes and the last-mentioned act, the latter is to be taken as the latest expression of the legislative will upon the subject to which it related, and is to control any contrary expression to be found on the same subject in

the revision. What is the expression on the subject of husband and wife testifying for or against each other, to be found in the revision? It is that to be found in sections 1094 and 2863, *supra*. The former of these sections is that married persons shall be competent witnesses for or against each other in civil cases wherein either of them is a party and allowed to testify. The latter section, providing that the provisions of law relative to the competency of witnesses in civil cases shall obtain also in criminal cases, was not intended to render the wife or husband a competent witness in a criminal cause to which the other was a party, and for the reason that a defendant in a criminal case was not "allowed to testify," within the meaning of this expression as used in section 1094; but the purpose of the revision was that such defendant should have only the right to make a statement under section 2908, *supra*. *Steele v. State*, 33 Fla. 348, 354, 14 South. 841. Section 1094 did not of itself, or with the aid of section 2863, or of any other part of the revision, confer any competency on the husband or wife as witnesses in criminal cases. Treating the revision as existing law at the time of the enactment of the statute of 1891, as we must do to ascertain the legislative intent, we find that it did not authorize the wife to testify against the husband in criminal cases. What, then, is the effect of the statute of June 4, 1891, *supra*, enacting that in the trial of civil actions in this state neither the husband nor the wife shall be excluded as witnesses where either the said husband or wife is an interested party to the suit pending? With reference to the legislative intention, it is to be viewed in two aspects. As an amendment of the act of 1879, c. 3124, *supra*, to operate until the Revised Statutes should become of force, it was to extend to the husband the same competency as to the wife, and relieve the competency of both from the limitation to which the act of 1879 subjected the wife's competency, *viz.* that the one who was a party or interested in the suit must be competent to testify (*Haworth v. Norris*, 28 Fla. 763, 10 South. 18); but of course, and as is apparent from the terms of the act of 1879, the intent to confine such increased and extended competency to civil cases is unquestionable. As the expression of the legislative intent in connection with the Revised Statutes when they should become operative, it shows no other purpose than to modify section 1094 by removing the limitation of the one who is a party to the civil case being allowed to testify. As a subsequent expression of legislative will, it is confined expressly to civil cases, and thereby purposely excludes criminal cases. Section 2863 did not extend section 1094 to criminal cases, and the statute in question (chapter 4029, viewed with reference to its effect upon the Revised Statutes, must be construed upon the assumption that the legis-

lature was cognizant of this feature of the revision. Knowing that, under the revision as it was framed and was to be printed, the husband and wife could not be witnesses for or against each other in criminal cases, the act last mentioned shows an express intent to confine its provisions to civil cases, and precludes the inference that section 2863 should extend its provisions to criminal cases. Its purpose was to confine it to civil cases, notwithstanding section 2863. It has so declared, and such declaration is a limitation on section 2863, as well as a preservation of the like limitation of section 1094. Section 2863 is, of course, not a limitation on legislative power to so limit its effect. It was not the intention of the legislature that chapter 4029 should be published as a part of the revision, or as a substitute for section 1094; nor is the last-named section one of those which were omitted, changed, or added to by the adopting act, but it is one which was retained in the compilation as reported, and was as much a part of the revision, when viewed in connection with the effect of chapter 4029, as any other section of that compilation, and, though it never became law in fact, it was as much within the contemplation of the legislature when it passed chapter 4029 as was section 2863, or any other part of the revision. Chapter 4029 was enacted in so far as it was to affect the revision with a view to the effect of that revision, with section 1094 as a part of it, and not simply with reference to section 2863; and its sole purpose as to the revision was to remove in civil cases the limitation to competency which was implied by the words "and is allowed to testify." The intent to extend the competency of the wife or husband as witnesses for or against each other to criminal cases is excluded by the terms of the act of 1891. It is true that section 1094 never became law, but it is no less true that it is a part of the revision as acted upon by the legislature in enacting Acts 1891, chapter 4055. This is clearly shown by the provisions of sections 5, 6, and 7, the one for omissions, the second for alterations, and the third for additions, to be made from, of, and to the revision as it was presented by the commissioners, and by sections 9 and 10, providing that the revision, as thus changed, and not otherwise, should be printed as the Revised Statutes. It was as much the subject of their action as if it had become law, and the act of 1891 had been subsequently enacted. The omission of section 1094 from the publication may be attributed to the fact that the compilers thought it would be of no further practical use, as it never became law. But they have not substituted chapter 4029 in its place, for the reason that it was not enacted as such, and is not to be found in the adopting act. Section 1094, as it remained in the revision after the passage of the adopting act, is an essential part of the Revised Statutes as the subject upon

which chapter 4029 was to act and was enacted with reference to; and the Revised Statutes, as containing sections 1094 and 2863, are to be regarded in ascertaining the effect of chapter 4029 upon such revision and the intent of the legislature in enacting such chapter, the same as if the revision had been in force at the time of enactment of such act of 1891. The intent of the legislature to confine this to civil cases is further shown by a consideration of chapter 4036, supra, which also was passed in 1891. In it there is no limitation to civil cases, and, as an expression of the legislative will, it acted upon the provisions of the revision as to witnesses in both civil and criminal cases; but had it contained, as does the other act of the same year, the words "in the trial of civil actions;" there would be no doubt that it would not include criminal cases. It, like chapter 4029, was not intended as a part of the revision, but as a subsequent law enacted with reference to the revision, as if the latter had been existing law.

For these reasons, and without expressing an opinion on any other point involved in the case, except to concur as to the sufficiency of the indictment, I think the judgment of the circuit court should be reversed on account of having permitted the wife of the plaintiff in error William H. Everett to testify against him.

(33 Fla. 715)

HODGES v. COOKSEY.

(Supreme Court of Florida. May 31, 1894.)

LANDLORD AND TENANT—EXEMPTIONS—LIEN FOR RENT.

1. The relation of landlord and tenant existed between the parties appellant and appellee, as shown by the record in this case.

2. The constitutional exemption of personal property to the head of a family residing in this state cannot be claimed by a tenant as against the lien for rent in favor of the landlord on any of the agricultural products raised on the land rented. The land in such a case is regarded as such a factor in the production of the crops as to subordinate the title of the tenant thereto to the superior lien given by statute for the use of the premises.

3. The statutory remedy for the enforcement of a claim for rent is embraced within the terms "any process of law," contained in the exemption article of the constitution of 1868; and the personal property exemption secured by that instrument, other than agricultural products raised on the land rented, may be claimed by the head of a family residing in this state, as against the lien for rent given by statute in favor of the landlord.

(Syllabus by the Court.)

Appeal from circuit court, Bradford county; James M. Baker, Judge.

Bill by A. G. Cooksey against Mary E. Hodges for an injunction. From an order refusing to dissolve the injunction, defendant appeals. Affirmed.

King & King, for appellant. Thos. M. Bugg and L. B. Rhodes, for appellee.

MABRY, J. Appellee filed a bill in chancery against appellant and the sheriff of Bradford county to enjoin the sale of personal property levied on by virtue of a distress warrant to collect rent alleged to be due appellant. The injunction prayed for in the bill was granted, to continue in force until the further order of the court; and, after answer filed, a motion was made to dissolve the injunction on bill and answer. The motion to dissolve the injunction was overruled, and from this ruling the respondent, Mary E. Hodges, appealed.

The bill contains many allegations of matters of which a court of chancery has no jurisdiction, and we do not deem it necessary to set them out in this opinion. As no objection was made to the sufficiency of the pleadings, we will consider no allegations therein except those relating to appellee's right of exemption in and to the property seized under the distress proceedings. The theory of the bill is that the complainant (appellee here) is entitled to the constitutional exemption of \$1,000 worth of personal property out of the property seized under the distress warrant. Chapter 3246, Laws 1881, confers upon the circuit courts "equity jurisdiction to enjoin the sale of all property, real and personal, that is exempt from forced sale under the constitution and laws of the state of Florida;" and such matters in the case before us as relate to the claim and right of appellee to hold as exempt from such forced sale the property, or any part of it, levied on by the sheriff, come properly within the jurisdiction of the court of chancery.

The relation between appellant and appellee, as shown by the written contract between them, a copy of which is attached to the bill, and not questioned by the answer, was, we think, that of landlord and tenant. The lease of the premises therein described was for five years, beginning on the 1st day of January, 1885, at a yearly rental of \$600, evidenced by five promissory notes, due, respectively, January 1, 1886, January 1, 1887, January 1, 1888, January 1, 1889, and January 1, 1890; and the claim for rent alleged to be due under this lease on the 10th day of October, 1889, when the distress warrant was issued, was \$1,446.22. The property levied on under the warrant consisted of horses, mules, cattle, hogs, wagons, cart, buggy, and harness, farming implements, corn, fodder, and cotton, gathered and ungathered, a steam sawmill and machinery attached, a gristmill, cotton gins, and a cotton press, a lot of sawed lumber, and a stock of merchandise consisting of dry goods, groceries, and medicines. All of the property levied upon was found on the leased premises, except about thirty-three head of cattle, one wagon, and one cart, and this part of the property was found on another place. Appellee was the head of a family, residing in this state, and claims that he is entitled to hold \$1,000 worth of the property levied on exempt from sale

under the distress proceedings; and this is the only question we need consider in determining the correctness of the court's ruling in refusing to dissolve the injunction.

Claims for rent under section 1, c. 3131, Acts 1879, are declared to be a lien on all agricultural products raised on the land rented superior to all other liens and claims, though of older date, and also a lien on all other property of the lessee or his sublessee or assigns usually kept on the premises, superior to any lien acquired subsequent to such property having been brought on the premises leased. The distress warrant may be levied on any property of the tenant liable for the rent, whether it be found on or off the leased premises, and in whosoever possession found; but the lien of the warrant on property not mentioned in the first section of said act dates from the day upon which the levy is made. Chapter 3247, Acts 1881, gave the landlord a lien on the crops grown on the rented land for rent for the current year, and also for advances made for the sustenance or well-being of the tenant or his family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market. This act gave a further lien on articles advanced and on property purchased with money advanced, which need not be considered in this case. We regard it as settled in this state that the constitutional exemption of personal property cannot be claimed as against the lien for rent on the agricultural products raised on the land rented. *Cathcart v. Turner*, 18 Fla. 837; *Blanchard v. Raines' Ex'x*, 20 Fla. 467. There are many decisions sustaining the view taken by this court in the cases mentioned. The land rented is regarded as such a factor in the production of the crops as to subordinate the title of the tenant thereto to the superior or paramount lien for the use and occupation of the land. As expressed in *Cathcart v. Turner*: "As to such products there can be no claim of exemption, because the very title of the tenant to such products is subordinate to the lien." *Slaughter v. Winfrey*, 85 N. C. 159. The lien given by the act of 1879, supra, is on the agricultural products raised on the land rented, and no reference is made to the crop of any year during the lease being bound only for the rent of that year. By this act the lien for rent is a charge, as between landlord and tenant, upon any of the agricultural products raised on the rented premises during the pendency of the lease. Whether the lien for rent on the other property of the tenant usually kept on the premises, and found either on or off the same, is superior to the claim of exemption from forced sale under the constitution, presents another question. In the absence of any right to the exemption provided for in the constitution, it is entirely clear that the act of 1879 gives a lien on all the property, other than agricultural products of the lessee or his sublessee or assigns, usually kept on the premises, superior

to liens acquired subsequent to the carrying of such property on the premises leased. *Jones v. Fox*, 23 Fla. 454, 2 South. 700; *Fox v. Jones*, 26 Fla. 276, 8 South. 449.

It is contended by counsel for appellee that the right to claim the constitutional exemption as against a demand for rent has been decided by this court in the case of *Cathcart v. Turner*. A careful examination of that case will show that it cannot be regarded as a direct adjudication of the point. It is true that in that case the distress warrant was levied upon agricultural products, and also on some "household goods," and as to the household goods the opinion says that the claimant, "if he is entitled to claim the benefit of any exemption of property 'from forced sale on any process of law,' he can lawfully claim them as exempt from distraint for rent or any other process of law under the terms of section 1, art. 9, of the constitution, to the value of not more than one thousand dollars." The statement of the case shows that Cathcart, the landlord, had a special contract for rent, by which all the crops grown on the place were to be appropriated to the payment of the rent and for supplies furnished, and that none of the crops were to be sold by the tenant until the rents and supplies were paid for. This contract is referred to in one place in the opinion as being a paper mortgaging the crops to pay the rent. As we understand the facts of that case, the landlord had taken a specific lien by contract on the agricultural products alone, to secure his rent and supplies, and he was insisting on that lien in his bill to enjoin the sheriff and the tenant from allowing a claim of exemptions. The further statement in reference to the household goods, that the sheriff should not be enjoined from allowing the debtor entitled to the exemption to select personal property within the constitutional limit as to value upon which the lien did not exist, indicates that such goods, in the case then before the court, were regarded as not being subject to the lien relied upon in the bill. Counsel for appellant insist that the case of *Blanchard v. Raines' Ex'r* is an authority against the right of the tenant to claim an exemption as against a demand for rent. We do not understand that the claim of exemption was presented in that case. An affidavit based upon a claim for rent and supplies furnished was made, and the warrant issued thereon levied upon agricultural products and horses, and the question presented to the court arose on a motion to quash the distress warrant, on the grounds that the affidavit was not sufficient, and that the writ was void because it was not made returnable on a rule day, and no service of it on any one was required. The principal point considered in the case is whether the procedure provided by the statute for the collection of rent by warrant of distress was in conflict with the constitutional provisions securing

the right of trial by jury, and providing that no person shall be deprived of his property without due process of law. The common-law proceeding by warrant of distress is referred to, and it is said that "our statute adopts the common-law right of distress for rent, but requires the landlord to make oath to the amount due. It has further provided that the landlord shall have a like lien upon crops for the price or value of supplies and advances made by him, or under his order, to the tenant, to enable him to make and harvest his crops. The contract of leasing is made under these conditions imposed by the statute, and of course the statute enters into and forms part of the contract, regulating and limiting the rights and duties of each party. This statute, as before remarked, makes the rent and advances a specific lien upon the property mentioned, and thereby the landlord has a right of property in the crops, etc., which he is by the act authorized to foreclose by seizure and sale in the manner prescribed." The court was speaking, it must be remembered, with reference to the necessity of notice and a trial by jury before the seizure of property under a distress warrant, and not as to the right of a tenant who was entitled to the benefit of exemptions to shield a part of his property other than agricultural products, to the value of \$1,000, from sale under such proceedings. The contract of lease in the case before us arose under the constitution of 1868, and the homestead article in that instrument provided that certain real estate, together with \$1,000 worth of personal property, "shall be exempted from forced sale under any process of law." It is clear, we think, that the statutory remedy for the enforcement of a claim for rent is embraced within the terms "any process of law." At common law the landlord could himself distrain for rent, or employ a bailiff or servant to do so for him; but under our statute he must make an affidavit setting forth his right to distrain and the amount due, and procure the issuance of a warrant to be levied by designated officers. Clearly, the proceeding authorized under the distress warrant is a process of law. *Smoot v. Strauss*, 21 Fla. 611. By entering into a lease of land, we can readily see how it is that a tenant voluntarily subjects himself to the remedies provided by law for the collection of rent due by the terms of the lease to the extent that his property is liable to be taken in satisfaction of such claim. To this extent the decision in *Blanchard v. Raines' Ex'r* went, but we do not understand that it was there decided that, by entering into a mere rental contract, the tenant waived his right of exemption under the constitution. It is conceded, of course, that the party entitled to such exemption can waive it; and it is contended here that, by entering into a lease of appellant's land, appellee has consented to the sale of his property to satisfy the lien given by statute for the rent,

and cannot claim any exemption as against such claim. While the lease in this case contains conditions to be performed by both lessor and lessee, there is no stipulation in it for a lien on any property to secure the rent agreed to be paid. It was decided in *Patterson v. Taylor*, 15 Fla. 336, that the exemption from forced sale under the constitution was expressly waived by voluntarily executing a mortgage on specific property, and the mortgagor was estopped from asserting his exemption as to such property in the face of such a contract. A waiver of any benefit of the exemption laws, or an agreement that all the debtor's property shall be subject to levy and sale, contained in a promissory note, was held in *Carter's Adm'rs v. Carter*, 20 Fla. 558, to be inoperative as against the policy of the exemption laws. It is said in this case that "the object of exemption laws is to protect people of limited means and their families in the enjoyment of such property as may be necessary to prevent absolute pauperism and want, and against the consequences of ill-advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasions of others." It was decided in *Baker v. State*, 17 Fla. 406, that the real-estate exemption of a party who had enjoyed the same accrued to his heirs, notwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should constitute his homestead. It cannot be said that the property of the tenant carried on the leased premises or left off is the immediate product of the soil leased, nor does the tenant acquire the title to such property as a result of the tenancy and in subordination to the lien of the statute. If the legislature can declare a lien in favor of the landlord for his rent on all the property of his tenant other than agricultural products, and it follows that, by entering into the rental contract alone, the tenant thereby pledges his property to pay such claim, and waives his constitutional right of exemption therein, then it seems to us that the legislature can, by providing similar liens to secure the payment of other debts, avoid and annul, not only the policy, but the plain provisions, of the constitution on the subject of exemptions. Food and raiment are as essential to life as a habitation and shelter, and we might find insurmountable difficulty in discriminating against the lien for one class of demands and in favor of the other. The claim for rent was highly favored at the common law, but we are unable to discover any purpose in the constitution to except this demand from those against which the exemptions provided for may be claimed. The constitution exempts to the person entitled thereto \$1,000 worth of personal property from forced sale under any process of law, and the legisla-

ture cannot indirectly deprive him of such right any more than it can directly do it.

The appellee, on the showing made, was entitled to his personal property exemption to the limit of \$1,000 worth in the personal property, other than agricultural products, levied upon by the sheriff; and the court did not err in refusing to dissolve the injunction restraining the sale until the further order of the court adjudicating such exemption right. This is the only question arising on the appeal involving the correctness of the order refusing to dissolve the injunction, and the decree of the court below must be affirmed. Ordered accordingly.

(23 Fla. 681)

FIRST NAT. BANK OF PENSACOLA et al.
v. WITTICH.

(Supreme Court of Florida. May 29, 1894.)

APPEAL—OBJECTIONS NOT MADE BELOW—CHattel
MORTGAGE OF STOCK—CHANGE OF POSSESSION—
VALIDITY—NEW CONTRACT.

1. On the hearing of exceptions to an answer, an order was made adjudging the answer to be sufficient, and dismissing the bill. On application of complainant, another order was made on the sixth day after the entry of the former one, reciting that the order dismissing the bill was made through inadvertence, and directing that the same be vacated, and complainant have leave to reply. Thereupon, replication was filed, and the cause proceeded regularly to final decree, the defendants participating in the proceedings. *Held*, that it was too late to object for the first time in the appellate court to the method of procedure in vacating the order dismissing the bill.

2. A mortgage covering a stock of merchandise, under which the mortgagor is permitted, by agreement or understanding of the mortgagee, to retain possession, and sell, in the usual course of business, the mortgaged goods, is fraudulent and void as to creditors of the mortgagor; and it makes no difference whether the agreement or understanding be expressed in the mortgage or not. If it was so agreed or understood at the time the mortgage was executed, whether in writing or not, the mortgage security will thereby be rendered void as to the mortgagor's creditors.

3. A mortgage that is fraudulent and void as to the creditors of the mortgagor cannot be purged of the existing fraud, and rendered valid as to such creditors, by any effort on the part of the mortgagee to assume any rights under and by virtue of it.

4. Where a mortgage of a stock of merchandise is void in law, as to the creditors of the mortgagor, by reason of permission on the part of the mortgagee to sell the goods in the usual course of business, this will not prevent the mortgagor and mortgagee from entering into an entire new agreement, in good faith, as to a security on the mortgaged goods; and if, after the making of such mortgage, the mortgagor deliver possession and control of the goods to the mortgagee, to be sold under his direction, and the proceeds to be applied to the payment of a valid indebtedness, such a pledge of the goods will be good, as against the lien of a judgment subsequently acquired, if such hypothecation was in good faith, and free from any fraudulent intent.

(Syllabus by the Court.)

Appeal from circuit court, Escambia county; J. F. McClellan, Judge.

Bill by W. L. Wittich against the First National Bank of Pensacola and others. Decree for plaintiff, and defendants appeal. Reversed.

Wittich filed a bill in chancery against the bank and others, and obtained a final decree, from which an appeal was taken.

The case made for Wittich in the bill of complaint filed on the 6th of February, 1882, is: That he was assignee of a judgment obtained on the 23d day of January, 1882, in the circuit court for Escambia county, by F. C. Brent against E. T. Hunt, for the sum of \$4,663.33, and that execution emanating from said judgment was placed in the hands of the sheriff of said county, and remained unsatisfied at the time of filing the bill. Brent, Hunt, the bank, and its officers were made parties defendant. That the only property belonging to Hunt, subject to levy and sale under said judgment and execution, was a quantity of salt then in warehouses in said county; and if said execution had been levied upon said salt, and it offered for sale thereunder, purchasers would have been deterred from bidding therefor because there was then of record, in the record books of said county, a mortgage given by said Hunt to the said bank. The mortgage was executed on the 31st day of August, 1881, to secure the sum of \$26,408.72, and covers 33,400 sacks of salt "stored in D. F. Sullivan's warehouse, on the wharf of said Sullivan, and 10,000 sacks of salt [then] stored in Wittich's warehouse, on the Central wharf; both of said wharves being in the city of Pensacola, Escambia county, state of Florida." It is further alleged: That the salt referred to as being subject to levy and sale under the said judgment and execution was part, and what remained, of the salt covered by said mortgage, and that it was insufficient to satisfy said mortgage debt, and, had said salt been offered for sale subject to the lien of the mortgage, no purchaser could have been found to bid therefor. That before, at, and after the time of the execution of said mortgage, the said Hunt was, and continued to be, a merchant engaged in the business of buying and selling salt, and that the salt upon which said mortgage was executed constituted his stock in trade, and it was permitted by the said bank to remain in his possession, and under his control. That, with the knowledge and consent of said bank, Hunt continued for some time after the execution of the mortgage to deal with the said salt in his business, to sell large portions thereof, from time to time, to buyers, and to apply considerable portions of the proceeds of said sales to his own personal and private use; and, at the time of the execution of said mortgage, it was agreed between the said Hunt and said bank that the former should continue to deal with and sell said salt, and apply to his own use portions of the proceeds of said sales. Upon the foregoing allegations, it was alleged that

the said mortgage was fraudulent in law, and void as against the said execution lien. There were other allegations, as to the incapacity of the bank to loan to Hunt the amount expressed in the mortgage; but, as no point is presented on this phase of the case, no reference need be made to them.

A special prayer of the bill is that Hunt and the bank be enjoined from selling, or otherwise disposing of, the residue of said salt; that a receiver be appointed to take possession of the same; and that so much thereof as may be necessary be sold, and the proceeds applied to the satisfaction of said execution, interest, and costs.

Respondents demurred to the bill on rule day in April, 1882, and on the 10th day of July following, by leave of the court, complainant filed a supplemental bill. The new matter alleged in this bill is that after respondents had been served with process, appeared, and demurred to the bill, but before any further proceedings were had in the cause, the said bank, "having possession of the salt covered by the said mortgage, sold the same, and realized from the sale thereof a sum greater than will suffice to satisfy the said judgment and execution, with interest and costs." The special prayer is that the bank be decreed to pay to complainant the amount of said judgment, interest, and costs.

Demurrers to the original and supplemental bills were overruled, and the bank and its cashier, W. A. S. Wheeler, answered. The answer denies all fraud, in law or in fact, actual or constructive, as charged in the bill, and alleges that the salt described in the mortgage as being in Sullivan's warehouse was the remnant of cargoes purchased and paid for by D. F. Sullivan, and stored in his warehouse, and that the understanding between Sullivan and Hunt in reference to the salt was that the latter should sell the same as he could find buyers, and pay over the proceeds of such sales to the former, to reimburse him for the cost and charges on account of the salt, and the profits to belong to Hunt; that in May, 1881, the bank agreed to pay Sullivan for what then remained of the said salt, and Hunt caused to be made, and discounted at the bank, the notes mentioned in the mortgage for the money paid by the bank to Sullivan, except for the note given for the purchase of the salt from Wittich; and that it was understood between the bank and Hunt that the salt should remain in the warehouse until purchasers therefor could be found, and that Hunt should make the sales as rapidly as he could, and pay over the proceeds to the bank in discharge of said notes. It is further alleged that the only purchase of salt by Hunt, of which respondents had any knowledge, was the salt described in the mortgage as being in Wittich's warehouse, and that to aid in making this purchase the bank loaned Hunt \$2,800, which, with the interest thereon, and a balance due by him to the bank, and not included in the

other notes, constituted the amount of the last note mentioned in the mortgage; that said loan was made with the understanding that Hunt should give a mortgage on the salt in Sullivan's warehouse, as well as that purchased from Wittich, and that Hunt was to make sales of both lots of salt as rapidly as the market would allow, and pay over the proceeds to the bank in discharge of said mortgage notes; and that the object of the bank in aiding Hunt to make said purchase of salt was not to enable him to carry on business as a salt merchant, but the sole purpose was to enable him to command the salt market at Pensacola, by buying out a sole competitor, and thereby enable him (Hunt) the sooner to pay off his indebtedness to the bank. And to the extent and in the manner stated, and not otherwise, it is alleged that Hunt was engaged in the business of buying and selling salt. It is also alleged that the salt in Sullivan's warehouse was never in the actual possession of Hunt, as said warehouse, from the time the salt was stored therein until the last sack was sold and shipped with the consent of Sullivan, who was president of the bank, was in his possession, and the salt in complainant's warehouse was under his control until he delivered it, from time to time, upon the order of Hunt, as he effected sales thereof.

The answer denied that, either before or after the execution of the mortgage, the officers of the bank had any understanding or other agreement with Hunt in reference to the sale of said salt, except that he should sell the same as rapidly as he could, and pay over the proceeds of said sales to the bank in discharge of said notes; and if he appropriated the proceeds of such sales, above the expenses necessarily incident to the business, to his own use, he did so without knowledge, concurrence, or consent of the officers of the bank.

It is also alleged that the foregoing arrangement continued until about the 1st of November, 1881, when the bank, for the purpose of exercising more control over the sales of said salt, agreed with Hunt that the sales should be made under the immediate direction of the bank, and that Hunt should use his best exertions to find purchasers, secure railroad transportation, and to attend to the shipment of salt, for which he was to receive from the bank \$150 per month, and that this arrangement continued until about the 1st of December, 1881, after which time the residue of the salt was sold by other agents for the best prices which could be obtained, and applied to the discharge of the said mortgage notes; leaving a balance due the bank on the 23d day of May, 1882, of \$4,646.26, which is still unpaid.

The answer further alleges that, when the bank advanced for Hunt the \$2,300 to pay Wittich for the salt in his warehouse, it did so upon the basis of one-third of the price,—68 cents,—and upon the representation made

by Wittich to Hunt, and by Hunt to the bank, that said salt amounted to 10,000 sacks, and said representation was untrue, as there were but 8,253 sacks; that, by said misrepresentation, complainant, Wittich, obtained from the bank, through Hunt, \$401.81 in cash, and an acceptance for \$786.15 more than he was entitled to, and that he (Wittich), immediately after receiving said acceptance, discounted it to Brent, who, as a bona fide purchaser without notice, obtained judgment for the full amount of said note against Hunt, and afterwards assigned said judgment to complainant, as alleged in the bill of complaint.

The other facts necessary to be given will appear in the opinion.

R. L. Campbell, for appellants. Blount & Blount and John O. Avery, for appellee.

MABRY, J. The petition of appeal does not present any question as to the ruling of the court on the demurrers to the original and supplemental bills, and the consideration of the case here will not involve such ruling.

It is insisted that, when the final decree was rendered in favor of appellee against the bank, no case was then pending in the court against it, in which such decree could be rendered. After answer was filed by appellants to the original and supplemental bills, appellee filed exceptions to the answer, and upon hearing of the exceptions the court made the following order, viz.: "This case, coming on to be heard on bill and answer, and exception to answer, and was argued by counsel, and on consideration thereof it is ordered, adjudged, and decreed that said answer is a sufficient defense to the bill, and that the said bill be dismissed at the cost of the plaintiff." This order was made at chambers, October 24, 1885, and on the 31st of the same month the following order was made in the cause, viz.: "This cause coming on to be heard upon the application of the solicitors for complainant for an order modifying the decree entered October 26, 1885, and that that portion of said decree dismissing the bill be vacated, and so that the complainant have leave to reply, and the said order of dismissal having been entered through inadvertence, it is therefore ordered that so much of the said decree as orders the dismissal of the bill be, and is hereby, vacated, and that the complainant have leave to reply, and that three months after filing of replication be given to the parties for taking testimony."

The contention is that the decree dismissing the bill was final, and, after entry or enrollment, could only be opened by bill of review. The order dismissing the bill is dated the 24th of October, 1885; and the order modifying it, made on the 31st of the same month, recites that it was on application of counsel for complainant. When the application was made is not stated, but it was brought on for a hearing on the 31st of the

month. The order recites that the decree dismissing the bill was "entered through inadvertence." Every reasonable presumption is in favor of the ruling of the court, until the contrary is shown; and, on this record, it must be assumed that for some cause the decree was entered through inattention or by mistake. It is not denied, of course, that the court had the power, in some way, to correct such an error. On the record before us, we think appellants are in no condition to question, in this court, the order modifying the one dismissing the bills. After this order was entered the general replication was filed, and the cause proceeded to final hearing; and it is made to appear that appellants, without making any objection to the order, participated in the said proceedings, contested appellee's right to a decree on the merits of the bills, and the decree in the cause recites that the final hearing upon the pleadings and proofs was on the application of defendants' solicitors. The objection to the order modifying the decree dismissing the bill is raised for the first time in this court, and we think it comes too late. *Peck v. Spencer*, 26 Fla. 23, 7 South. 642.

The ground of the appeal, involving the merits of the case, and argued here, is that "appellee was not entitled to relief upon the pleadings and evidence." We have held that a mortgage covering a stock of merchandise, under which the mortgagor is permitted, by agreement or understanding of the mortgagee, to retain possession, and sell the goods at discretion, or in the usual course of business, is fraudulent and void, as to existing creditors of the mortgagor, and it makes no difference whether the agreement or understanding in reference to the sale of the goods be expressed in the mortgage itself or not. If it was so agreed or understood at the time the mortgage was executed, whether in writing or parol, the security is thereby rendered void, as to the creditors of the mortgagor. *Eckman v. Munnerlyn*, 32 Fla. 367, 13 South. 922. The decision cited followed the former one of this court on the subject (*Logan v. Logan*, 22 Fla. 561), and the cases sustaining the rule announced by it. If a stipulation in a mortgage of merchandise, to the effect that the mortgagor may retain possession of the goods, and sell them in due course of trade, avoids the security, it follows logically that such an agreement in parol will have the same effect. The cases referred to in this court are on the side of those decisions holding that such an understanding or agreement, whether expressed in the mortgage, or shown by proof aliunde, renders the mortgage fraudulent in law. After what has been said in the *Eckman-Munnerlyn* Case, it is not necessary to go into any further discussion of the point. Speaking for myself, had the point been an open one in this state, I would have preferred the decisions holding that the question is not one of law, so much as it is one of fact and good faith, under the

circumstances of each case. The question, however, has been settled here, as above stated. But it has never been decided here that an agreement, whether expressed in the mortgage or resting in parol, to the effect that the mortgagor may retain possession of the merchandise mortgaged, sell the same, and apply the proceeds exclusively to the payment of the mortgage debt, will render the mortgage security void. The mortgage on the salt, in the case before us, is not void by reason of any of its stipulations, as there is no express agreement in it in reference to the possession or sale of the salt by the mortgagor. Its supposed infirmity is based upon an alleged agreement or understanding between the mortgagor and mortgagee that the former should retain possession of the salt, and sell the same in the usual course of trade, or that the mortgagee knowingly permitted the mortgagor, after the execution of the mortgage, to continue to sell the salt, and apply the proceeds in part to his individual use and private account. The answer denies, in effect, the possession of the salt by Hunt, the mortgagor, and also alleges that it was sold under an agreement that the proceeds should be applied to the mortgage debt. The testimony shows, we think, that from the time of the execution of the mortgage, in August, 1881, up to November 1st of that year, the salt was in the possession, and under the exclusive control, of the mortgagor. The fact that it was stored in warehouses that did not belong to him does not alter the situation; as it is clearly shown that he paid storage on the salt, and it was, during the time mentioned, entirely under his control. The decree of the court was against the bank, the mortgagee, for the amount due on appellee's judgment, and was evidently based upon the view that the mortgagor, with the consent and understanding of the mortgagee, continued, after the execution of the mortgage, to sell the salt in the usual course of trade, and apply the proceeds, in part, to his individual use. Although it cannot be affirmed, on the record before us, that there was an express agreement between Hunt and the bank, when the mortgage was executed, that the former should sell the salt in the usual course of business, and dispose of the proceeds in his discretion, yet the evidence is sufficient to sustain the conclusion that there was an implied understanding at the time that such a course of business should be pursued in reference to the sale of the salt. For several years before the commencement of his business relations with the bank, Hunt had been engaged as a merchant in the purchase and sale of salt in the city of Pensacola, and from May, 1881, to the 31st of August of the same year, had procured from the bank, without giving any security therefor, money with which to carry on the business. On the date last above mentioned, the mortgage was executed to secure what was then due the bank; but it is clearly shown that there was no

change thereafter in Hunt's method of business in reference to the sale of the salt up to November, 1881, and that the bank, with full knowledge, permitted and acquiesced in such continued course of business. We would not be authorized, on the record before us, to disturb the conclusion of the chancellor that there was at the time of the execution of the mortgage an implied understanding between the bank and Hunt that the latter should dispose of the salt mortgaged in the usual course of business, and use the proceeds as he saw proper. This conclusion will sustain a decree that the mortgage was void in law as to the creditors of Hunt. But in addition to the allegation that Hunt was to sell the salt after the execution of the mortgage, and apply the proceeds to the mortgage debt, the answer further avers that such arrangement continued until about November 1, 1881, when the bank, for the purpose of exercising more control over the sales of said salt, agreed with Hunt that the sales should be made under its immediate direction, and that he (Hunt) should use his best exertions to find purchasers, secure railroad transportation, and attend to the shipment of the salt, for which the bank was to allow him \$150 per month, and that this arrangement continued until about December 1, 1881, after which the residue of the salt was sold by other agents for the best prices that could be obtained, and applied to the said mortgage notes, leaving a balance due of \$4,646.26.

Only two witnesses were examined in the case,—E. T. Hunt and L. P. Knowles,—and they for complainant. Hunt, testifying in reference to his mode of living and expenses after the mortgage was executed, says that there was no change in the particulars mentioned until the business was taken out of his hands, and he received a salary. He also says that there was no change in his method of doing business until the bank took charge of the salt, when he, for two months, was paid \$150.

Knowles says there was no change in the method of conducting said business until November 1, 1881, and at that time the bank took charge of the salt, and allowed Hunt a salary.

The conclusion that the mortgage on the salt was void in law, as against Hunt's creditors, makes it impossible for the bank to rely upon it, in this case, as any security for its claim against him. The rule is that, if the mortgage is fraudulent and void as to creditors, no effort to enforce it, or assuming control or possession thereunder, can purge it of the existing fraud, and render valid, as against creditors, an instrument which the law declares to be fraudulent and void. *Wells v. Langbein*, 20 Fed. 183; *Blakeslee v. Rossman*, 43 Wis. 116; *Stein v. Munch*, 24 Minn. 390; *Ohenery v. Palmer*, 6 Cal. 119; *Dutcher v. Swartwood*, 15 Hun. 31. The fact, however, that the mortgage given by Hunt to the bank was void, as to his creditors, by reason of the

permission given him to sell and dispose of the mortgaged property in the usual course of trade, did not preclude the bank from entering into any other valid bona fide arrangement with Hunt before complainant's judgment lien was obtained, by which a superior right to be paid out of Hunt's property was secured. The answer of the bank, in effect, sets up that the old course of dealing by Hunt with the property described in the mortgage was interrupted about November 1, 1881, three months before the judgment lien attached, when an agreement was had with Hunt by which he was to have a salary for selling the salt under the immediate direction of the bank. The testimony shows, without any contradiction, that when this agreement was made with Hunt the business was taken out of his hands, and the salt taken charge of by the bank. The bank had no authority or power given it by the mortgage, if valid, to assume such control and ownership over the salt. Our statute provides "that a mortgage is and shall be held in our courts a specific lien on property therein for a specific object, and in point of fact, as well as law, the mortgagee is incapable of acquiring possession until after a decree of foreclosure, and then only by bidding and outbidding all competitors in market." *McClell. Dig.* p. 765, § 3. The only way that the bank could have legitimately gotten control and charge of the salt was by agreement and consent of Hunt; and, on the record before us, we think it is sufficiently shown that he consented and agreed for the bank to take charge and control of the salt for the purpose of selling it, and applying the proceeds to the payment of its debt. A delivery of the property into the charge and control of the bank, with authority to sell, and apply the proceeds to the payment of a specified debt, would be a pledge of the property for that purpose, and, in the absence of any fraud in fact, would be valid as against judgment liens subsequently acquired. We do not understand that it is claimed here that there was any fraudulent intent on the part of either Hunt or the bank, in delivering the salt into the control and charge of the latter to pay a valid claim then existing. An examination of the testimony leaves no doubt in our mind that such a claim could not be sustained, if made. Hunt owed the bank a valid debt, and he had a right, if he saw proper, to deliver his property to the bank, to be sold and applied to that debt. The testimony shows that he did that with the salt described in the mortgage in question, before the complainant's judgment was obtained, and we see nothing in the record sufficient to impeach the good faith of the transaction. The placing the bank in charge and control of the salt, so far as appears here, was independent of the mortgage, as no such rights could grow out of the mortgage itself, and was for the purpose of giving a new and independent right. This being the effect of the testimony,

we think the chancellor erred in decreeing in favor of complainant on it. The decree will therefore be reversed, and it is so ordered.

(104 Ala. 79)

BELL v. STATE.

(Supreme Court of Alabama. June 14, 1894.)

INDICTMENT—FORM—EXCEPTIONS.

It is not necessary to aver in the indictment that the defendant does not come within an exception in a proviso to the enacting clause.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Seaborn Bell was convicted of practicing medicine without a certificate of qualification, and appeals. Affirmed.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that before the finding of this indictment, that Seaborn Bell practiced medicine in Dale county, Alabama, without having first obtained a certificate of qualification from one of the authorized boards of medical examiners of the state of Alabama, against the peace and dignity of the state of Alabama." This indictment was filed in open court on March 30, 1893, and was based upon the provisions of an act approved February 18, 1891, amending section 4078 of the Criminal Code, which is in words as follows: "Any person practicing medicine or surgery in this state without having first obtained a certificate of qualification from one of the authorized boards of medical examiners of this state shall be guilty of a misdemeanor, and on conviction shall be fined not less than twenty-five dollars, nor more than one hundred dollars: provided, that this act shall not apply to any doctors or physicians now practicing medicine in Alabama who are graduates of a respectable medical college, and have complied with the law by having their diplomas recorded by the judge of probate in the county in which they may be practicing medicine; and this act shall not apply to any physician who has practiced medicine in this state for the past five years." The defendant demurred to the indictment, among others, upon the following grounds: (1) Because the indictment does not charge any offense against the laws of Alabama; (2) because the law under which the indictment is drawn is unconstitutional; (3) because the indictment does not allege that, at the time the defendant is charged with practicing medicine without a certificate of qualification, there was, in Dale county, a medical society in affiliation with the Medical Association of the State; (4) because the indictment does not negative by proper averments that the defendant was within the several provisos of the amendatory act. The court overruled the demurrer, and the defendant duly excepted. Issue was joined upon the plea of not guilty; and the state offered evidence tending to show that in said county,

and within the time covered by said indictment, and before his license was recorded, the defendant practiced medicine without having first obtained a certificate of qualification from the Medical Society of Dale County or the Medical Association of Alabama. The state also proved that there was a medical society in Dale county at that time, which was organized in pursuance of the rules and regulations of the Medical Association of the State of Alabama. The state offered in evidence "the printed book of rules of the Medical Association of the State of Alabama." The defendant objected to the introduction of said book in evidence, and duly excepted to the court's overruling his objection, and also excepted to the court's overruling his motion to exclude said book from evidence. The defendant offered in evidence his diploma, which was awarded to him as a doctor of medicine by the "Georgia College of Eclectic Medicine and Surgery," on February 25, 1892. This diploma was indorsed by the probate judge of Dale county, as follows: "I hereby certify that the within diploma was filed in this office for record on the 28th day of March, 1893, at 11 o'clock a. m., and duly recorded." The court, at the request of the state, instructed the jury in writing as follows: "If the jury believe the evidence beyond a reasonable doubt, they must find the defendant guilty as charged." To the giving of this charge the defendant duly excepted, and also excepted to the court's refusal to give the general affirmative charge in his behalf.

Lee & Lee, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was convicted for practicing medicine without having first obtained a certificate of qualification, as provided in section 4078 of the Criminal Code, and the statute amendatory thereof, approved February 18, 1891 (Acts 1890-91, p. 857). This court has declared that the statute is constitutional. *Brooks v. State*, 88 Ala. 122, 6 South. 902; *Nicholson v. State* (Ala.) 14 South. 746. It was not necessary to aver in the indictment that the defendant did not come within the proviso of the amendatory act of 1890-91, *supra*. Where the exception is incorporated in the enacting clause, the indictment should negative the fact that the defendant came within the exception, but this rule does not apply to an exception contained in a proviso to the enacting clause. It then becomes a matter of defense. *Carson v. State*, 69 Ala. 235; *Grattan v. State*, 71 Ala. 344; *Bellinger v. State*, 92 Ala. 86, 9 South. 399. The indictment was sufficiently definite. The court did not err in overruling the demurrer to the indictment. It may not have been necessary to introduce in evidence the book of rules of the Medical Association of the State of Alabama, but its admission was not error.

Code 1886, § 1296; Book of Rules, § 14, arts. 63, 64, 70, 73. The objection was to the whole book, and not to such portions as may have been irrelevant. The evidence, without conflict, showed that the defendant practiced medicine without having complied with the provisions of the statute. The court did not err in the charge given. Affirmed.

(103 Ala. 97)

KOLSKY v. ENSLEN.

(Supreme Court of Alabama. May 3, 1894.)

ACTION ON CONTRACT — SUFFICIENCY OF PLEA — OPTION TO SELL STOCK — CONSTRUCTION.

1. Under Code, § 2769, declaring that every written contract, the foundation of a suit, imports a sufficient consideration which may be impeached by plea, and that, when so impeached, the burden of proof is on defendant, a plea in an action on a contract alleging that it was without consideration is sufficient.

2. Defendant agreed to refund to plaintiff, on his surrender to defendant of his shares or interest in a certain company, at the end of two years from date of the agreement, the amount paid by plaintiff for 10 shares of stock in such company. Held that, if plaintiff voluntarily surrendered to the company the shares of stock in consideration of its issue to him of new stock, he could not recover on the agreement, as he had incapacitated himself to perform his part thereof.

3. The fact that defendant was a director of the company, had knowledge of the surrender of the stock, and was active in consummating it, was immaterial.

Appeal from city court of Birmingham; H. A. Thorpe, Judge.

Action by A. Kolsky against E. F. Enslen to recover on a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

The action was founded upon the following contract: "A. Kolsky, Esq., Birmingham, Ala.—Dear Sir: We hereby agree to refund to you, on surrender to us by you of your shares of interest in the Ea. Tenn. & No. Ala. Coal & Iron Co., at the end of two years from this date, the sum of \$800, being the amount paid for ten shares of the 'ground-floor stock' of said company by you this day; in other words, we guaranty you against loss of principal invested. [Signed] E. F. Enslen. A. S. Loventhal. By J. C. Marks." Among the other defenses set up by the defendant in several special pleas were the following: "(2) Defendant says that said alleged agreement is without consideration. (3) Defendant says that after the date of the alleged contract, and before the expiration of two years from said date, the plaintiff transferred or surrendered the ten shares of stock in the East Tennessee & North Alabama Coal & Iron Company mentioned in the complaint to the company, and, in lieu and in consideration of such surrender, received from said company, to wit, seventy shares of a new issue of stock in said company, and voluntarily surrendered to said company one-third of his said new stock, or returned the said one-third of his new stock to said

company, to be held by it as treasury stock. (4) Defendant says that after the date of the alleged contract, and before the expiration of two years from said date, the said company issued to plaintiff a bond for one thousand dollars, secured by a deed of trust or mortgage on said company's property, and also issued to plaintiff a certificate for a number of shares, to wit, seventy-five shares of a new issue of stock in said company, and that plaintiff received the same, and that the consideration for said issue of said bond and new stock was the return of said ten shares of stock described in the complaint, wherefore defendant says that plaintiff disabled himself to comply with his part of said alleged contract." To the second plea the plaintiff demurred, on the ground that it "states a conclusion, and fails to set forth any facts." The substance of the demurrers to the third and fourth pleas is sufficiently stated in the opinion. These demurrers were all overruled, and the plaintiff filed several replications to the third and fourth pleas. The substance of these replications is sufficiently stated in the opinion. To these several replications the defendant demurred, on the grounds, substantially, that they did not allege that the defendant agreed to receive the said new stock in lieu of the 10 shares, as described in the complaint, and that the defendant's right to insist upon the terms of his original contract was not impaired by the issue of the new stock. The demurrers to the replications were sustained, and, in accordance with the verdict of the jury impaneled to try the cause, the court rendered judgment for the defendant.

E. E. Webb and W. R. Houghton, for appellant. E. K. Campbell and W. O. Ward, for appellee.

BRICKELL, C. J. The assignments of error are directed solely to the revision of rulings of the court below, overruling demurrers to pleas, and sustaining demurrers to replications; and it is convenient to consider these rulings in the order in which they have been argued by counsel.

1. The action is founded on a contract or agreement in writing, and the first plea to which our attention is drawn is brief. Omitting the commencement, it merely alleges "that said agreement is without consideration." The Code (section 2769) declares that every written contract, the foundation of suit, imports a sufficient consideration which may be impeached by plea, "and, when so impeached, the burden of proof is on the defendant." A plea not distinguishable from this plea, in form and substance, was held good in *Giles v. Williams*, 3 Ala. 316,—an action on a sealed instrument, the consideration of which may be impeached by plea. Code, § 2667. And it was said this form of pleading resulted from the statute. If there was an absence of consideration to support the

contract, there were no special circumstances to aver. The plea was of necessity negative, for it was not possible to state that affirmatively which had no existence. It is not, as is suggested by counsel, a conclusion, but a fact, which the plea avers as the matter of defense,—a fact of which the defendant must make proof. The test of the sufficiency of a plea in abatement or in bar of a suit is whether the facts are so stated that a material issue may be taken thereon. If the facts are so stated, however informal the plea may be, it is not subject to objection. Code, § 2674. The general replication would have put in issue the truth of the plea, compelling the defendant to disproof of a valuable consideration, which the writing imports; or, if there was a valuable consideration, its existence was matter which could have been averred in a special replication, on which the defendant must have taken issue. A material issue could have been formed on the plea, and, of consequence, it was not subject to demurrer. The cases of *Insurance Co. v. Moog*, 78 Ala. 284; *Carmelich v. Mims*, 88 Ala. 335, 6 South. 913; *Darby v. Bank*, 97 Ala. 653, 11 South. 881; *McAfee v. Iron Co.*, 97 Ala. 709, 11 South. 881,—to which we are referred, are not opposed to this conclusion. The pleas in these cases were apparently intended, and were so deemed by the court, as "pleas in short by consent," the consent not having been obtained. No one of them contained an averment of the issuable fact found in the present plea,—a want of consideration for the contract on which the suit was founded.

2. The third and fourth pleas, the remaining pleas, the demurrers to which were overruled, may properly be considered in connection. Substantially, these pleas aver, as matter of defense, that, before the expiration of two years from the making of the agreement, the plaintiff had voluntarily surrendered to the company issuing them the 10 shares of corporate stock, the subject-matter of the agreement; the company, in consideration of the surrender, issuing to him 70 or 75 shares of new stock, one-third of which he left with the company as treasury stock. There were numerous causes of demurrer assigned to these pleas, but they are readily reducible to the inquiry whether the facts stated are sufficient to bar the right of recovery. The agreement is not of difficult construction, and the relative rights and duties of the parties are of easy ascertainment and solution. The facts recited in the agreement are that, on the day it was made, the plaintiff purchased 10 shares of the "ground-floor stock," as it is termed, of the East Tennessee & North Alabama Coal & Iron Company, paying therefor \$800. It is not perhaps a strained inference that the promisors were the vendors of the stock, or, if not, had induced the purchase. However this may be, they promise, on the expiration of two years, to pay the plaintiff the principal

sum invested in the purchase, on his surrender to them of his "shares or interest in the company." These general words, "shares or interest in the company," must be referred to the 10 shares of stock that day purchased, for it is manifest this is the only purchase or transaction which was in the contemplation of the parties. They are incapable of extension, so as to embrace any other purchase, or any other transaction, or any larger number of shares, or greater interest than these shares represented. The promise of guaranty or indemnity extends only to loss resulting from this purchase or investment, and not to loss resulting from any other transaction. The agreement placed the parties in a relation not dissimilar to that of vendor and vendee, on a bargain of "sale or return," the buyer having the option to return the goods within a designated period or a reasonable time; and their rights and duties correspond to the rights and duties of vendor and vendee on such bargain. The title to the goods passes to the vendee. He becomes the absolute owner, and the element of option the bargain involves is his option, not that of the vendor. If he should, before the expiration of the time appointed for the return, make an absolute sale of the goods, or otherwise incapacitate himself to make the return, the option would be exercised; he would choose not to return. This agreement has in it a like element of option, and it is the option of the plaintiff only. He was the absolute owner of the stock, and, in the exercise of his option to surrender it, the promisors could not quicken him; nor could they interfere or complain of any disposition he made or proposed to make of it. Nor could they on the expiration of the two years, or at any time prior, on the tender or payment of the \$800 invested in the purchase of the stock, demand its surrender. The whole purpose, scope, and object of the agreement is to give the plaintiff the option,—the privilege,—on the expiration of two years, to surrender—to transfer—to the promisors the title to and possession of the 10 shares of stock, in that event imposing on them the duty of refunding the principal sum invested in its purchase. The promise is conditional; it is dependent upon the surrender of the stock. Without the surrender, there cannot be performance of the condition which will satisfy the spirit and meaning of the agreement and the intention of the parties as therein expressed. *Lester v. Jewett*, 11 N. Y. 453; *Wooster v. Sage*, 67 N. Y. 67; *Pope v. Manufacturing Co.*, 107 N. Y. 61; 13 N. E. 592; *Taylor v. Blair* (Sup.) 13 N. Y. Supp. 152; *Henderson v. Wheaton* (Ill. Sup.) 28 N. E. 1100.

The term "ground-floor stock," it may be, in common parlance, is used to distinguish a particular class of stock. If illegality be not presumed (a presumption the law never indulges), as employed in the agreement, the term cannot be accepted as referring to any

other stock than stock of legal validity,—stock legally issued by the company for money, or for labor done, or for property, the company had capacity to acquire and hold, taken at its reasonable value. There is no other corporate stock which is recognized as of legal validity. *Williams v. Searcy*, 94 Ala. 360, 10 South. 682; *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 9 South. 129. This is the character of the stock in which the plaintiff invested, whether it was the common stock of the company or preferred stock, if the company had authority to issue stock of that class; and it is this stock he must surrender before the duty of the promisors arises. The transaction averred in the pleas we are considering is irreconcilable with any purpose or intent on the part of the plaintiff to exercise the option or privilege of surrendering the stock; they are reconcilable only with an election not to make the surrender. An absolute sale of the stock, or its conversion into any other species of property, would not have been a more complete manifestation of an election not to make the surrender. The identity and legal existence of the original stock were merged in the new issue, and, in effect, the original stock canceled, or subjected to cancellation, at the pleasure of the company. Without inquiring what differences may exist between the liability of the holder of the original stock and the holder of the new stock, the plaintiff has exercised the option or privilege the agreement gave him, incapacitating himself to perform the condition on which the duty of the promisors depended. We do not propose to consider whether these transactions were, as is now insisted by counsel, infected with illegality. They were not void; voidable only, in any event, at the instance of innocent parties, having rights or interests injured by them. All standing in the relation of the plaintiff, all participating in them, are bound by them, and estopped to deny their validity. *Cook, Stock & S.* 39; *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788. There was no error in overruling the demurrers to these pleas.

3. The several replications to which demurrers were sustained aver that the appellee, the promisor, now sued, at the time of the transaction set out in the third and fourth pleas was an officer and a director of the company, having knowledge of the transactions, and active in their consummation. This works no change in the character and effect of the transactions, and cannot relieve the plaintiff from the consequences of them. The conversion of the stock was the voluntary act of the plaintiff, to which the assent and agency of the company were necessary. The assent could be given by the company only by and through its officers and agents, and, when given, was ineffective without the concurring action of the plaintiff; and it is

this concurring action which was the manifestation of his election not to surrender the stock, and incapacitated him from making the surrender. Affirmed.

(102 Ala. 431)

GOLDTHWAITE et al. v. JANNEY et al.
(two cases).

ABRAHAM v. SAME.

(Supreme Court of Alabama. Feb. 13, 1894.)

PARTNERSHIP—FIRM PROPERTY—FIRM AND PRIVATE CREDITORS.

1. Land purchased with partnership funds is firm property, and is subject to the payment of firm debts, in preference to the individual debts of the several partners.

2. The fact that land purchased with firm funds stands in the name of one of the partners does not estop the firm from claiming such property, on becoming bankrupt, as against a person who may have dealt with such partner on the faith of the property, as a creditor of a partner cannot acquire any greater interest in the partnership property than the partner himself has.

3. Where one partner, in whose name land belonging to the partnership stands, loans funds of which he is a trustee to the firm, the land, on the bankruptcy of the firm, will not be subjected to payment of such loan, in preference to claims of firm creditors.

Appeal from chancery court, Montgomery county; Jere N. Williams, Chancellor.

Suits by Robert Goldthwaite and others against Janney & Cheney, trustees, and by Adolph Abraham and others against the same parties. There were decrees for defendants, and plaintiffs appeal. Affirmed.

On July 6, 1891, the firm of Moses Bros., composed of H. C., A. H. and M. L. Moses, made a general assignment to certain named trustees of all their property, for the benefit of their creditors. The trustees named in this general assignment filed a bill in the chancery court of Montgomery county, praying that said court take jurisdiction of the matters relative to said assignment, and govern, control and direct the trustees, the property and interests of Moses Bros. and their creditors, as would best conserve equity to all parties. The chancellor granted the prayer of said bill, and took charge of the matters pertaining to said general assignment. Subsequently, on October 10, 1892, Adolph Abraham, Isaac Abraham and Rosa Abraham, the two last named by their next friend, filed their petition, addressed to the chancellor, in their own behalf, and in behalf of such other individual creditors of H. C., A. H. and M. L. Moses, as would come into the cause and share the expenses thereof, in which they averred that each one of them was a creditor of H. C., A. H. and M. L. Moses individually, setting out the amount of said indebtedness; that among the property which was conveyed by Moses Bros. in the deed of general assignment, was a large amount of private property, which was owned individually by the respective members of the firm; that "by the terms of said deed of trust, as well as by

law, they and the other individual creditors of the said Henry C. Moses, A. H. Moses, and M. L. Moses are entitled to be paid the full amount of their claims out of the private property of the said H. C. Moses, A. H. Moses and M. L. Moses in priority to the creditors of Moses Bros., and they prayed that "the private property of said Henry C. Moses, A. H. Moses and M. L. Moses be ascertained and the amount of claims which are entitled to priority therein be stated, such claims to be paid to the full extent of such property, and that the trustees be restrained from paying to the general creditors of the firm of Moses Bros. any portion of the proceeds of said property until said individual debts are paid in full." In response to this petition the chancellor ordered a reference to the register to ascertain and report to what property conveyed by the assignment the individual members of the firm of Moses Bros. held title, and to make a statement of the individual debts of the members of said firm. The substance of the evidence disclosed on the reference which was thus ordered, is sufficiently stated in the opinion. On the submission of this cause upon the report of the register, it was decreed that "all of the property, real and personal, assigned by the said A. H. Moses, H. C. Moses and M. L. Moses, constituting the firm of Moses Bros., for the benefit of their creditors, whether the title thereto stood at the time of said assignment in the name of said firm, or any part thereof, except the residences of the members of said firm, and the lot in Sheffield, Alabama, given to A. H. Moses by the Sheffield Land, Iron & Coal Company, constituted the assets of said partnership, to which the creditors of said firm are primarily entitled, and must be so regarded by the trustees administering said trusts in the distribution of said assigned property." On September 14, 1893, Robert Goldthwaite, as receiver, in the case of *Paull v. Knox et al.*, by petition, made himself a party complainant in the petition of the Abrahams, and prayed for the benefit of the proceedings thereon in his behalf. The facts as stated in the petition of said Goldthwaite are substantially as follows: First, that the petitioner is the successor of H. C. Moses, as receiver in the case of *Paull v. Knox et al.*; second, that petitioner as said receiver is the owner of an allowed claim against the estate of H. C. Moses, individually, in the amount of \$18,108.11; third, that said claim arose on account of trust funds in the hands of H. C. Moses, as said receiver, which he advanced to the firm of Moses Bros. of which firm he was a member, without taking the proper security required by a court; fourth, that Moses Bros. were indebted to H. C. Moses for said advances, at the time of the general assignment made by them, and the members of said firm are yet indebted to him for such amount; and fifth, that at the time of the assignment, the said H. C. Moses held the legal title to some real estate, which, in

equity, belonged to said firm. The prayer of this petition was that "the proceeds accruing under said deed of assignment be directed and ordered to be regarded and held as property to which H. C. Moses held the legal title at the date of said assignment as the individual property of said Henry C. Moses, so far as petitioner's debt is concerned; and out of the proceeds thereof be declared dividends for the benefit of petitioner's said debt, until it is paid with other debts similarly situated." The ground upon which said Goldthwaite, in his petition, based his right to relief thus prayed for, is sufficiently stated in the opinion. The trustees, acting under the deed of general assignment, demurred to this petition, among others, upon the following grounds: That the said petition shows that the property in the name of H. C. Moses was partnership assets; that the petition fails to show that there has been any settlement of the affairs of said partnership, showing any indebtedness of the firm to said Henry C. Moses; that the petition shows that said property was partnership assets, and that H. C. Moses, together with other members of the firm, has assigned the same for the benefit of all of the creditors of said partnership. Upon the submission of this cause, upon the petition and the demurrers thereto, there was a decree sustaining the demurrers. This appeal is prosecuted by Robert Goldthwaite, as receiver, who assigns as error the decree of the chancellor sustaining the demurrers to his petition; and by the Abraham petitioners, who assign as error the decree of the chancellor denying them the relief prayed for.

Brickell, Semple & Gunter, for appellants.
Tompkins & Troy and Horace Stringfellow, for appellees.

HARALSON, J. The sole question for decision in this case, as respects the rights of the Abraham petitioners, is whether the property in question belonged to the individuals composing the firm of Moses Bros., or to the firm itself; and, Goldthwaite, receiver, has, also, an equal interest in the determination of that question. It it was individual property, it must be distributed among the individual creditors of that insolvent firm; but, if in equity it belonged to the partnership, it is to be distributed, with the other property belonging to the firm, to its creditors. There was real estate, the title to which stood in the names of the individual members, and stocks standing on the books in the names of one or another of the individuals, schedules of which real estate and stocks are attached to the petitions. These lands and stocks were included in the general assignment of Moses Bros., and came into the possession of the appellees, as assignees, and they claim them as the property of said firm, subject to distribution among its creditors, and not to the creditors

of the individuals composing the said firm, whereas, the petitioners claim said property as belonging to the individuals in whose names the bills appear, and not to the firm of which they were members. It is a rule of universal recognition, that real estate acquired with partnership funds, or on partnership credit and for partnership purposes, is regarded in a court of equity as partnership property, and is subject to the payment of partnership debts, in preference and priority to the separate debts of the several parties; and it is wholly immaterial, says Judge Story, in the view of a court of equity, in whose name or names the purchase is made and the conveyance taken, whether in the name of one or of all the parties, or in the name of a stranger, alone, or jointly with a partner. In all these cases, let the legal title be where it may, it is in equity deemed partnership property, not subject to survivorship, and the partners are deemed the cestui que trust therefor. 2 Story Eq. Jur. § 1207; *Hatchett v. Blanton*, 72 Ala. 435; *Little v. Snedecor*, 52 Ala. 167; *Offutt v. Scott*, 47 Ala. 104; *Coles v. Coles*, 1 Hare & W. Lead. Cas. 492, note; and *Dyer v. Clark*, Id. 495, note. Whether the land belongs to a firm or to one of the individuals composing it,—when the title is in his name, and not in that of his firm,—it must be solved by what appears to have been the intention of the parties. *Prima facie*, ownership is where the muniment of title places it; but if by all the circumstances attending the transaction,—which may be shown by parol, if there is no written evidence,—it is made to appear, that in the intention of the parties, it was purchased for and was treated as partnership property, that presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership. Authorities *supra*. It had been insisted, that when a partner buys real estate for his firm with its money, and takes the title in his own name, which title is spread upon the records of the county, those who have financial dealings with him, are presumed to have done so on the faith and credit of that property, and the partnership is estopped afterwards, to claim the property against the claims of the creditors of such partner. This doctrine is true, certainly, in cases of bona fide purchasers of such property, for value and without notice, that it belonged to the partnership. But it cannot be extended further, without overthrowing all our adjudications on the subject, as well as the general current of authorities, everywhere. No man has a lien on the property of another, with whom he deals, whether he is a member of a partnership or not, unless it is conferred by contract or by some rule of law. A creditor of one who is a member of a partnership, can never put his hand on such a partner's interest in the firm, until the assets of the firm have been applied to the full payment

and discharge of all debts and liabilities of the partnership, and after discharging these, the residuum is still held in trust for distribution among the several partners, according to their several interests. A lien exists in favor of each partner on the partnership effects to secure these results, and for the one as well as the other. This lien, as a general thing, exists only in favor of the several partners. They may sell the firm's property, may convey it to one of their own number, may partition or divide, and the lien will thereby be destroyed. Creditors as such cannot be said to have any lien on the partnership effects. There are conditions in which a creditor has been allowed to avail himself of this quasi lien of a partner, but it is derivative only, and not of original existence. But, in no event can a creditor of an individual partner acquire any greater interest in the assets of the firm of which the partner is a member, than the partner himself is entitled to, which is nothing, if the partnership is insolvent. The stream in law, no more than in nature, can rise higher than its source. *Lindlay*, in his work on Partnerships, states the principles so aptly, we quote what he says on the subject. Subject to certain exceptions, within which this case does not fall, he says: "It is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself. If, therefore, a partner is a creditor of a firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate. Lord Hardwick, it is true, in *Ex parte Hunter*, 1 Atk. 223, allowed this to be done; but that case has not, in this respect, been followed, and has long been considered as overruled." 2 *Lindl. Partn.* p. 720, § 721, and authorities cited; *Hart v. Clark*, 54 Ala. 490; *Warren v. Taylor*, 60 Ala. 218; *Farley v. Moog*, 79 Ala. 153; *Goldsmith v. Eichold*, 94 Ala. 116, 10 South. 80; *Buchan v. Sumner*, 2 Barb. Ch. 167; *Jones v. Fletcher*, 42 Ark. 422; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 380; *Story*, *Partn.* §§ 97, 360, 361; 13 Am. & Eng. Enc. Law, 611; 17 Am. & Eng. Enc. Law, 1195.

The written agreement executed between the partners on the 17th May, 1879, recites, that in the course of their business, the three brothers composing the firm of Moses Bros. had acquired titles to real estate in the individual names of the one or the other of said parties, and it was provided by that agreement, that all real estate or interest therein then held by either of the members of that firm, in his individual name, was the property of the partnership, having been brought into the firm, or bought with its funds for partnership purposes. The testimony of M.

C., H. C., and A. H. Moses, taken before the register, shows that the acquisition of real estate after that agreement was signed, continued as before, viz., that in many instances the title was taken in the name of the partner effecting the transaction, but all real estate, whether the title was so taken, or in the name of the firm, was bought for the firm, paid for out of its funds and was taken and treated as its property, and not as the property of the member in whose name the title stood, excepting the residences of H. C. and A. H. Moses in Montgomery, and the residence of said A. H. Moses in Sheffield, and a lot given to him in Sheffield by the Sheffield Iron & Coal Company. A careful review of all the evidence satisfies us that the decree of the chancery court on this question was correct.

Let us now refer specially to the petition of Robert Goldthwaite, as receiver in the case of Paul v. Knox, in which it is stated that petitioner's claim had been adjudicated and allowed in this case, for \$18,108.11, as a claim against the estate of H. C. Moses; that said claim arose on account of trust funds in said Moses' hands as a receiver in the case of Paul v. Knox, which he advanced to the firm of Moses Bros., of which he was a member, without taking the security required by the court; that Moses Bros. were indebted to said H. C. Moses for said advances at the time of the general assignment made by them and as members of said firm, and are still indebted to him for the same, and at the time of said assignment, "besides the property belonging to H. C. Moses individually, and to which he had the legal title, he also held the legal title to some real estate, which in equity belonged, after the adjustment and payment of the claims of said H. C. Moses against said firm, to said firm of Moses Bros.; that as between said H. C. Moses as an individual and the said firm of Moses Bros., the said H. C. was at most the trustee of the legal title of the property so held by him for said firm after the adjustment and payment of the said debt due by said firm to him, on account of said funds so advanced by him for the use of said firm, and that said property to which he, said H. C. Moses, thus held the legal title individually, was the individual property of said Henry Moses in equity, to the amount and extent of said advances, for said firm, and being so, petitioner as the creditor of said Henry C. Moses and the holder of said debt is entitled to have said property regarded as the individual property of said Henry C. Moses, and to be paid out of the proceeds thereof, if the same is sufficient therefor." We have quoted this language of the petition to show the more plainly the position and contention of the petitioner. In short, this is the statement of the proposition, that real estate belonging to a partnership, but standing in the name of one of the partners at the time of the insolvency of the firm, is the individual property of such partner to

the extent of his claim against the firm, so that, to such extent, such property must be distributed among his individual creditors, rather than among the creditors of the partnership. When H. C. Moses lent the money in his hands, as receiver, to Moses Bros., he was guilty of a breach of trust, in which his firm participated, if they knew the character of the fund that was lent them. By so doing he incurred a personal liability on himself to account for the money, and the borrowers, if chargeable with a knowledge of the violated duty, incurred a similar pecuniary liability; but, in contracting the debt, even if they participated in the breach of duty,—as we before now, in reference to this same matter, decided,—that fact did not change the nature of the obligation, so as to fasten a lien on their property for its payment. A lien, as we have said, is never an incident of a contract or money obligation unless made so by the contract or by some rule of law. The proposition submitted does not differ materially from the same question presented and decided in cases heretofore before us on appeal. It cannot be sustained without overruling these and many other cases in this and other courts. Goldthwaite v. Ellison (Ala.) 12 South. 812; Ellison v. Moses, 95 Ala. 221, 11 South. 347; 17 Am. & Eng. Enc. Law, 1195, and notes 2, 3.

What we have said is equally applicable to each of the cases set forth in the transcript,—that of Robert Goldthwaite, receiver, v. Janney & Cheney, trustees, etc., and of Adolph Abraham and others against same parties. There was no error in the rulings of the court below, and the decrees in each case must in all respects be affirmed. Let the appellants, each, pay one-half of the costs of this appeal. Affirmed.

(102 Ala. 170)

HARRISON v. STATE.

(Supreme Court of Alabama. May 4, 1894.)

PHYSICIANS—PRACTICING WITHOUT LICENSE.

A person who has practiced medicine in the state for five years, though he is not a graduate of a medical school, is a "physician," within Acts 1890-91, providing that "any person practicing medicine" without a certificate of qualification from an authorized board of examiners shall be punishable, but that the act shall not apply to any "physician" who has practiced medicine in the state for the past five years.

Appeal from Shelby county court; John S. Leeper, Judge.

Henry W. Harrison was convicted of practicing medicine without a license, and appeals. Reversed.

Practicing medicine without license. The case was tried by and before the judge of the county court, without the intervention of a jury, on a charge against the defendant, for a violation of section 4078 of the Code as amended February 18, 1891 (Acts 1890-91, p. 857), which reads as follows: "Any person practicing medicine or surgery in this

state, without having first obtained a certificate of qualification, from one of the authorized boards of medical examiners of this state, shall be guilty of a misdemeanor, and on conviction thereof shall be fined, not less than \$25.00, nor more than \$100: provided, that this act shall not apply to any doctors or physicians now practicing medicine in Alabama, who are graduates of a respectable medical college, and have complied with the laws by having their diplomas recorded by the judge of probate in the county in which they may be practicing medicine; and this act shall not apply to any physician who has practiced medicine in this state for the past five years." The evidence showed that the defendant had been practicing medicine in Shelby county, Ala., regularly, since 1885, and occasionally, prior thereto, for some years; that he had done all of the practice in the neighborhood where he lives in said county, since the year 1885; that he did this for a livelihood; that in that time, he had treated about 1,100 cases of fever, and had not lost a patient; that he attended medical lectures in Mobile, for about 11 months in the year 1887, and for about the same time in 1888. The evidence also showed, that the defendant had not obtained a license or diploma or a certificate of qualification and was not a graduate of a medical college. This was all the evidence, and on it the court found the defendant guilty and assessed a fine of \$25, to which finding and judgment of the court the defendant excepted, and assigns the same as error.

W. S. Cary, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. The only defense the defendant made to the accusation preferred against him was, that he did not violate said act, because he was exempted from its penalties by its proviso, in that he had practiced medicine in Shelby county, Ala., for five years, continuously, prior to the time when said act of 18th February, 1891, went into effect. The contention on the part of the state, and under which the conviction must be sustained, if at all, is, that the word, "physician," as used in the proviso of the act, does not mean the same thing as the words, "person practicing medicine," as employed in the first sentence of the act, or, in other words, that a physician is not the same thing, in the meaning of the enactment, as a person practicing medicine. Words are to be construed in their popular sense,—the plain sense in which the people generally understand them,—unless it plainly appears from the writing in which they appear that they were intended to be employed in some other sense. *Lehman, Durr & Co. v. Robinson*, 59 Ala. 234; 2 Brick. Dig. p. 208, § 60. *Bouvier* defines the word, "physician," to mean: "A person who has received the degree of doctor of medicine from an incorporated institution;

one lawfully engaged in the practice of medicine." 18 Am. & Eng. Enc. Law, 427. This definition does not confine the class to those who have graduated at a medical college, but includes, as well, all who are lawfully engaged in the practice of medicine, whether graduates or not. The word, in its popular sense, means, "one who professes or practices medicine, or the healing art; a doctor." *Worcester*. The words, "person practicing medicine" and "doctor and physician," as employed in the act under consideration, refer to one of the same class of persons, and are used interchangeably. Section 4078, before its amendment, did not contain the word, "doctor," or, "physician," but the general designation, "any person practicing medicine." Construing this section, in *Brooks v. State*, 88 Ala. 125, 6 South. 902, this court used those words, as synonymous with the word, "physician." To do otherwise in construing this act, would make it a delusion and a snare. The judgment of the court below is reversed, and the defendant discharged. Reversed and rendered.

(108 Ala. 196)

TIPPINS v. PETERS.

(Supreme Court of Alabama. May 15, 1894.)

JUDGMENT—AMENDMENT.

Under Code, § 2838, providing that, when damages in tort do not exceed \$20, plaintiff shall recover no more costs than damages, unless the judge certify that greater damages should have been awarded, a judgment in an action for injury to land, for \$6 and full costs, is erroneous where the judge failed to certify that greater damages should have been awarded, but such error cannot be corrected by motion at a subsequent term to amend the judgment so that the costs should be limited to the damages assessed.

Appeal from circuit court, Escambia county; J. R. Tyson, Judge.

Action of trespass by P. H. M. Tippins against Richard G. Peters. Plaintiff got judgment, and, at a subsequent term, defendant moved to amend. From a judgment overruling the motion, defendant appeals. Affirmed.

James M. Davison, for appellant. Rabb & Stevens, for appellee.

BRICKELL, C. J. The appellee, plaintiff in an action of trespass for an injury to lands, on the verdict of a jury, recovered judgment against the appellant, the defendant in the action, for six dollars, the damages assessed by the jury, and full costs, the presiding judge not certifying that greater damages should have been awarded. At a subsequent term, the appellant moved to amend the judgment so that the recovery of costs should be limited to the amount of the damages assessed. The motion was overruled, and from the judgment overruling it the appeal is taken.

The statute (Code, § 2838) declares that "in all actions to recover damages for torts, * * * the plaintiff recovers no more costs than damages, when such damages do not exceed twenty dollars, unless the presiding judge certifies that greater damages should have been awarded; and on failure to certify, judgment must be rendered against the plaintiff for such residue." It is manifest the judgment is erroneous, and, on appeal, would have been reversed, and a judgment in conformity to the statute rendered. *Reid v. Gordon*, 2 Stew. (Ala.) 469; *Galle v. Lynch*, 21 Ala. 579; *Tecumseh Co. v. Mangum*, 67 Ala. 246. An application to amend a judgment is not the equivalent of an appeal, and cannot be made to perform its office. Clerical errors may be corrected by amendment after the expiration of the term at which a judgment was rendered; judicial errors, after the expiration of the term, are incapable of correction otherwise than by appeal. The judgment before us is that which the court pronounced. There was no error in its entry, and its correction at a subsequent term would be the exercise of revisory power by the court rendering it. If it were amended so as to conform to the statute, there must be added to it a judgment against the plaintiff for the residue of the costs, in excess of the damages recovered,—a judgment which ought to have been rendered, but was not, nor was it the purpose to render it. The power and duty of a court to correct clerical errors has in it no element of revisory power. Its scope and extent is declared by the statute: The amendment of "any clerical error, mistake in the calculation of interest, or other mistake of the clerk, when there is sufficient matter apparent on the record, or entries of the court, to amend by." Code, § 2836; *Browder v. Faulkner*, 82 Ala. 257, 3 South. 30; *Emerson v. Heard*, 81 Ala. 443, 1 South. 197; *Ex parte Robinson*, 72 Ala. 389; *Whorley v. Railroad Co.*, Id. 20; 1 Freem. Judgm. § 70. There is no error in the judgment from which the appeal is taken, and it must be affirmed. Affirmed.

(108 Ala. 55)

LONG v. STATE.

(Supreme Court of Alabama. May 15, 1894.)
SUMMONING GRAND JURY—SALE OF INTOXICATING LIQUORS.

1. The fact that the jury commissioners break open the jury box, the key having been lost, and then draw the grand jury, does not render an indictment found by such jury invalid.

2. Where a statute forbids the sale of liquors in a certain precinct, by name, which is afterwards subdivided, it is unlawful to sell liquors in either subdivision, though one is called by another name.

Appeal from circuit court, Pickens county; S. H. Sprott, Judge.

Robert Long was convicted of selling intoxicating liquors, and appeals. Affirmed.

E. D. Willett, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The motion to quash the indictment against the defendant below (appellant here) was properly overruled. It proceeded on the idea that there had been vitiating irregularity in drawing the grand jury which found and returned the indictment; and this, it is satisfactorily shown, consisted alone in the fact that, the key of the jury box being lost, the jury commissioners broke the seals, and pried the box open, and then proceeded to draw this grand jury and other juries in the manner prescribed by law. The objection to the validity of their action is really too untenable for discussion.

The only other question presented by the record arises on an exception to the affirmative charge given at the request of the state. The defendant was charged with the violation of a statute prohibiting the sale, etc., of liquors in Fairfield precinct of Pickens county. There was an agreed statement of facts, from which every element of guilt clearly appears, if, as matter of law, the sale was within the territory covered by the prohibitory statute. That it was within the boundaries of Fairfield precinct, as that subdivision of the county was constituted when the act was passed, is admitted. It is also admitted that, since then, Fairfield precinct has been divided into two precincts, one of which is still known as Fairfield, and the other is called Whitten's precinct. This occurred prior to the sale admitted by the defendant, and the sale was made in that part of the original Fairfield precinct which now constitutes Whitten's precinct; and it is insisted that the sale was not a violation of the statute in question, because not made in Fairfield precinct, as now constituted. There is no merit in the contention, as has been decided by this court in the singularly identical case of *Prestwood v. State*, 88 Ala. 235, 7 South. 259. See, also, *Love v. Porter*, 98 Ala. 384, 9 South. 585.

Affirmed.

(108 Ala. 400)

MURRAY et al. v. HEARD et al.

(Supreme Court of Alabama. May 16, 1894.)
FRAUDULENT CONVEYANCE—CONSIDERATION—
BONA FIDES.

1. Where an insolvent debtor conveys his property in consideration of an antecedent debt, the burden of proof is upon the grantee, in an action by the creditors to set aside the conveyance, to show bona fides.

2. Where, in an action to set aside a conveyance by an insolvent debtor to his wife, in consideration of an antecedent debt, the uncontradicted testimony of the husband, wife, and wife's brother shows the bona fides of the consideration and the property was taken at a fair valuation, the conveyance will not be set aside.

Appeal from chancery court, Butler county; John A. Foster, Chancellor.

Bill by Murray, Dibbrell & Co. and others

against George P. Heard and others. There was a decree for defendants, and complainants appeal. Affirmed.

On January 10, 1891, Murray, Dibbrell & Co. and O'Bryan Bros. filed a bill of complaint against George P. Heard, A. A. Heard, and W. L. Tillman, in which the complainants alleged that they were creditors of said George P. Heard; that on the 5th day of January, 1891, the said George P. Heard conveyed to his wife, A. A. Heard, certain lands, upon the recited consideration of \$1,100, in payment of an alleged antecedent debt due to her by the said George P. Heard; that the said George P. Heard also conveyed to W. L. Tillman certain other lands and personal property, upon the recited consideration of \$4,084.58, in payment of an alleged antecedent debt. The bill averred that the considerations recited in the respective deeds were fictitious and simulated; that the property conveyed was greatly disproportionate to the debts; and that the conveyances were fraudulent and void. The prayer of the bill was that these conveyances be declared fraudulent and void as to complainants, and that the property therein described and attempted to be conveyed be subjected to the debts of the complainants. Shortly after the filing of this bill, there were two other bills filed by the creditors of the said George P. Heard. Each of these bills was substantially a copy of the first, with the exception of the amounts claimed and the names of the complainants. The respondents answered and defended separately these three bills of complaint, and in their answers denied that said George P. Heard was indebted to either of the complainants at the time of the execution of the conveyances to A. A. Heard and W. L. Tillman, or at the time of the filing of the respective bills, and they affirmed in their answer the existence and validity of George P. Heard's indebtedness to each of the other respondents, the sufficiency of the consideration of each of the conveyances, and that no reservation of an interest in said property was reserved to the said George P. Heard, and that the conveyances were not executed for the purpose of hindering, delaying, or defrauding his other creditors. The evidence in each of the cases was the same. The opinion renders it unnecessary to set out this evidence. The three causes were submitted together, and upon the final hearing, upon the pleadings and proof, it was decreed that the complainants in each of the bills were not entitled to the relief prayed for, and each of the bills was dismissed. From this decree, Murray, Dibbrell & Co. prosecute the present appeal, and assign the same as error.

Stallings & Willinson, for appellants. J. C. Richardson, for appellees.

COLEMAN, J. The appellants, creditors of George P. Heard, filed the present bill in the chancery court, and sought to set aside

and annul certain conveyances of land and a bill of sale executed by the debtor to Mrs. A. A. Heard and William L. Tillman, the former being the wife and the latter the brother-in-law of the debtor. There were separate conveyances, and for separate property, to each of the grantees. The proof shows that the claims of the complainants were bona fide, and in part were past due, before the execution of the several conveyances and bill of sale. The defense set up was that the property was sold and received in absolute payment of pre-existing debts. The fact that complainants' debts were owing prior to the date of the execution of the grant cast the burden of showing the bona fides of the consideration, and that the property was taken at its fair value, on the defendants. There is a statement in the case of *Moore v. Penn*, 95 Ala., top of page 204, 10 South. 343, to the effect that the purchasing creditor must "also show that no benefit was reserved to the debtor," which is calculated to mislead. This burden is not on the purchasing creditor. The true rule is declared in *Roswald v. Hobbie*, 85 Ala. 73, 4 South. 177; *Pollak v. Searcy*, 84 Ala. 259, 4 South. 137; *Dollins v. Pollock*, 89 Ala. 351, 7 South. 904; *Smith v. Collins*, 94 Ala. 394, 10 South. 334; *Chipman v. Glennon*, 98 Ala. 263, 13 South. 822. In the examination of the testimony introduced by the respondent, the relation of the grantees to the debtor is a fact to be considered in determining the bona fides of the transaction between them and the truth of their statements. We have examined the testimony with great care, and find from the testimony of disinterested parties that the property was sold at a price not less than its real value. The brother-in-law, Tillman, has established the bona fides and amount of his claim, by the testimony of disinterested witnesses, and by evidence which leaves no room to question its correctness. His claim alone, according to the great weight of the evidence, was a fair equivalent for the property conveyed and sold to both grantees. Mrs. A. A. Heard has established her claim by her own testimony and that of Tillman, her brother, and her husband, the defendant debtor. She has gone into details, as to her resources, her means of obtaining the money she claims to have loaned her husband. She testifies as to her landed interest, where it is situated, the annual rents received from this source, and by whom and when paid; also, as to her ownership of the livery stable, the evidence of such ownership, and how long she has owned it, from whom obtained, and how paid for. The complainants offered no evidence in rebuttal of the facts testified to by her and her brother in regard to her pecuniary abilities. This court would be compelled to reject, without any reason save that she was the wife of the debtor, testimony which the complainants themselves did not pretend to meet, before we could conclude that she had not fully discharged

the burden resting upon her. The law is well settled that an insolvent or failing debtor may, under proper conditions and limitations, prefer certain creditors in the payment of the debts due them. The proof brings the case fairly within the principles of law decided in the case of *Pollock v. Meyer* (Ala.) 11 South. 385, and the authorities there cited. Appellants' counsel have submitted no argument and filed no brief in the case in this court, but we have considered the questions raised by the assignments of error. There is no error in the record. Affirmed.

(108 Ala. 203)

HOME PROTECTION OF NORTH ALABAMA v. WHIDDEN.

(Supreme Court of Alabama. May 14, 1894.)

SECONDARY EVIDENCE—DECLARATIONS OF AGENT—ADMISSIBILITY.

1. Where notice to produce certain letters is not given, and no evidence is offered to show that they are lost or destroyed, copies are not admissible.

2. Acts or admissions of one professing to act as the agent of another are not admissible without independent proof of his authority.

3. To render an agent's admissions binding on his principal, they must be explanatory of some contemporaneous act, within the scope of his authority, or be made while in the execution of the agency forming part of the *res gestae*.

4. Portions of a letter containing expressions of opinion by an agent, which throw no light on the issue, are not admissible against the principal if especially objected to.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action by J. J. Whidden against the Home Protection of North Alabama upon a policy of fire insurance, to recover for the loss, by fire, of merchandise, a storehouse, and fixtures, etc., insured in said policy. Judgment for plaintiff, and defendant appeals. Reversed.

The defendant pleaded the general issue, and, by special pleas, that the assured was not entitled to recover in the present action, because he failed to observe the conditions and requirements of said policy. Upon the trial of the case, the defendant introduced in evidence the policy, and testified in his own behalf that the goods and other property covered by said policy were destroyed by fire a few nights after the issuance of said policy; that he gave the local agent of the defendant at Dothan, where the fire occurred, notice of such loss; and that he made his proof of loss, and forwarded it to the company. The plaintiff introduced, against the objection and exception of the defendant, several letters, which were written by the defendant to their adjuster, and also introduced in evidence copies of other letters which were written by the local agent of the defendant to the defendant itself, notifying it of the fire and other matters in reference to said policy. The defendant objected to the introduction of these copies of said letters, on the ground that they were irrelevant,

and that the originals had not been accounted for or shown to have been misplaced. The court overruled this objection, and the defendant duly excepted. The testimony for the plaintiff tended to show that the property which was destroyed by fire exceeded the amount of the policy, and that he had complied with the requirements of said policy as to the proof of loss and other conditions. The defendant's evidence was in conflict with that of the plaintiff, and tended to show that, at the time the fire occurred, the stock of goods in the storehouse was greatly less than the amount of insurance, and that the defendant did not give the proper notice of the fire or the proper proof of loss. Upon the introduction of all the evidence, and after the court's oral charge to the jury, which is not set out in the bill of exceptions, the court, at the request of the plaintiff, gave the following written charge: "The written charges given at the instance of the defendant are not in conflict with the general charge of the court, and are not entitled to any more consideration by the jury than the general charge."

T. W. Espy and R. W. Walker, for appellant. A. E. Pace, for appellee.

COLEMAN, J. This is an action by the plaintiff, Whidden, upon a fire insurance policy, to recover for the loss of merchandise, etc., sustained by fire. The assignments of error are based upon the admission of evidence, against the objection of the appellant, and upon a charge given for the plaintiff, and the refusal to charge the jury as requested by the defendant.

The court permitted the plaintiff to introduce in evidence, against the objection of the defendant, writings which were admitted to be mere copies of letters written by one professing to be an agent of the company to another agent. The plaintiff did not serve notice on the defendant to produce the original letters, neither was there any evidence offered to show that the originals were lost or destroyed. Copies of letters cannot be classed as original evidence, and were not admissible except upon proof of notice to produce the original, or after properly accounting for the absence of the original. 13 Am. & Eng. Enc. Law, 261, 282; 21 Am. & Eng. Enc. Law, 984-989. Generally, the mere acts or admissions of one professing to act as the agent of another are not admissible, without independent proof of his authority. 3 Brick. Dig. p. 21, § 43. After the fact of agency has been established, to render his admissions binding on the principal, they must be explanatory of some contemporaneous act within the scope of his authority, or must be made while in the execution of the agency forming a part of the *res gestae*. Id. p. 25, § 108. Portions of a letter written by one who is an agent may be admissible against his principal, while other portions of the same letter may be inadmissible. Merely personal expressions of opinion by an agent, and which

throw no light upon the issue involved, ought not to be admitted against the principal if such portions are especially objected to. These principles cover the assignments of error directed against the admissions of evidence.

We cannot say the court erred in giving charge No. 1, assigned as error. The oral charge of the court is not set out, and we cannot say whether there was any conflict between it and the written charges given for the defendant. The charge may have been abstract, but the giving of such a charge is not necessarily reversible error. We do not think the court erred in refusing to give the affirmative charge for the defendant. The court should never invade the province of the jury. If all the evidence introduced by the defendant was excluded, and the record showed no evidence except that for the plaintiff, we cannot say the jury would not be authorized to find for the plaintiff. This is one way to test the right of a party to the general affirmative charge. These are the only assignments of error. Reversed and remanded.

(108 Ala. 250)

PEARCE v. WALKER.

(Supreme Court of Alabama. May 15, 1894.)

APPLICATION OF PAYMENTS.

1. If one indebted to another on several accounts fails to direct the application of a partial payment at the time of the payment, the creditor may apply it on either account.

2. In a suit to enjoin the enforcement of a power of sale in a mortgage on the ground that the debt had been paid, it appeared that the mortgagor was indebted to B. on a mortgage, and also to a firm of which B. was a member. A payment was made by a third person, with whom money had been deposited by the mortgagor, to another member, and the depository made a memorandum at time of the deposit indicating that the money was to be applied on the mortgage, but neither such member nor the mortgagee had knowledge of it. The contradicted testimony of this other member was that he received the money under an agreement with the mortgagor that it was to be applied on the debt due the firm. The payment was not entered on the mortgagor's account with the firm until 12 months later, though written evidence of it was given. *Held*, that a conclusion that the payment should have been applied in satisfaction of the mortgage was erroneous.

3. A creditor's right of application of a payment to either of several debts is not limited in time, but, having once made it, he cannot change it without the consent of the debtor.

4. A debtor cannot, after having made a payment, direct its application to any special debt, as after payment he loses all control over the payment.

5. The burden of proving payment is upon the party pleading it.

6. The burden of proving that a direction as to the application of a payment was made known to the creditor is on the debtor.

Appeal from chancery court, Marion county; Thomas Cobbs, Chancellor.

Bill by Thad. W. Walker against James P. Pearce. There was a decree for complainant, and defendant appeals. Reversed.

Almon & Bullock, for appellant. McGuire & Collier, for appellee.

BRICKELL, C. J. The bill was filed by the appellee for the cancellation of a mortgage on lands he had executed to the appellant, and to enjoin the appellant from proceeding to the execution of a power of sale contained in the mortgage. The relief was sought upon two grounds, the first of which was that the mortgage had been extinguished by a second mortgage taken in satisfaction, and the second, the payment of the mortgage debt. The chancellor did not sustain the first contention, and in that respect the decree is not now open to revision. The contention of payment was sustained, and a cancellation of the mortgage decreed, from which decree this appeal is taken.

A party pleading payment, whether as matter of defense or as ground of affirmative relief, must prove it, if the fact is denied. If of it no evidence is offered, or if the evidence of it be equally balanced, or if the evidence does not generate a rational belief of the fact, the party affirming its existence must fall for want of proof. 3 Brick. Dig. p. 698, §§ 1, 2. It is not the fact of payment which is now the matter of dispute. That there was a payment of a sum which, taken in connection with other payments, was more than sufficient to satisfy the mortgage debt, is admitted. The controversy is whether a particular payment shall be applied to the mortgage debt, or to another debt owing by the mortgagor to a partnership of which the mortgagee was a member. The general rule is that, when a party indebted to the same person on more than one account makes a partial payment, he has the unqualified right to direct its application to one debt in preference to the other. The payment is voluntary, and the debtor may declare the terms upon which it is made, and the creditor must accept them, or reject the payment. If he accepts the payment, he takes it cum onere. Therefore it is that if the debtor pay with one intent, which is known or communicated to the creditor, and the creditor receives with another intent, the intent of the payer must prevail. *Mayor, etc., v. Patten*, 1 Am. Lead. Cas. 339. But if the debtor does not, at or before the time of the payment, give direction to its application, his control of the payment is gone, and the right of the creditor to appropriate it arises, and he has the unqualified right to apply it to any valid, subsisting debt he may hold against the debtor. *Id.* 341. An exception to this rule obtains when the money with which the payment is made is known to the creditor to have been derived from a particular source or fund. Then, without the consent of the debtor, the creditor cannot apply it otherwise than to the exoneration of the source or fund from which it was derived. Nor can the debtor, without the consent of the creditor, divert the payment from the relief of that source or fund. *Id.* 341; *Strickland v. Hardie*, 82 Ala. 412, 3 South. 40.

We have with much care examined the evidence, and we cannot concur in the conclu-

sion of the chancellor that, at or before the time of the payment, the mortgagor directed its application to the payment of the mortgage debt. The fact of such direction is like the fact of payment,—an affirmative fact lying particularly within the knowledge of the debtor; and, if it be denied, the burden of proving it rests upon him. The direction need not be given in express words; circumstances may indicate it as fully as express words. If it is insisted that the direction was given in words, these must be communicated to the creditor; and, if circumstances are relied upon as indicating it, knowledge of these circumstances must be traced to the creditor. There is an entire want of evidence that the intent of the mortgagor to apply the payment to the mortgage debt, if such intent existed, was made known to the mortgagee before or at the time of the payment. The payment was not made to the mortgagee, but to a partnership of which he was a member, having a valid debt against the mortgagor; and of it the mortgagee had not knowledge or notice until it was claimed by the partnership as a payment on the debt due it. The payment was not made by the mortgagor, but by a third person with whom a brother of the mortgagor had deposited money. The memoranda made by this depositary do indicate that the money was deposited with him to be applied to the payment of the mortgage debt; but of these memoranda, and of the facts they indicate, the mortgagee had not information prior to or at the time of the payment; nor is it shown that the partner to whom the money was paid had notice or information of the memoranda, or of the fact they indicate. On the contrary, the partner receiving the money testified that he applied for and received it because of an agreement with the mortgagor that he should receive and apply it to the debt due the partnership; and in this respect his evidence is uncontroverted. Some stress seems to be laid by the chancellor on the fact that the payment was not entered on the account of the mortgagor with the partnership until more than 12 months after it was made. If this case were to be determined wholly upon the right of a creditor to apply a payment, the fact would be of little, if any, significance. The general principle is that a creditor's right of application is not limited in point of time. He may make it any time he elects; but, having once made it, he cannot change it without the consent of the debtor. The fact, however, is not now of any significance, because there was, at the time of the payment, written evidence of it given, which was accessible to the debtor, and of which, as evidence, he could have availed himself at any time. There may or may not have been in the mind of the mortgagor an intent, when the payment was made, that it should be applied to the mortgage debt. Such intent was not communicated to the mortgagee, and the payment was unattended by any act or declaration mani-

festing it; and, if there was nothing else in the case, it would be enough to say that, before the creditor can be affected by the intent of the debtor in making a payment, the intent must be disclosed to him. *Brice v. Hamilton*, 12 S. C. 32; *Long v. Miller*, 93 N. C. 233. The subsequent declarations of the mortgagor that he intended the payment to be applied to the mortgage debt are not of any consequence. The payment was an act completed. Before or at the time of making it, he could have given direction to it; after it was made, he was without control over it; nor could his past conduct be qualified or explained by his subsequent declarations. The partner receiving the payment did not act or profess to act as the agent of the mortgagee, nor was he dealt with in that capacity. If he had been dealt with in that capacity, the evidence does not disclose authority to receive payment of the mortgage debt. *Smith v. Kidd*, 23 Am. Rep. 157. The decree must be reversed, and the cause remanded for further proceedings in conformity to this opinion. Reversed and remanded.

(103 Ala. 276)

BELL v. MONTGOMERY LIGHT CO. et al.
(Supreme Court of Alabama. May 17, 1894.)
EQUITY JURISDICTION—BILL BY CORPORATE STOCKHOLDER.

1. A court of chancery has jurisdiction of a bill by a stockholder for the redress of corporate wrongs where the value of his stock is alleged to be \$100.

2. A request of the governing body of a corporation by a stockholder for the redress of grievances before he brings suit is not necessary where the corporate management is under the control of the guilty parties, but the complainant must allege with particularity the facts which excuse such request to the directors.

Appeal from chancery court, Montgomery county; John A. Foster, Judge.

Bill by Smith Cullom against the Montgomery Light Company and another to set aside defendants' charter, and for an accounting. Cullom having died, the case was revived in the name of P. H. Bell, administrator of his estate. A motion to dismiss the bill for want of equity was sustained, and plaintiff appeals. Reversed.

The bill, as originally filed, was by a stockholder, and prayed to have the charter of the Montgomery Light Company vacated and annulled, and to require Ignatius Pollak to account for money received by him, on bonds or otherwise, which belonged to the company, and for other relief looking to the remedy of grievous wrongs, which were alleged in the bill to have been perpetrated by the said Pollak and his associates, against the company and its stockholders.

J. M. Chilton, Thos. H. Clark, and Sumter Lea, for appellant. Tompkins & Gray, for appellees.

HARALSON, J. 1. The defendant pleaded to the bill as originally filed, that the whole interest of the complainant in the suit did not

equal \$20, and this court had no jurisdiction of the case made by the bill; that all the other stockholders in said company, and all persons interested therein other than complainant, had been cognizant of the change in the name of said company, of the increase of its capital stock and of the issuance of its bonds, and had made no objection to the said several acts, but, on the contrary, had indorsed, ratified and confirmed the same, and made no complaint thereof. The record shows, also, that the defendant demurred to the bill on grounds questioning its equity, and moved to dismiss it for want of equity. At the April term, 1892, as appears, the cause was submitted on a motion to dismiss for want of equity, on the demurrer, and on the plea and its sufficiency, with an admission of the truth of the plea. The cause was held up, on such submission, for decree in vacation. The court rendered its decree, holding that there was no equity in the bill, and that the plea,—on an admission of the complainant, that the facts stated in it, were true, presented a good defense; and, upon consideration, it was ordered, that the cause be dismissed, unless, during the term, an amendment, sufficient to give the bill equity, should be offered. The complainant, accordingly, sought and amended his bill—First. By adding the averments, that the nominal or face value of the stock held by him, was \$8, but that its actual value, was \$100; that notwithstanding the fraudulent acts and purposes of said Pollak in procuring said amendments to the charter of the Montgomery Gas Light Company, including its change of name, the act of the judge of probate in the matter was valid, and its validity was not questioned by the bill, especially so, as some of the bonds issued had passed into the hands of bona fide purchasers for value; that the legal title to the property of the Electric Light Company passed, under the purchase mentioned in the original bill, and the validity of said purchase was not questioned; but that said Pollak, while controlling both companies, as alleged in the original bill, sold said property to the Montgomery Light Company, at a sum greatly in excess of its value. Second. By striking out the prayer for special relief, as found in the original bill, and inserting in lieu thereof, the prayer, that said Pollak be made to account for and pay over the proceeds of the sale of \$125,000 of bonds sold by him and which belonged to said company; that a reference be ordered to ascertain the real value of the property sold by the Electric Light Company to the Montgomery Light Company, at the time of the sale; that if it should appear that said Pollak or said Montgomery Light Company, sold the same for more than it was worth, and that the trade was unfair, the said Pollak be required to turn over for cancellation (if he still owned the same) so much of said stock and bonds as should appear to be in excess of the true value of said property at the time of said sale, the

proportion between the stock and bonds received by him, being considered and observed in the matter of such cancellation, and, if it should appear that such stock and bonds have been sold, then, as to said excess, he be required to pay in money. At the April term, 1893, of said chancery court, the bill as amended, was submitted on a motion to dismiss it for want of equity, and the court, holding that it was without equity, dismissed it. He appeals from this decree dismissing the bill, and this is the only error assigned.

2. Complainant does not state in his bill what a share of the stock in the company is, but he does state, that he owns stock of the nominal face value of \$8, but that its value is \$100. The motion to dismiss the bill for the want of equity admitted this to be its value, and of this sum the chancery court has jurisdiction. *Hall v. Cannte*, 22 Ala. 650; *Campbell v. Conner*, 78 Ala. 211.

3. The bill was filed by a stockholder against the corporation of which he is a member, to remedy an alleged corporate wrong, without first having applied to the directors or the stockholders of the corporation for redress of his grievances, or for action in conformity to his wishes. He excuses himself for not doing so, on the ground, that any such an attempt would have been useless and futile, for reasons disclosed in his bill. Unless he has presented a good excuse for not having preferred this request, his bill is without equity, and certainly liable to demurrer on that account. We have so many times discussed the law governing cases of this character, and it is so well settled in this court, as to leave no necessity for its further consideration, except to make application of the well-settled rules, to the cases as they may arise. It may be stated as the settled rule, that this request by the stockholder of the governing body for redress before he brings suit, is not necessary or required, when the corporate management is under the control of the guilty parties, for the reason, that they would not comply with the request, or if they did, the court would not allow them to conduct the litigation against themselves. But, the complainant is required, nevertheless, to allege with particularity and definiteness the facts which excuse such a demand or request to the directors. See *Steiner v. Parsons* (Ala.) 13 South. 772; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 219; and the authorities cited in those cases; *Cook, Stock, Stockh. & Corp. Law*, § 741. If the facts stated in the bill are true,—and on a motion to dismiss for want of equity, they must be so taken,—frauds of the most grievous character have been committed by Pollak and his associate directors, which call for redress, and it may be, that if tested by a demurrer, these allegations constituting complainant's excuse for not making request of the corporation, to remedy his alleged grievances, before bringing the suit himself for that purpose, would be held to be sufficient; but this we need not

decide, since, if not sufficient, on a motion to dismiss for the want of equity, the lack of sufficiency of averment in this respect, will be regarded as an amendable defect. It is well, in this connection, to call to mind our former rulings, holding, that under the rules of practice in this state, a motion to dismiss a bill for want of equity should prevail only when, admitting all the facts apparent on the face of the bill, whether well or illy pleaded, the complainant can have no relief; and that, if it appear, upon proper averments of facts and appropriate prayer, equitable relief may be obtained, which cannot be had on the bill as framed, the motion to dismiss should be overruled and respondent put to his demurrer; that the bill for the purposes of such a motion, will be considered, as if it had already been amended in all particulars in which amendments are proper. *Hooper v. Railroad Co.*, 69 Ala. 529; *Seals v. Robinson*, 75 Ala. 363; *Glover v. Hembree*, 82 Ala. 324, 8 South. 251; *Haynes v. Short*, 88 Ala. 562, 7 South. 157.

4. Whether the amendment allowed and made, was a departure from and inconsistent with the case as made by the original bill, as is contended, we will not stop to consider on this motion. A demurrer was the proper means of reaching that vice, if it existed. We can have reference, at this time, only to the bill as it is presented to us by the amendment, and, if it contains equity, or, by still further amendment it can be made to contain it, it is our duty to set aside the decree of the chancery court dismissing it, in order that defendant, if not satisfied with its present frame, may test the sufficiency of its averments, or any vice which it may be supposed to contain, by appropriate demurrer, and that complainant may, in that event, have the opportunity of amending, as he may be advised. The motion to dismiss for want of equity, should have been denied. Reversed and remanded.

(202 Ala. 37)

GOODWIN v. STATE.

(Supreme Court of Alabama. May 4, 1894.)

JURORS—SUMMONING AND IMPANELING—MURDER—EVIDENCE—CONFESSIONS—INSTRUCTIONS.

1. On a trial for a capital offense, a copy of the venire served on defendant contained the name of F. G., Jr., and, when such name was called, one F. G., an old man of 70 years, appeared and stated that he was not F. G., Jr., and was excused from service. *Held*, that the court did not err in denying the motion to quash the venire, and in ordering the sheriff to summon F. G., Jr., and in stopping the proceeding until he appeared in court.

2. The Mobile county special jury law provides that the jury commissioners shall draw 36 names from the city court jury box for jurors for the first week of the next term, and that the clerk shall preserve the slips, and direct the sheriff to summon the persons drawn; that, on trial for a capital offense, the judge, when he has fixed the number of special jurors allowed defendant, shall direct the clerk to draw such number from the jury box, the slips to be preserved in a separate package; that such

slips, together with the slips containing the names of the regular jurors, shall be placed in a box, and drawn out one by one till the jury is completed. *Held*, on such a trial, that where the name of one T. M., Jr., was drawn by the commissioners, returned to the clerk, placed in a hat by the sheriff, and drawn out by him, and the person summoned on the venire and who answered the call was one T. M., another person, it was reversible error to put such person on defendant as a juror, over his objection.

3. On a murder trial, testimony of one that he saw the shooting, and pointed out the places where deceased and defendant were standing at the time of the shooting to another witness, who measured the distance between the two points, was competent.

4. Where defendant put his character for peace and quiet in issue, the state, on cross-examination, could ask the witnesses who testified in his favor on that issue if they had not heard of specified acts of violence committed by defendant.

5. Defendant testified that, when he surrendered, the jailer took him into his office, and told him it would be better for him to tell all about the difficulty. A witness who stated that he was present when defendant surrendered, and went into the office with him, but was not present all the time defendant was in the office, testified that, while present, he had not heard the jailer tell defendant it would be better to tell all about it, and that what defendant said was voluntarily said. The jailer also denied that he made such remark or other threats or promises. *Held*, that defendant's confession to the jailer was competent.

6. An instruction that, if the jury believed that the jailer told the prisoner that it would be worse for him if he did not confess before the confession was made, then the jury should disregard the confession, was erroneous; since the admissibility of confessions is for the court, and their credibility for the jury.

7. An instruction that, if the jury believed that the jailer made any threats to the prisoner before the confession, the jury should disregard such confessions, was erroneous, for the same reason.

8. There being no evidence that there were any threats made to induce confession, such instruction was further erroneous as being abstract.

9. The court properly refused to charge that, if the circumstances tending to the firing of the fatal shot were such as to impress defendant with a reasonable belief that, at the time of firing the shot, it was necessary to prevent death or great bodily harm, defendant should be acquitted, unless the jury further believed that defendant was not free from fault in bringing on the difficulty.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Philip Goodwin was convicted of murder, and appeals. Reversed.

The testimony for the state, as is shown by the bill of exceptions, tended to show that on the morning of the killing, the defendant came up in front of the house upon the porch of which Poole was standing, and after abusing Poole said he was going to shoot him; that Poole told the defendant not to shoot him, and that thereupon, after walking a short distance by the yard fence, the defendant raised his gun and fired upon Poole, the shot entering his right side; that there was no demonstration on the part of Poole; and that his hands were hanging down by his side when he was shot. The defendant testified in his own behalf that when he shot said

Poole he, Poole, had cursed him, and was starting from the porch in an angry manner, and reached his hand behind him as if to draw a pistol, whereupon the defendant fired. During the examination of Jerry Busby as a witness for the state, and after he had testified that he was sitting on the porch of the house where Poole was shot, at the time the shooting occurred, and that he knew the respective positions of the parties, the said witness was asked the following question by the solicitor: "Did you show Mr. Dorlan the place where Poole and Goodwin were each standing when the shooting took place?" The defendant objected to this question, and duly excepted to the court's overruling his objection. The witness answered: "I pointed out to Mr. Dorlan the place where Poole was standing on the gallery when he was shot, and also the place where Goodwin was standing when he shot Poole. I saw Mr. Dorlan measure the distance between these two points." Defendant excepted to the court overruling his motion to exclude this answer. Upon the introduction of the said Phelan Dorlan, who was sheriff of Mobile county, as a witness for the state, the solicitor asked him the following question: "Did Mr. Jerry Busby show you the place where Mr. Poole and Goodwin were each standing at the time of the shooting?" The defendant objected to this question, and duly excepted to the court's overruling his objection. The witness answered: "Mr. Jerry Busby showed me the place where Poole and Goodwin were each standing at the time of the shooting. I measured the distance between these two points." The defendant moved to exclude this answer from the jury, and duly excepted to the court's overruling his motion. The solicitor then asked the witness: "What is the distance between these two points?" The defendant objected to this question, and duly excepted to the court's overruling his objection, and upon the witness giving the distance according to the measurements he had made, the defendant moved to exclude said answer, and duly excepted to the overruling his said motion. Upon the introduction of several witnesses by the defendant who testified as to his good reputation for peace and quiet, the solicitor on cross-examination asked each of the witnesses the following question: "Did you hear that Philip Goodwin hit a man with an ax at Cuba, Mississippi, before he came to Venetia," the place where the shooting occurred, "and that was the reason he left Cuba?" The defendant separately objected to each of these questions, as asked the several witnesses. The court overruled each of such objections, and the defendant separately excepted to each of these rulings. The facts in reference to the alleged confessions of the defendant are sufficiently stated in the opinion. Upon the introduction of all the evidence, the defendant requested the court to give to the jury each of the following charges, and separately ex-

cepted to the court's refusal to give each of them as asked: (3) "If the jury believe from the evidence that the jailer told the prisoner that it would be worse for him if he did not confess, before said confession was made to him, then the jury will disregard said confession in considering the evidence in this case." (4) "If the jury believe from the evidence that the jailer made any threats to the prisoner, before said confession was made to him, then the jury will discard said confession in weighing the evidence in this cause." (6) "If the jury believe from the evidence that, at the time the defendant fired the fatal shot, the deceased was advancing towards defendant in an angry and threatening manner, and as he advanced put his right hand towards his hip pocket as if to draw his pistol, then the defendant could lawfully anticipate his assailant and fire upon him first, and without waiting till the deceased drew his pistol, and the jury must acquit the defendant." (7) "If the jury believe from the evidence, that, at the time the fatal shot was fired, the deceased cursed the defendant, and was advancing towards him in an angry and threatening manner, and as he advanced put his right hand back towards his hip pocket as if to draw his pistol, then the defendant could lawfully fire upon his assailant and the jury must acquit him." (8) "If the jury believe from the evidence, that, at the time the fatal shot was fired, the deceased cursed or abused the defendant, and advanced towards him in an angry and threatening manner, and as he advanced put his right hand back towards his hip pocket, as if to draw his pistol, and that the defendant had good reason to believe and did believe that he was in great danger of life or limb or of great bodily harm from the deceased, then he could lawfully fire upon the deceased, and the jury must acquit him." (9) "If the jury believe from the evidence, that, at the time the fatal shot was fired, the defendant had good reason to believe and did believe that he was in great danger of life or limb, or of great bodily harm, at the hands of the deceased, then the jury must acquit him." (10) "If the jury believe from the evidence, that, at the time the fatal shot was fired, the defendant had good reason to believe and did believe that he was in danger of life or limb, or of great bodily harm, at the hands of the deceased, then the defendant might lawfully anticipate the deceased and fire upon him, without waiting for him to draw his pistol, and the jury must acquit him." (11) "If the jury believe from the evidence, that, at the time the fatal shot was fired, the deceased cursed or abused the defendant and was advancing towards him in an angry and threatening manner, and as he advanced put his right hand back towards his hip pocket, as if to draw his pistol, and the defendant had good reason to believe and did believe that he was in great danger of life or limb or of great bodily harm from the deceased, then the defendant might

act on appearances, and fire upon the deceased, without waiting for the deceased to draw his pistol, and the defendant, under such circumstances, could lawfully fire upon the deceased, even if it should turn out that the deceased had no pistol in his pocket." (12) "If the jury believe from the evidence that, at the time the fatal shot was fired, the deceased cursed or abused the defendant, and was advancing towards him in an angry manner, and as he advanced put his right hand back towards his hip pocket as if to draw his pistol, and the defendant had good reason to believe and did believe that he was in great danger of life or limb or of great bodily harm, from the deceased, then the defendant might act on appearances, and fire upon the deceased, without waiting for the deceased to draw his pistol, and the defendant, under such circumstances, could lawfully fire upon the deceased, even if it should turn out that the deceased in fact had no pistol in his pocket at the time, and the jury must acquit the defendant." (29) "If the defendant, at the time he shot, believed that he was in danger of his life, or of great bodily harm from the deceased, though in fact he was mistaken, and was not in actual danger, yet, if he did so believe, and had reasonable grounds to so believe, the defendant had the right to shoot in self-defense, and the jury must acquit him." (39) "It is not necessary that there should be actual danger of death or great bodily harm in order to justify the taking of human life; but, if the jury are satisfied, from all the evidence in the case, that the circumstances attending the firing of the fatal shot were such as to impress Philip Goodwin, the defendant, with a reasonable belief that at the time of firing the shot it was necessary in order to prevent death or great bodily harm to his person, then they must acquit the defendant, unless they further believe that the defendant was not free from fault in bringing on the difficulty."

McCarron & Lewis and Henry Tonsmeire, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. 1. On the day set for the trial of this cause, the names of the 100 persons allowed and summoned for the trial were placed in a hat, and the drawing proceeded under the direction of the court, and according to the terms of the statute (Acts 1884-85, p. 539), until the name of Francisco Gomez, Jr., was called, when one Francisco Gomez appeared in person, who being sworn, stated that he was 70 years old; that he was not Francisco Gomez, Jr.; his son bore that name, and lived in Mobile county. The old man claimed his exemption for overage, which was allowed by the court. The copy of the venire that had been served on defendant, contained the name of Francisco Gomez, Jr. The defendant then moved to quash the venire, which motion the court

denied, and ordered the sheriff to summon Francisco Gomez, Jr., instantler, and stopped the proceedings till said Gomez, Jr., appeared in court. He was challenged peremptorily by the state. The defendant excepted to the refusal of the court to quash the venire, and also excepted to the court ordering the sheriff to go out and summons said Francisco Gomez, Jr. It seemed to be difficult to satisfy the defendant. He moved to quash the venire, because Gomez, Jr., was not present, and had not been served, and when the court took the time and trouble and had him brought in, he objected to this procedure. The court, by its action, put defendant in the same position exactly, as to this juror, that he would have occupied if he had been served in the first instance and had been present in court. It was not shown that there was any other Francisco Gomez, Jr., in the county, and the presumption is, that this was the man whose name was drawn from the jury box by the court, and served on defendant, as one of the special venire for his trial. There was no error in the rulings as to this matter. Code, § 4322.¹

2. The drawing proceeded, as before, until a slip containing the name of Thomas McDonald, Jr., was drawn, and in response to the call, a man appeared, who being duly examined, said his name was Thomas McDonald; that he lived in Mobile county and had been summoned for the week; that there was another family in Mobile county by the name of McDonald, of kin to him, in which there were two Thomas McDonalds,—father and son,—but he did not know whether the son was called McDonald, Jr., or not. It is stated in the bill of exceptions, that "the slip of paper drawn from the hat by the sheriff, had on it, 'Thomas McDonald, Jr., Co.,'—the latter affix standing for 'County.' The venire returned by the jury commissioners for Mobile county to the clerk of the court had on it, 'Thomas McDonald, Co.,' and the copy served on the defendant, had on it, 'Thomas McDonald, County.' The sheriff stated that the man, Thomas McDonald, who had appeared in answer to the call, was the man whom he had summoned as a juror, and that he was on the regular jury for the week." The special jury law of Mobile county provides that the jury commissioners shall draw 86 names from the "city court jury box," and these shall be recorded as the petit jurors for the first jury week of the

¹ Code, § 4322, provides that a mistake in the name of any person summoned as a juror for the trial of a capital offense, either in the venire or in the list of jurors delivered to defendant, shall not be sufficient cause to quash the venire, or to delay or continue the trial, unless the court, in its discretion, is of opinion that the ends of justice so require; but that the court must in such case direct the names of such persons to be discarded, and others to be forthwith summoned to supply their places; and that the persons so summoned shall be disposed of in the same manner as if they had been summoned in the first instance.

next term of the city court, and that the slips which have been drawn "shall be delivered to the clerk of the city court, who shall carefully preserve the same until the meeting of said court." It is made the duty of the clerk to direct, at once, to the sheriff, a writ commanding him to summons the persons drawn as petit jurors and named in the writ, to appear as such. On the trial of a person charged in said court with the commission of a capital offense, it is provided, that the judge,—when he has made his order fixing the day of trial and the number of special jurors allowed defendant for his trial,—shall direct the clerk to draw from the jury box, in open court, the number of additional jurors specified in such order, and as the names of such jurors are drawn, they are to be entered on the minutes of the court, "and the slips so drawn shall be preserved by the clerk in a separate package until disposed of as directed." On the day of trial, "the slips containing the names of the regular jurors drawn for the week in which such trial is set,—(which have been returned to the clerk by the jury commissioners who drew them from the box),—together with the slips containing the names of the additional jurors drawn, under the direction of the court, shall be folded or rolled up and placed in a box, or some substitute therefor and shaken together, and such officer as may be designated by the court must, in the presence of the court, draw out such slips, one by one, until the jury is completed." The bill of exceptions, in addition to the statements above recited, taken from it, contains this further statement as to the drawing of the jury in this case, viz.: "The court ordered the sheriff to proceed with the call of the venire drawn for the trial of this cause, and thereupon the sheriff put into a hat the small slips of paper which had been drawn by the jury commissioners for Mobile county, and each of which slips of paper contained the name of a juror written thereon, and proceeded with the call of said venire by drawing from said hat one of said slips of paper at a time with the name of a juror thereon," until the names of Gomez, Jr., and Thomas McDonald, Jr., were called. The word "Junior," or "Jr.," it has been held, is no part of the name of a person who uses it as an affix to his name, but is ordinarily a mere description of the person. The word means, "younger," "later born," "later in office or rank." And where two reside in the same place, and one uses the addition, "Jr.," they will be presumed to be father and son. 16 Am. & Eng. Enc. Law, 121. The statute under construction, seems to require that the names of the persons whose names are drawn from the jury box, whether by the commissioners, or under the direction of the court, shall be the very persons to whom the defendant in a capital case is entitled, from whom to select a jury. The particularity with which the identical slips drawn

from the jury box are to be preserved by the clerk, to be used in the drawing of the jury, in addition to the terms of the statute itself, leaves us no room to doubt on this point. It was not intended that the prisoner should be subject, as to this matter, to the discretion or the mistakes of the officers intrusted with the execution of the law. As we have seen, the bill of exceptions states positively, "that the sheriff put into a hat the small slips of paper which had been drawn by the jury commissioners," from the jury box. It is certain, therefore, that a man by the name of Thomas McDonald, with the affix of "Jr.," was drawn by the commissioners from said box, was returned by them to the clerk, and was placed by the sheriff in the hat and was drawn out by him; and that a mistake was made by the commissioners in copying their list from the slips to be returned to the court, or else, the clerk made the mistake in copying the writ for the sheriff; but, however it may have occurred, it is equally certain, that the Thomas McDonald to whom the defendant was entitled, was not the one on the venire and who responded to the call of Thomas McDonald, Jr. The defendant objected to having said juror put upon him, but his objection was overruled and he excepted. The ruling of the court was erroneous.

3. There was no merit in the objections to the testimony of the witnesses,—Busby and Dorian,—that Busby, who saw the shooting, pointed out to Dorian, the places where the deceased and defendant were standing, at the time of the shooting, and that Dorian measured and testified to the distance between the two points. The relative positions of the parties at the time one shoots and kills the other, is always competent, and the method pursued to prove it in this case was free from objection. Busby's evidence was for the purpose of identifying two points, the distance between which, important to know, had been measured by Dorian. *Green v. State* (Ala.) 11 South. 478.

4. The defendant put his character for peace and quiet in issue, and it was permissible for the state, on cross-examination, to ask the witnesses who testified in favor of defendant on that issue, if they had not heard of specific acts of violence on the part of the defendant. *Ingram v. State*, 67 Ala. 67; *De Arman v. State*, 71 Ala. 351; *Moulton v. State*, 88 Ala. 116, 6 South. 753; *Thompson v. State* (Ala.) 14 South. 878.

5. The defendant, after he had shot deceased, surrendered himself at the jail of Mobile county. He testified that the jailer carried him into the hall of the jail, and one of the deputies started away with him, when the jailer called, and told the deputy to bring him into the office, and there the jailer interrogated him about the difficulty, and told him it would be better for him to tell all about it. Rube Dorian, for the state, testified that he was present when defendant sur-

rendered himself to the jailer, and went with them into the office, but was not present all the while the jailer had the defendant in the office, but while present he never heard the jailer or any one else tell the defendant it would be better for him to tell all about it, or that it would be worse for him if he did not; and no threats or promises were made, and what he stated was voluntarily said. The jailer testified, also, that he did not tell him that it would be better or worse for him if he did or did not tell about the killing; that he did not threaten him or make him any promises, but all he said was voluntary. Both these witnesses testified to the confession as made,—that defendant stated he had had a difficulty with Poole on the day before the killing, and that he had shot him, "so he could get away, and because he said he was going to kill him, and he wanted to be as good as his word." The confession to these witnesses was admitted by the court, against the objection and exception of the defendant. He also confessed to Dr. Inge, the county physician, who testified that he did so voluntarily, without the influence of threats or promises. The confession was in substance, that he had had a difficulty with Poole the day before he shot him, about a difference between them as to defendant's account; that Poole took his pistol and ran him out of the house; that the more he thought of it, the madder he got; and that after he shot him, his first thought was to run away, but he thought it would be no use, as Mr. Dorian would catch him, so he came and gave himself up. These confessions were properly admitted. *Mauli v. State*, 95 Ala. 1, 11 South. 218.

6. Charge 3 requested by defendant was properly refused. The admissibility of confessions is for the court; their credibility for the jury. When confessions are admitted on controverted questions of fact, this court will not revise the rulings of the lower court, admitting them, unless they appear to be manifestly wrong. *Bonner v. State*, 55 Ala. 242. And, when such confessions are admitted, if the jury, from all the circumstances, are not satisfied they were voluntarily and intelligently made, it is their province and duty to reject them as entitled to no weight in passing on the question of the guilt or innocence of the accused. *Young v. State*, 68 Ala. 570. The fourth is vicious for a like reason, and because it is abstract. There is no evidence that there were any threats made to induce the confessions.

7. The refusal of the court to give charge numbered 39 is assigned as error. It seems to be a copy of one refused in the case of *Keith v. State*, 11 South. 914, 97 Ala. 32, which was there held to be a proper one, and its refusal error. We have other and some later adjudications, however, which make that an erroneous ruling. There was no error in the refusal of the court to give said charge. *Sullivan v. State* (Ala.) 15

South. 264; *Holmes v. State* (Ala.) 14 South. 864; *Webb v. State*, Id. 865; *Gibson v. State*, 89 Ala. 121, 8 South. 98.

8. The remaining charges asked and refused ignored the duty of retreat, and all inquiry into the question of freedom of defendant from fault; and the sixth and seventh are subject to the further infirmity of ignoring the existence of reasonable grounds for believing, and that defendant did believe, he was in peril of life or great bodily harm, when he shot deceased. *Cribbs v. State*, 86 Ala. 613, 6 South. 109; *Rutledge v. State*, 88 Ala. 85, 7 South. 335; *Gibson v. State*, 89 Ala. 121, 8 South. 98; *Cotten v. State*, 91 Ala. 106, 9 South. 287; *Davis v. State*, 92 Ala. 20, 9 South. 618; *Perry v. State*, 94 Ala. 25, 10 South. 650; *Wilkins v. State* (Ala.) 13 South. 312.

For the error in putting the juror, McDonald, on the defendant, and not excluding him from the venire, the judgment of the court below must be reversed. Reversed and remanded.

COLEMAN, J. (concurring). It might be inferred from the opinion in this case that the charge requested, and which apparently was copied from the *Keith Case*, 11 South. 914, 97 Ala. 32, was inherently vicious. The case of *Jones v. State*, 76 Ala. 8, was reversed because of the error in refusing a charge in which the question of retreat was ignored; and the case of *Christian v. State*, 96 Ala. 89, 11 South. 338, was reversed for refusing to give a similar charge. The principle of law involved and upon which the court proceeded in reversing these cases was fully recognized in the cases of *Lee v. State*, 92 Ala. 15, 9 South. 407, and *Harris v. State*, 96 Ala. 24, 11 South. 255. It would be error to refuse such a charge when the facts and circumstances affirmatively showed that no duty to retreat devolved upon the slayer, as where the party assaulted "was in his own house, or within the curtilage or space usually occupied and used for the purpose of the house," or in some cases of felonious assault. Where these conditions do not exist, and the defendant relies upon the law of self-defense, a charge which ignores the doctrine of retreat should be refused. As was said in the case of *Holmes v. State* (Ala.) 14 South. 864, "there cannot be a necessity to kill where there is a safe way to retreat open to the slayer, available by the exercise of reasonable prudence." The statement of the facts in the *Keith Case*, reported in 11 South. 914, and 97 Ala. 32, does not show that the assailant was excused from the duty to retreat; and, under the facts and the foregoing principles, the court did not err in refusing charge No. 2. The *Case of Keith* was properly reversed for refusing to give charge No. 1, which charge contained every element of the doctrine of self-defense. From the brief consideration given to charge No. 2, in the opinion, and the authorities cited, it would

seem that the only question raised by this charge, considered by the court, was whether the danger must be real, or whether "it is sufficient if the apparent danger is such as to create in the mind of a reasonable man a just apprehension of imminent danger to life or limb." I have felt justified in saying this much, to prevent any misunderstanding of the decision in this case and in the Keith Case.

(103 Ala. 175)

JACKSON et al. v. MILLSPAUGH et al.

(Supreme Court of Alabama. May 16, 1894.)

BILL OF SALE — CONSTRUCTION — EXECUTED AND EXECUTORY AGREEMENTS—TRANSFER OF INSURANCE POLICY.

1. A deed conveying the purchasers the furniture, rights, contracts, and effects owned by the sellers in connection with their hotel stipulated that the sellers should be liable to pay all the debts chargeable to the hotel business prior to March 1, 1891, but should retain the income therefrom till that date. The sellers had several fire insurance policies at the time of the sale, to expire February 12, 1892, which required any transfer of the policies to be in writing indorsed thereon, and forbidding their transfer without the insurers' consent. Held that since, if the policies passed under the deed, they thereby became void, no written assignment by indorsement thereon having been made, the purchasers could not, on a cancellation of such policies, recover from the sellers amounts paid by them as premiums for the unexpired term of the policies.

2. Since the deed was completely executed so far as it manifested a purpose to vest in the purchasers rights of property, it could not be contended that there was therein an executory agreement to sell and transfer the policies, with an obligation on the sellers' part to procure the insurers' consent to their transfer.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by William H. Millspaugh and others against J. F. B. Jackson and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Hewitt, Walker & Porter, for appellants. Arnold & Evans, for appellees.

HEAD, J. On the 7th day of March, 1891, J. F. B. Jackson and W. D. McCurdy executed to W. H. Millspaugh, George H. Clower, and R. D. Burnett a bill of sale by which, for value, they "bargained, sold, and delivered" to them all the furniture, fixtures, rights, contracts, stores, property, and effects owned jointly by the sellers and then connected with or used in the Florence Hotel, and belonging to their Florence Hotel property; which hotel was then being kept by the sellers in the city of Birmingham, Ala. The title to the property sold was expressly warranted. It was stipulated that sellers should be liable to pay all the debts, liabilities, and expenses chargeable to or against said hotel business prior to March 1, 1891, and that they should be entitled to retain, have, and receive all the rents, incomes, choses in action, bills receivable, and receipts

earned by and belonging to said hotel business prior to the said March 1, 1891. At the time of this sale the sellers had in force, to expire February 12, 1892, six policies of fire insurance, in different companies, covering the goods sold. These policies, when written, were deposited in the hotel safe, and were kept therein when the safe went into possession of the purchasers under the bill of sale. Each of them contained a clause requiring any transfer of the policy to be in writing, indorsed on the same, and forbidding its transfer by the assured, without the consent of the insurer indorsed thereon in writing, and avoiding the policy if a transfer was made without such consent so indorsed. The insurers never gave consent to the transfer of these policies by the assured to any one. On the contrary, after, but as of, the 1st of March, 1891, they canceled them. After the purchasers under the bill of sale got possession of the policies, they called upon Jackson & McCurdy, the sellers, and demanded that they transfer the same to them by indorsement thereon. They refused to do so, or to obtain the consent of the several insurance companies to such a transfer, claiming that the policies were not included in the sale. Thereupon Millspaugh and others took out new insurance, at a cost of \$412.50, covering the unexpired term of the other policies, and brought this action against Jackson & McCurdy to recover that sum. The gravamen of the complaint is that, by the terms of the bill of sale, the policies "became the property of plaintiffs;" that, to effectuate the transfer of said policies, it was, according to their terms, necessary that they should be transferred to plaintiffs by writing indorsed upon them. It is also alleged that the policies were taken out prior to March 1, 1891, and the premiums had become payable prior thereto, but the same had not been paid, and that said premiums were debts and liabilities chargeable to and against the said hotel business under the terms of the bill of sale, whereby it became and was defendants' duty, in accordance with the terms of the contract and purchase, to pay said premiums and transfer said policies to plaintiffs in writing thereon, which they failed and refused to do, on request, compelling plaintiffs to take out other insurance, as above stated, to their damage in the said sum paid for the new insurance. The defendants demurred on the ground of repugnancy, objecting that the complaint does not show a cause of action with necessary precision. These demurrers were overruled, and that ruling is assigned as error. The same questions were raised by exception reserved to the finding and judgment of the court, with the addition that, in that finding, the clauses avoiding the policies, if assigned without the consent of the companies indorsed thereon, are brought to the view of the court, the complaint omitting all notice of those clauses. After the execution of the bill of sale, Jack-

son & McCurdy paid the premiums on the policies up to March 1, 1891, and all the policies were then canceled by the respective companies.

Upon due consideration, we are unable to see how this action can possibly be maintained. The very foundation principle, upon which plaintiffs seek to base the action, it seems to us, necessarily defeats it, which is, that by the terms of the deed the policies were transferred to and became the property of the plaintiffs, which act of itself, eo instanti, rendered the policies absolutely null and void by reason of the express conditions therein that such a transfer should have that effect. Certainly the plaintiffs never acquired any right whatever, and the defendants owed them no duty, in respect of the policies, until and unless, by the terms of the deed, such right or duty arose; and the terms of the deed conferred and created no such right or duty, because their very effort so to do, in and of itself, in view of the conditions mentioned, accomplished the total destruction of the policies. This is the logic of the bottom proposition upon which plaintiffs attempt to rest their case. If the deed was so comprehensive, as plaintiffs allege and contend, as to include in its transfer these policies, and if the legal effect of its terms, upon its face, was such, as plaintiffs allege and contend, that the ownership of the policies was transferred to them, it cannot be denied that the execution of the deed, so far as it concerned the policies, was within the inhibition of the clauses against assignment. That inhibition is against any assignment, howsoever attempted to be accomplished, legal or equitable, absolute or conditional, without the required consent. We say, then, that the deed, if sufficient to embrace the policies, and their assignment had not been forbidden, was an absolute transfer to the plaintiffs of the policies, and that the same, when brought to the touch of the stipulations against assignment, rendered the policies null and void. The position, then, of the plaintiffs, insisting upon a recovery here, must necessarily be that, although the act out of which alone they profess to have acquired all their rights had the effect to destroy the policies, yet they were injured because thereafter the defendants did not go through the form of transferring to them, by indorsement, the sheets of paper which at one time were policies of insurance, but then utterly defunct. It needs no argument to show that a right of action cannot arise out of such conditions.

We might rest this opinion here, but we go further, and remark that plaintiffs otherwise misapprehend the import of the bill of sale. They fall into the error of treating it, in respect of the policies, as an executory agreement to sell and transfer them, and, so treating it, argue that the agreement implied an obligation on defendants' part to procure, at all events, the consent of the com-

panies to their transfer, to be indorsed on the policies, and, in pursuance of such consent, to themselves indorse the transfers thereon, inasmuch as such consent and indorsements were essential to the valid transfer of the policies to, and the beneficial enjoyment thereof by, the plaintiffs. But there is no such executory agreement. Aside from the covenants of warranty of title, and to pay the debts, liabilities, and expenses chargeable to or against the hotel business prior to March 1, 1891, there is nothing executory in it. In so far as the deed manifests a purpose to vest in the purchasers rights of property, it is completely executed in its nature. It manifests and executes the whole agreement, leaving nothing to be done in the future. The parties had the right to make the contract as they chose. The consideration received is presumed to have been fixed with reference to what was granted. If the agreement was so made and executed that the purchasers took nothing of benefit in the policies, they have suffered no loss, because they got what they contracted and paid for. Presumably, if the sellers had bound themselves to obtain the consent of the insurance companies indorsed on the policies, and to have indorsed transfers thereon, a further consideration would have been exacted. At any rate, the deed shows that it was a completely executed contract, leaving nothing for the sellers to do but to answer in damages, by virtue of the warranty of title, for any want of title which might develop, to the injury of the purchasers; and, by virtue of the covenant to that effect, to hold the purchasers harmless against any debts, liabilities, and expenses "chargeable to or against said hotel business prior to the 1st day of March, 1891." It is not the theory of this action that the damages sought to be recovered resulted from a breach of either of these covenants. It is true the complaint alleges that the premiums were not paid, and that the last-mentioned covenant was thereby broken; but, if that allegation be not founded in a misconception of the meaning of the covenant, it becomes wholly immaterial, and is not relied on in the light of the evidence, which shows that the premiums were paid and the policies canceled by the companies, which they had a right to do of their mere option, before the plaintiffs expended the money in the purchase of the new insurance. The action proceeds upon a different theory altogether. It assumes the existence of a covenant on the part of the defendants that they would go beyond what their deed had effected, and make a new contract with the insurance companies, at whatever cost might be necessary, and obtain from them a new agreement, authorizing the transfer of the policies to the plaintiffs, or, being unable or failing to procure such consent, to answer in damages to the plaintiffs therefor; and not only this, but a covenant that the insurance companies

would not exercise their option at any time to cancel the policies; and not only this, but a covenant for further assurance, so to speak, that the defendants would execute a further transfer by indorsement on the policies; and that there were breaches of all these covenants. When we go to the deed to look for these supposed covenants, we find nothing but a plain, absolute, fully-executed conveyance.

There are other counts in the complaint, upon different causes of action, under which it is not denied plaintiffs were entitled to recover \$457.40, with interest thereon from March 7, 1891. The judgment of the circuit court will be reversed, and a judgment here rendered in favor of the appellees against the appellants for that sum and interest. Let the appellees pay the costs of appeal. Reversed and rendered.

(108 Ala. 281)

COLLIER v. COGGINS.

(Supreme Court of Alabama. May 18, 1894.)

ACTION FOR PERSONAL INJURIES — EVIDENCE — PLEADING AND PROOF — VARIANCE — PETITION — SUFFICIENCY — APPEAL — DISMISSAL — DELAY IN FILING TRANSCRIPT.

1. In an action for personal injuries, it is error to admit evidence that defendant stated to plaintiff that he thought the latter could get \$75 in compromise of his claim, and asked plaintiff how much he wanted.

2. In an action by an employe for injuries caused by the falling of a post which defendant's superintendent, S., negligently left standing without being secured, plaintiff alleged in certain counts that, while he was carrying a piece of timber as directed by S., he had to pass by such post, and it fell on and injured him. There was no evidence that plaintiff, when injured, was carrying timber, or acting under the orders of S., but the proof showed that he had quit the work S. had directed him to do, before completing it, and had gone to assist a person who had charge of a squad of men to which plaintiff did not belong. *Held*, that plaintiff was not entitled to recover under such counts.

3. A count of the complaint averred that plaintiff was struck by two falling timbers, by reason of the negligence of defendant's employe in charge of the construction of a bridge, such injury resulting while acting under the orders of such superior, and while conforming thereto; and issue was joined thereon. There was evidence that plaintiff was assisting an employe of defendant who was plaintiff's superior, and who knew that such timbers were in an unsafe condition, and that the falling of the timbers was due to the negligence of an employe of defendant in having them stand upright unsecured. *Held*, that plaintiff could recover on such count.

4. It was error to charge, in such case, that the jury might look to the fact, if it be a fact, that plaintiff was not a skilled workman, in connection with all other evidence, in determining whether or not plaintiff was directed by those having the right to direct him to aid in raising such timber.

5. An appeal will not be dismissed for delay in filing the transcript where the appellee is not prejudiced by the delay.

Appeal from circuit court, Marshall county; John B. Tally, Judge.

Action by W. M. Coggins against H. J. Collier, Allison, Schaeffer & Co., the Tennes-

see & Coosa River Railway Company, and the Nashville, Chattanooga & St. Louis Railway Company for personal injuries. From a judgment for plaintiff against defendant Collier only, the latter appeals. Reversed.

The court, at the request of plaintiff, gave the following written charges: (1) "The jury may look to the fact, if it be a fact, that plaintiff was not a skilled workman, in connection with all the other evidence, in determining whether or not the plaintiff was directed by those having the right to direct him to aid in the raising of the timber in question." (2) "If the jury believe that Billingsley had the right to direct Coggins, and did direct him, and that Coggins was obeying his orders, and, while so doing, was injured by negligence on the part of the defendant, then the plaintiff ought to have damages in such sum as the evidence entitles him to, if he did not contribute to his own injury by his own negligence." The court refused to give each of the following charges, requested by defendant: (1) "I charge you, gentlemen, that, if you believe the evidence in this case, you must find for the defendants under the first count of the complaint." (2) "I charge you, gentlemen, that, if you believe the evidence in this case, you must find for the defendants under the second count of the complaint." (3) "I charge you, gentlemen, that, if you believe the evidence in this case, you must find for the defendants under the third count of plaintiff's complaint." (4) "I charge you, gentlemen, that, if you believe the evidence in this case, you must find for the defendants under the fourth count of the complaint." (5) "I charge you, gentlemen, that, if you believe the evidence in this case, you must find for the defendants." (6) "I charge you, gentlemen, that if, from the evidence, you find that one John Stout was the authorized agent or supervisor in charge of the erection of the trestle mentioned in plaintiff's complaint, and if you further find the plaintiff was aware of the existence of the defect in the post which struck the plaintiff, and, after such knowledge, failed to notify said John Stout, and, after such knowledge, remained at work at or near said post, and was injured thereby, then you must find for the defendant H. J. Collier." (7) "If the jury believe from the evidence that plaintiff had knowledge of the existence of the negligence or defect which caused his injury, and that the defendants Allison, Schaeffer and Company, and H. J. Collier were not aware of such negligence or defect, and plaintiff failed to notify said defendants, but continued in the work, he cannot have a recovery in this case." (8) "I charge you, gentlemen, that, under the evidence in this case, the plaintiff, at the time of the accident, was not acting within the line of his duty." (9) "I charge you, gentlemen, that if, from the evidence, you find that the plaintiff knew that the post which had been erected at the place

of the accident mentioned in his complaint was defective, and failed to notify the defendant H. J. Collier, or his superior person or agent in charge of said work, and if you further find the plaintiff's injuries arose from said defective post, then you must find for said defendant H. J. Collier." (10) "I charge you, gentlemen, that the defect in the post which fell and injured plaintiff is not such a defect, within the meaning of section 2590 of the Code of 1886." (11) "I charge, you, gentlemen, that if, from the evidence, you find that the plaintiff knew that the post in one of the bents of defendant, which had been erected without a pin through it, was defective, and, after knowledge of such fact, remained in the employ of the defendant H. J. Collier, then you must find for the defendant H. J. Collier." (12) "I charge you, gentlemen, that the failure of the employes of the defendant H. J. Collier to place a pin through the post which fell and injured plaintiff is not such negligence as will support a recovery in this case against the defendant H. J. Collier." (13) "If the jury believe from the evidence that there is a variance between these allegations of the complaint and the evidence, in this: that Coggins received his instructions, to go and work at the place where the injuries were received, from one Cans Billingsley, and not from John Stout,—they must find for the defendants." (14) "If the jury believe from the evidence that there is a variance between the allegations of the complaint and the evidence, in this: that Coggins received his instructions, to go to work at the place where the injuries were received, from Cans Billingsley, and not from John Stout, except that Stout had told him, said Coggins, to follow the instructions of Billingsley when not otherwise engaged,—they must find for the defendants."

John F. Martin, for appellant. Lusk & Bell, for appellee.

COLEMAN, J. This cause was submitted on a motion to dismiss the appeal, and, if that is overruled, then upon its merits. The judgment was rendered in the circuit court on the 27th day of April, 1893. The appeal and supersedeas bond were filed on the 2d day of May, and, by statute, the appeal was returnable to this court on the 29th day of May afterwards; that being the first Monday after the expiration of 20 days from the date of the appeal. Code 1886, § 3620. The transcript for the appeal was filed in this court on the 5th day of December, 1893. It is evident that there is an error as to the date of the signing of the bill of exceptions. The bill of exceptions certifies that it is signed within the time as extended by order of the court of 22d of May, 1893, and yet the bill itself bears date of May 5, 1893. The certificate of the clerk shows that the bill of exceptions was filed in his office July 19, 1893. The summer call of the eighth division ex-

pired before the return day of the appeal. The next call was late in January, 1894. The record was filed December 5, 1893. The appellee was not prejudiced by the delay in not filing the transcript at an earlier date. The rule on this question is as follows: "Upon satisfactory excuse being shown for the delay, the court may, in its discretion, permit the transcript to be filed and the cause docketed, for the first time, after the adjournment of the term to, or during, which the appeal is returnable, upon such terms as the court may impose,"—adopted February 10, 1894. 97 Ala. 1x., 15 South. —; Bayzer v. Mill Co. (Ala.) 13 South. 144. The motion to dismiss the appeal must be overruled.

The action is in case brought by the appellee to recover damages for personal injuries, and the trial resulted in a verdict for the plaintiff. Against the objection of the defendant, the court permitted the plaintiff to prove that the defendant stated to him "he thought that plaintiff could get seventy-five dollars in compromise of his claim," and that defendant asked him "how much he wanted." The admission of this evidence was error. Admissions of a party made with a view to a compromise or an amicable adjustment of a matter in dispute are not admissible against the party making them. 1 Brick. Dig. p. 838, § 478; Jackson v. Clopton, 66 Ala. 29.

As a general rule, it is proper to admit proof that the defect or cause of the injury was one that could be seen by ordinary observation; but where the proof shows affirmatively that the person injured knew of the defect or danger, and it is not denied, possibly the error in excluding such testimony would not require a reversal of the case.

The other assignments of error are based upon charges given for the plaintiff and the refusal of the court to instruct the jury as requested by the defendant. That our conclusion upon these questions may be better understood, it becomes necessary to state the several grounds upon which the plaintiff relies for a recovery as set out in the complaint, and the tendencies of the evidence. The first count avers, substantially, that the defendant was engaged in building a bridge or trestle; that one John Stout had supervision and control of the work, and that plaintiff was a laborer employed with others to do the work; that a post had been placed in an upright position on a sill, and negligently had been left standing in that position without being pinned or secured, so as to prevent its falling; and that plaintiff had been directed by the supervisor in control to carry a piece of timber, and, while performing this duty, he had to pass by the upright post, and, while near the post, it fell upon him and injured him. The averments of the second count are substantially the same as those in the first count, except that

in this count it is charged that John Stout was in charge; that plaintiff was bound to conform, and did conform, to his orders in carrying the timber, etc. The third count does not state in what respect the defendant was negligent. It simply avers that the plaintiff was struck by two falling pieces of timber, "by reason of the negligence of defendant's employe who was in charge of the construction of said bridge or trestle, said injury resulting while acting under the orders of said supervisor and while conforming thereto," etc. No objection was taken to the complaint or to any count, and the case was tried upon the pleas of the general issue and contributory negligence. To entitle plaintiff to recover under the first or second count of the complaint, he was required to prove, as laid, that the post was left standing unsecured, and that, when injured, he was carrying timber under the orders of John Stout, the supervisor. There is evidence tending to show culpable negligence in leaving the post unsecured against falling; but there is no evidence tending to show that, at the time of the injury, plaintiff was carrying timber, or was acting under the order of John Stout. On the contrary, the proof is that he had quit the work which he was directed by John Stout to perform, before completing it, and had gone to assist one Billingsley, at his direction, who had charge of a different squad of hands, and was engaged in erecting the post for the bridge or trestle. The plaintiff did not belong to his squad of laborers. We are of opinion that the court should have instructed the jury, at the request of the defendant, that the plaintiff could not recover under the first or second count of the complaint. The court was requested to instruct the jury that plaintiff could not recover under the third count in the complaint. The third count is very broad. It avers injury, and charges it as the result of the negligence of the defendant's employe. Issue was joined upon the defendant's pleas to this count. There is evidence tending to show that defendant's employe was guilty of culpable negligence, in leaving the post standing upright unsecured, and that the falling of the post was due to this negligence. The evidence shows that Billingsley was an employe of the defendant; that he had charge of the laborers engaged in erecting the post, was a superior to plaintiff in this respect, and knew that the post was left in an unsafe condition. There were questions of fact arising under the third count and the pleas, which were properly referred to the jury. These principles dispose of the remaining charges requested by the defendant. We think the court erred in giving the first charge requested by the plaintiff.

Conceding there was evidence that plaintiff was not a "skilled workman," we do not perceive the connection this fact has with the conclusion stated in the charge. How was this fact to aid the jury "in determining whether or

not plaintiff was directed by those having the right to direct him to aid in the raising of the timber in question?" Besides being abstract, the conclusion is a non sequitur from the fact predicated. Reversed and remanded.

PECAN LAKE MILL CO. v. AMERICAN COOPERAGE CO.

(Supreme Court of Mississippi. Jan. 1, 1894.)

CONDITIONAL SALE—WHEN TITLE PASSES.

Where oxen are sold under an agreement that the title shall not pass until the price is paid, the fact that, on the books of the plaintiff, defendant is charged with the price, and that there are other debits on the account for goods sold, and credits exceeding the amount of the price of the oxen, does not give the purchaser title to the oxen.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Replevin by the Pecan Lake Mill Company against the American Cooperage Company. Judgment for defendant, and plaintiff brings error. Reversed.

This is an action to recover possession of six oxen and a wagon upon the following facts, as shown by the evidence: The property in controversy was sold by appellant in December, 1891, to one J. B. Duncan, the contract being oral, and there was an agreement that the title to the property should remain in appellant until the purchase price had been paid in full. On the day the sale was made, appellant opened an account on its books with Duncan, the first item being a debit of "Cattle, \$525.00." On sundry dates from that time to November 18, 1892, there are debits and credits on this account, the credits being in excess of this first item. Duncan sold the property in controversy to one Murphy, who sold it to appellee. The court gave the following three instructions for the defendant: "First. The court instructs the jury that if they believe from the evidence that Duncan made payments to plaintiff through their representative Bream between December, 1891, and August 5, 1892, sufficient to pay for the cattle and wagon, and that such cattle constituted the first item on a general account between plaintiff and said Duncan, and that said payments were applied as general credits on said account by plaintiff, then the jury will return a verdict for the defendant, unless they believe from the evidence he had the right to apply the payments to supplies, cash, etc. Second. The burden of proof is on the plaintiff, and it must show by a preponderance of the evidence (1) that it never parted with its title to the property sued for; (2) that Duncan never paid for same; (3) that it had the right to apply payments made by Duncan to amounts due by him for supplies, cash, etc.; (4) that it did so apply said payments. Third. In considering whether the property in litigation was paid for, they may consider the account kept by plaintiffs, showing the

application of payments against it." From a verdict and judgment for defendant, plaintiff appealed.

E. Mayes and Glover & Sawyer, for appellant. D. A. Scott, for appellee.

CAMPBELL, C. J. The plaintiff is entitled to recover the property in dispute if its testimony is credited. If that testimony is true, there was a misapplication of the doctrine as to the appropriation of payments, which has no application to such a case. None of the instructions for the defendant should have been given, for they were all inapplicable to the real controversy between the parties. They misled the jury as to the issue being tried. Reversed, and remanded for a new trial.

(34 Fla. 43)

DE BARY-BAYA MERCHANTS' LINE v. COTTER.

(Supreme Court of Florida. June 19, 1894.)

APPEAL—DEFICIENT TRANSCRIPT—DISMISSAL.

1. It is the duty of the plaintiff in error or his counsel to see that a proper transcript of the proceedings in the court below is correctly and skillfully prepared and transmitted to this court.

2. If a defective transcript of the proceedings in the court below is filed in this court, and a writ of certiorari is awarded, on motion of defendant in error, to supply the defects in such transcript, it is the duty of the plaintiff in error and his counsel to see that a proper return is duly made to such writ. If there is a failure for an unreasonable period of time to perform this duty, the writ of error, on motion made for that purpose, will be dismissed.

(Syllabus by the Court.)

Error to circuit court, Orange county; John D. Broome, Judge.

Action by William T. Cotter against the De Bary-Baya Merchants' Line. Judgment for plaintiff, and defendant brings error. Dismissed.

J. F. Welborne, for plaintiff in error. Thomas E. Wilson, for defendant in error.

LIDDON, C. J. This motion is made up on several grounds. As the court holds the opinion that the writ of error should be dismissed for reasons stated in the first and second grounds, it is not necessary to pass upon the other. The first ground of the motion is that "the plaintiff in error has failed to file with the clerk of this court a true copy of the record and proceedings of the lower court, as required by law, but sent up an imperfect and defective copy of the record, which was filed in this court April 3, 1890." The second ground of the motion is that "the plaintiff in error has refused, and still refuses, to file with the clerk of this court a true copy of the record and proceedings, although a suggestion of the diminution of the record and motion for certiorari, with proper affidavits, were made and filed in this court January 11, 1892, and the

usual order of the court was made January 12, 1892, that the missing papers, to wit, certified copies of the exhibits and testimony taken by the referee in this case, be transmitted to this court."

The matters alleged in the motion are by the records of this court shown to be true. It further appears that the order of January 12, 1892, referred to, was made by consent of parties, and that a writ of certiorari issued on the same day, and that no formal return upon the same has been filed in this court. It was the duty of the plaintiff in error or its counsel to see that the record of the proceedings in the court below was correctly made out, skillfully prepared, and transmitted to this court. Orman v. Barnard, 5 Fla. 528; Bridger v. Thrasher, 22 Fla. 383. In this case the record filed is so defective that the court cannot, upon considering it, adjudicate the merits of the controversy between the parties. It was the duty of the plaintiff in error or its attorney to see that a proper return was made to the writ of certiorari. This duty having been neglected for more than two years, the motion is granted, and the writ of error is dismissed.

In stating that no formal return had been made by the clerk of the circuit court to the writ of certiorari herein, it was not meant that he treated this court with contempt, or refused to obey its writ. He sent up certified copies of the papers called for in the writ, but stated that his costs have never been paid for the same, and asked that the court withhold the papers from the files until his proper costs were paid. This the court has done as a matter of justice to the circuit court clerk. These costs have never been paid, nor have the papers ever been filed in this court.

(34 Fla. 25)

STATE ex rel. AMBLER v. HOCKER, Circuit Judge.

(Supreme Court of Florida. June 16, 1894.)

JUDGE—DISQUALIFICATION — ATTORNEY OF PARTY INTERESTED—MEMBER OF FIRM.

1. The previous relation of attorney and client, as shown in this case, disqualifies a judge in this state.

2. The principle of disqualification of a judge by reason of a previous relation of attorney and client should not be given a narrow and technical construction, but should be applied to all classes of cases and to all judicial officers.

3. A judge who, previous to his commission, was an attorney of record in a suit in which an execution issued, is disqualified to try a claim interposed to property levied upon under such execution.

4. A judge who, previous to his commission, was a solicitor of record for complainant in a chancery cause, brought for the purpose of having receivers appointed for certain property, is disqualified from trying a claim interposed by said receivers to said property, when the same is levied upon under execution in favor of third parties.

5. A judge who, previous to his commission, has been an attorney in a case, is disqualified

to adjudicate, not only all matters arising in that identical case, but also all supplemental matters or proceedings had or taken to enforce, or to resist the enforcement of, any judgment or decree rendered in such case.

6. The question of the disqualification of a judge, by reason of a former relation of attorney and client, is entirely distinct and independent of any question of present interest in the case, and of the payment of any fee or reward therein.

7. An act done by a partner in the firm name in the pursuit of its ordinary business is the act of the firm. A judge who, prior to his commission as such, was a member of a law firm which began a suit, using the name of such firm as attorneys for the plaintiff, is disqualified from trying a claim interposed to property levied upon by virtue of an execution issued in such main case, although the management of such suit may have been exclusively under the direction of the other member of such firm, and not within the knowledge of such judge.

8. A judge who, previous to his commission, was an attorney of record in an attachment suit at the time of the levy of the writ of attachment upon certain property, is disqualified to try a claim interposed to said property, when the same is afterwards levied upon under an execution issued in the same suit.

(Syllabus by the Court.)

Application by the state of Florida, ex rel. Daniel G. Ambler, against William A. Hocker, circuit judge, for mandamus. Motion to strike the answer of defendant for insufficiency. Denied.

Edgar P. Allen, for relator. Cooper & Cooper, for defendant.

LIDDON, C. J. This is a case of original jurisdiction. The petition, filed May 1, 1894, alleges, in substance, that the relator began on February 10, 1893, an action by attachment against G. C. Stevens and H. H. Graham, copartners under the firm name of Stevens, Graham & Co., in the circuit court of Marion county; that, the case having been referred to Jesse J. Finley, a practicing attorney, the relator, on December 15, 1893, obtained a judgment against Stevens, Graham & Co., the defendants, for \$11,216.68 and costs; that execution issued upon said judgment, and was levied upon certain personal property, being the same property upon which attachment had been levied; that said property was advertised for sale on the first Monday in March, 1894, but that, before the legal hours of sale on said day, Enoch W. Agnew and John A. Bishop, receivers, appointed by the United States circuit court for the northern district of Florida, filed a claim to said property, and obtained possession thereof from the sheriff; that on the following day the relator, in the circuit court of Marion county, caused said case to be called for trial, whereupon the Honorable William A. Hocker, the defendant, judge of said court, adjudged himself disqualified to sit in the trial of said claim case, and refused to do so, alleging the following ground of disqualification, to wit: That he was one of the attorneys of record in the principal case of D. G. Ambler v. Stevens, Graham & Co. The petition further alleges that prior to said suit or

premises, to wit, in November, 1892, the relator brought the written contract therein sued upon to the said William A. Hocker, then a practicing attorney; but thereafter the said Hocker formed a copartnership with the present attorney of the relator, and when action was brought thereafter, on the 10th day of February, 1893, the management of the matters pertaining thereto was turned over to the latter; and, although William A. Hocker's name appears as an attorney of record in the case in the firm name of Hocker & Allen until his (Hocker's) appointment to the circuit bench, that he at no time took any part in the direction of said case, and since his appointment as aforesaid has had no interest in said case, or its outcome, by reason of fees or otherwise. The petition further states that the issues in the claim case which the said Judge William A. Hocker refuses to try are not in any way connected with the issues in the main case, in which said Hocker was attorney of record, and have arisen since said Hocker was appointed a judge of the circuit court of Florida, and long after his connection with said case had been severed. The petition concludes with a prayer for an alternative writ of mandamus, commanding the defendant to try the aforesaid claim case, or show cause why he should not do so. This writ issued, and the defendant has answered the same.

The answer expressly admits all of the allegations of the petition in reference to the suit by the relator against Stevens, Graham & Co., and the issuing and levying of the execution. The answer also admits that the defendant adjudged himself disqualified for the reasons alleged in the petition, and that the allegations of the petition are true which state his connection with the suit of Ambler v. Stevens et al., and that he had turned over all matters connected with said case to Mr. Edgar P. Allen, as his attorney, and that he had no interest in the same. The answer sets up other matters of disqualification of the defendant, besides those alleged in the petition.

In view of the conclusion we reach in the case, it is only necessary to notice one of these additional matters, which is the allegation that the defendant was one of the attorneys of record of John C. McKibbin, in the suit instituted by him (McKibbin) in the circuit court of the United States for the northern district of Florida, against the said Stevens and Graham, and in which the said Enoch W. Agnew and John A. Bishop, who interposed said claim, were appointed receivers. The defendant admits that, at the time said claim was filed, he had ceased to have any relations with said suit as attorney or solicitor. The relator moves to strike out the answer, on the ground that it is insufficient. This motion is in the nature of a demurrer to the answer, and of course admits the truth of all of its material allegations.

Two reasons are assumed in the pleadings

stated herein for the disqualification of Judge Hocker. The first is that he was disqualified to try the claim case on account of his connection, as an attorney of record for the plaintiff, with the suit in which the execution which was levied upon the property in dispute was issued; the second is that he was disqualified by reason of having been an attorney of record for the complainant, McKibbin, in the case wherein McKibbin sought and obtained the appointment of the receivers, who, by virtue of their appointment, interposed said claim.

That the previous relation of attorney and client disqualifies a judge has been determined in this state. *Tampa St. Railway & Power Co. v. Tampa Suburban R. Co.*, 30 Fla. 595, 11 South. 562.

As to the first matter,—the connection of the defendant with the suit of the relator against Stevens et al.,—it is contended by the relator that the defendant, Judge Hocker, is not disqualified, because he was only connected with the main case, and that the claim case presents issues entirely foreign to the main case. It may be true, strictly speaking, that the defendant was not an attorney of record in the claim proceedings; but when we consider that the claim arose and is sought to be maintained in resistance to an effort to enforce the execution issued in a case in which the defendant was once an attorney of record, and that the result of his judgment must be that the execution can or cannot be enforced by a sale of the property levied upon, it must appear that the distinction claimed by the relator is too narrow and technical. The rule of disqualification of a judge who has been of counsel for one of the parties in the matter of the litigation, or matters intimately connected therewith, is but an evolution of the elementary maxim that no man should be a judge in his own lawsuit. The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. The great principle should not have a narrow or technical construction, but should be applied to all classes of cases where a judicial officer is called upon to decide controversies between the people. 12 Am. & Eng. Enc. Law, 40; *Hall v. Thayer*, 105 Mass. 219, text, 223; *Curtis v. Wilcox*, 74 Mich. 79, 41 N. W. 863; *Gains v. Barr*, 60 Tex. 676; *Moses v. Julian*, 45 N. H. 52; *Slaven v. Wheeler*, 58 Tex. 23. Not only is a judge who has been an attorney in a case prohibited from acting in a judicial capacity in the identical case in which he has been such attorney, but he cannot act in any supplemental or other proceedings closely connected with such case. *McLaren v. Charrier*, 5 Paige, 530. That the defendant, Judge Hocker, has no interest whatever in the claim suit which the relator seeks to compel him to adjudicate, cannot

affect the question. The matter is simply one of having been of counsel, and is entirely independent and distinct from any question of pecuniary interest, or of the payment of any fee or reward. *Newcome v. Light*, 58 Tex. 141; *Slaven v. Wheeler*, supra. That the main suit of *Ambler v. Stevens et al.* was entirely in charge of another member of the law firm in which defendant was a partner does not alter the principle. What a partner does in the firm name in the pursuit of its ordinary business is done by the firm, and upon the firm's responsibility. *Town Co. v. Cothran*, 81 Ga. 359, text, 368, 8 S. E. 737; *McLaren v. Charrier*, supra.

The next question presented by the pleadings, as stated, is whether the defendant is disqualified by reason of his connection with the suit of McKibbin, Complainant, v. Stevens et al., Defendants. In this suit the complainant sought and obtained the appointment of the receivers who interposed the claim in question. It was contended in brief of relator that Judge Hocker would not be disqualified by reason of having been attorney for the relator in the suit of *Ambler v. Stevens et al.*, for the reason that a claimant could not attack the validity of the proceedings in which the execution issued, and that, therefore, Judge Hocker would not be called upon to determine the validity or invalidity of any proceeding in a suit in which he was of counsel. It is not contended, however, nor does it appear to us, that the validity of the appointment of the claimants as receivers might not be involved in the claim case, and that Judge Hocker might not in such a case be called upon to adjudicate such matter. The authorities are clear, and the principle is virtually admitted in the brief for the relator, that a judge is disqualified to adjudicate upon the validity of proceedings had and taken in a case in which he was of counsel. *Darling v. Pierce*, 15 Hun, 542. This matter was one in which Agnew and Bishop, the receivers, appointed at the instance and for the benefit of McKibbin, Judge Hocker's client, were taking such action, probably at his (McKibbin's) instance, as they thought legal and necessary to the performance of their duty, and to reap for him the benefit of their appointment as receivers. It was a proceeding intimately connected with a case in which the defendant had been of counsel. Much that has been stated as to the first question presented by the pleadings is equally applicable to this, and need not be repeated.

We hold that the connections of the defendant with the main suit of *Ambler v. Stevens et al.*, and with the case of *McKibbin v. Stevens et al.*, were either, and each of them, sufficient to disqualify him from trying the claim case of *Agnew and Bishop*, as receivers, mentioned in the pleadings herein.

The motion to strike the answer is denied.

(33 Fla. 696)

WHEELER v. BAARS.

(Supreme Court of Florida. May 29, 1894.)

ACTION FOR DECEIT — PROOF OF SCIENTER—LIABILITY OF PRINCIPAL AND AGENT—FAILURE TO SEARCH RECORDS — COURT MUST NOT INSTRUCT ON THE WEIGHT OF EVIDENCE.

1. A false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position, is a fraud of which the law will take cognizance.

2. The knowledge, by the maker of the representation, of its falsity, or, in technical phrase, the scienter, can be established by either one of the three following phases of proof: (1) That the representation was made with actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; (3) under circumstances in which the person making it ought to have known, if he did not know, of its falsity. Under the first phase the proof must show actual knowledge of the falsity of the representation. Under the second phase it should show that the representation was made in such absolute, unqualified, and positive terms as to imply that the party making it had knowledge of its truth, and that he made such absolute, unqualified, and positive assertion on a subject of which he was ignorant, and that he had no knowledge whether his assertion in reference thereto was true or false. Under the third phase, the proof should show that the party occupied such a special situation or possessed such means of knowledge as made it his duty to know as to the truth or falsity of the representation made. If the proof establishes either one of these three phases, the scienter is sufficiently made out.

3. The requisite intent to deceive in such cases is to be inferred from the facts in proof.

4. The laches of a party to whom a misrepresentation of a material fact has been made, in failing to search public records or other accessible sources of information that would have disclosed the falsity of the representation made, furnishes no excuse or defense to the party guilty of the misrepresentation in an action for deceit thereon.

5. For deceit and false representations made by an agent in the course of his employment, both the principal and his agent are civilly liable; and, so far as the liability of the principal is concerned, it makes no difference whether he authorized or was cognizant of the misrepresentation and deceit of his agent or not.

6. It is the exclusive right of the jury to determine how much and what comparative weight they will give to the different kinds of evidence submitted in a cause; and it is error for the court to instruct them, as matter of law, that one kind of evidence is entitled to more or greater weight than another kind.

(Syllabus by the Court.)

Appeal from circuit court, Escambia county; J. F. McClellan, Judge.

Action by Henry Baars against W. A. S. Wheeler. Judgment for plaintiff. Defendant appeals. Reversed.

John C. Avery and Richard L. Campbell, for appellant. Blount & Blount, for appellee.

TAYLOR, J. Henry Baars, the appellee, sued the appellant in the circuit court of Escambia county in an action for deceit in the sale of a steam tugboat, and recovered judgment for \$381.64, from which the defendant below appeals.

The original declaration contains four counts, in substance as follows: (1) That on March 23, 1884, the plaintiff bought of defendant, as trustee of Piaggio Bros., one steam tug called Jumbo, for a large sum of money, viz. the sum of \$4,250, and that upon said sale the defendant falsely and fraudulently represented that said steam tug was free from all liens and incumbrances, whereas, in truth and in fact, there was a lien upon said tug for the sum of \$246, of which said lien the defendant well knew, and of which plaintiff was ignorant. That, since said purchase, plaintiff has been compelled to pay the full amount of said lien in order to prevent a sale of the said tug to pay same, which lien, together with interest and costs of suit brought by the said lienholders to enforce same, and which plaintiff was also compelled to pay, amounts to \$337.54. (2) The second count is substantially the same as the first, except that it alleges that the false representation by the defendant was made in order to induce the plaintiff to purchase said tug. (3) The third charges that the defendant, craftily and fraudulently intending to deceive the plaintiff and to benefit himself thereby, as agent of one Rinaldo Piaggio, caused the plaintiff and others to purchase on March 28, 1884, of the said Rinaldo Piaggio, a steam tug called Jumbo; and, in order to effect said sale, falsely and fraudulently represented to plaintiff that the said tug was free from all liens and incumbrances, whereas, in truth and in fact, as defendant ought to have known, there was a lien upon said tug, and of which plaintiff was ignorant; and plaintiff has been compelled to pay the full amount of said lien, together with the costs of suit brought to enforce the same, amounting to \$337.54. (4) The fourth count alleges that the defendant, as trustee for Piaggio Bros. and R. L. Campbell, on and prior to the sale of said tugboat to the plaintiff, falsely and wrongfully intending to deceive the plaintiff to his own profit and advantage, failed to inform plaintiff that there was a claim existing against said tug, although plaintiff particularly inquired of him whether there was any claim upon said tug, and although defendant knew at the time of said inquiry that W. F. & J. E. Creary had a claim against said tug for \$242.06, and that they had brought suit thereupon; and that of the existence of said claim plaintiff remained ignorant until after his purchase of said tug; and that he was compelled to pay the judgment for \$337.50 that said parties afterwards recovered on said claim against said tug, in order to save her from sale thereunder.

Before plea by the defendant, the plaintiff filed, as an amendment to his declaration, three additional counts, besides the common count for money had and received, in substance as follows: (1) That the defendant, as trustee for Piaggio Bros. and R. L. Campbell, negotiated with plaintiff's agent, one

William Elias, for the sale of said steam tug to plaintiff, and that, during the pendency of said negotiations, that were consummated by a sale on March 28, 1884, of said tug to plaintiff, defendant falsely and fraudulently warranted said boat to be free from all incumbrances in the shape of claims, whereas, in truth and in fact, the firm of W. F. & J. E. Creary had a claim against the tug, which, since said sale to plaintiff, the circuit court of Escambia county and the supreme court of Florida (2 South. 682) have adjudged to be a valid lien upon said tug for materials and repairs amounting to \$246.02, and plaintiff was compelled to pay the full amount of same, with costs of suit, amounting in all to \$337.54. (2) The second additional count charges substantially that the defendant, as agent for Rinaldo Piaggio, while conducting negotiations that culminated on March 28, 1884, in the sale of the steam tug Jumbo by the said Rinaldo Piaggio to plaintiff, falsely and fraudulently warranted that no claims existed against said steam tug, whereas, in truth and in fact, a claim of W. F. & J. E. Creary for materials and repairs, amounting to \$246.02, did so exist, which, since said sale to plaintiff, the circuit court of Escambia county and the supreme court of Florida have adjudged to be a valid lien upon said tug, and plaintiff has been compelled to pay same, with costs of suit brought to enforce same, amounting in all to \$337.54. The third additional count of the amended declaration it is unnecessary to notice, as it was withdrawn by the plaintiff before the submission of the cause to the jury.

To the original and amended declaration the defendant pleaded the general issue of "Not guilty," and "Never was indebted," to the common count for money had and received.

The testimony for the plaintiff was as follows: William Elias deposed for the plaintiff that his occupation was that of a commission agent; that he resided in London, England. "I acted as agent for Henry Baars, and, as such agent, entered into negotiations with defendant Wheeler for the purchase, on behalf of plaintiff, Henry Baars, of the steam tug Jumbo. Prior to said sale by Wheeler I did speak to him in regard to the existence or nonexistence of claims against said steam tug. I spoke to him on this subject a few days prior to the date on which the tug had been advertised for public sale in the Pensacola papers. I cannot now recall the exact date. The conversation took place in one of the rooms of the First National Bank, Pensacola, and Wheeler assured me that there were, with the exception of that of the First National Bank, no claims of any kind against the said steam tug Jumbo, and he further said, in order to prove such assertion to be correct, that, had there been any claims, all claims would have been sent in to the First National Bank, as that institution had advertised said steam tug for sale by public auc-

tion in various papers, and there were no claims lodged. I made such investigation in regard to claims against said boat in the interest of Henry Baars, and at his special request. I certainly did not know at the time or before I was negotiating said sale from defendant to plaintiff of the existence of any claim against the Jumbo by W. F. & J. E. Creary, and I first heard of such claim being put in when Creary started an action against the tugboat Jumbo some long time after I had completed the purchase of said tug on behalf of the plaintiff, Henry Baars. The defendant, Wheeler, distinctly told me that, if I bought the tug, there were no claims out against her for which my principal, Henry Baars (not then known to Wheeler), would be responsible. If such a claim as Creary's was known, it was only known to the defendant, Wheeler. I certainly was not informed of it. Had I been so informed, I certainly should have insisted on such claims being satisfied before concluding the purchase on behalf of my client, the plaintiff, Henry Baars."

The plaintiff also introduced the record in a suit instituted on March 20, 1884, and the judgment therein in the circuit court of Escambia county in favor of W. F. & J. E. Creary against R. & D. Piaggio, as owners of the steam tug Jumbo, in which their claim was adjudged to be a superior lien on said tugboat. In which suit a writ of garnishment was issued on the 4th day of April, 1884, and served same day on the defendant W. A. S. Wheeler, as garnishee, requiring him to show upon oath what moneys, etc., he held of the said R. & D. Piaggio. The garnishee (the defendant herein) answered said writ on the 2d day of June, 1884, in which he averred that he then had no money or effects of the said Piaggios in his possession, and was not indebted to them except as follows: "That Richard L. Campbell held a mortgage on the steam tug Jumbo, owned by the defendants (Piaggios), and, that mortgage debt being due and unpaid, the said Campbell and the Piaggios appointed him (Wheeler) their trustee to take and sell the said tug, and apply the proceeds of the sale to the satisfaction of said mortgage debt. He accepted said trust, and sold the said tug, realizing from the sale less than the amount of the said mortgage debt; \$250 of the proceeds of said sale still remaining in his hands to be disposed of as the court should direct." This record shows that W. F. & J. E. Creary recovered judgment on their claim against the Piaggios on December 19, 1884, for \$268.70; the judgment declaring it to be a lien on said steam tug, and that she be sold to satisfy same. This record shows further that, upon execution being issued on the judgment in favor of the Crearys and levied on said steam tug, the plaintiff in this suit, Henry Baars, interposed a claim thereto, giving the usual claim bond. It shows further that, upon the trial of this claim, it was adjudged

that said tug was subject to the lien of the judgment and execution of the Crearys. From this judgment the claimant, Henry Baars (the plaintiff herein) took an appeal to the supreme court, where the judgment of the lower court upon his claim was affirmed. 23 Fla. 311, 2 South. 662.

The garnishment against the defendant, Wheeler, in the suit of Creary against the Piaggios, was dismissed according to the evidence, but the record before us does not show when or at whose instance it was dismissed.

The plaintiff, Henry Baars, on his own behalf, testified that William Elias was directed by him as his agent to call upon Mr. Wheeler, who had the steam tug Jumbo for sale, and negotiate the purchase of her for him. He purchased her for him. Subsequently, he was compelled to pay the lien of W. F. & J. E. Creary on the Jumbo, which the supreme court of the state held was a valid lien on her. This closed the testimony on behalf of the plaintiff.

The defendant then on his own behalf testified as follows: "I remember Mr. Elias calling on me with reference to the purchase of the tug Jumbo. I was advertising her for sale as trustee, and solely under the authority I had through a writing from Piaggio Bros. This is the paper: 'Pensacola, Fla., 1st March, 1884. We hereby authorize and empower W. A. S. Wheeler to take possession of and to sell at public auction after fifteen days' notice in the Pensacola Commercial newspaper of the city, for cash, steam tug Jumbo, and to apply the proceeds of said sale in payment of debts due by Piaggio Brothers to R. L. Campbell and Mrs. Emily C. Smith; and we hereby authorize said Wheeler to execute any writing, under seal or otherwise, which may be necessary to give effect to the power hereby vested in him. Witness our hands and seals the day and year above written. R. Piaggio. [Seal.] Dario Piaggio. [Seal.] I had no other power, authority, or connection with the matter. I do not remember stating to Mr. Elias that there was no lien on the boat. I did not tell him that the only claim against the boat was that of the First National Bank. The bank had no claim at all, and had nothing to do with the matter. I had no knowledge of the existence of the lien of W. F. & J. E. Creary until after the date of the service of the writ of garnishment on me in the suit against Piaggio Bros. How I first learned the fact that there was such a lien I do not remember. I retained out of the proceeds of the sale of the Jumbo \$250 to meet the garnishment, and held it until the garnishment was dismissed. I am prepared to swear that I did not tell William Elias that there were no liens on the Jumbo. I do say that I did not know of the existence of said lien until after the writ of garnishment was served on me." On cross-examination, the following paper was handed to the defendant witness by the plaintiff's counsel:

Account Sales Steamer Jumbo and Lighters,
Account of R. L. Campbell's Mortgage against Piaggio Bros.

By sale:	
Steam tug Jumbo to Elias.....	\$3,250 00
Lighter Florida to Brent.....	600 00
Lighter Genoa to Wittich.....	525 00
Lighter Tycoon to Elias.....	150 00
Lighter Minnie H. to Brent....	750 00
	<hr/>
	\$5,575 00

Charges:	
Jos. Sierra, auctioneer, on	
\$1,575 at 5 per cent..	\$ 78 75
Pensacola Commercial,	
advertising	8 00
Commissions, 5 per cent..	278 75
1 month's interest on \$750	
note for Minnie H., dated	
February 29, 1884..	7 00
Amount reserved awaiting	
result of suit against	
Jumbo, W. F. & J. E.	
Creary, for repairs...	246 02
	<hr/>
	619 02
Proceeds	\$4,955 98
	W. A. S. Wheeler.

1884.

March 31. Note Piaggio	
Bros., dated	
Dec. 1, 1882	\$3,100 00
4 M. B. 10 per	
cent. interest	
from maturity, April	
4, to April	
20, 1883...	13 76
	<hr/>
	3,113 76
Less amount paid April	
20, 1883.....	1,117 22
	<hr/>
	\$1,996 54
Interest from April 20,	
1883, to March 31,	
1884	191 90
	<hr/>
	\$2,188 44
Note dated	
April 20,	
1883, 6 mos.	
after date,	
due Oct. 23,	
1883	\$3,150 00
Interest from	
maturity to	
March 31,	
'84	140 00
	<hr/>
	3,290 00
	<hr/>
	\$5,478 44

The defendant testified in reference to this paper that he presumed that it is the account rendered by him to Piaggio Bros. of his actions as trustee, and the disbursements he had made. "I recognize the signature to it as my signature. Yes; it is the account rendered. This statement was made at the date it bears." On redirect examination, he said that, after his attention had been called to the dates upon the paper and to the writ of garnishment, "this paper has no date at the bottom, where statements are usually dated. The date was omitted through an oversight, I presume. I am sure that it was not rendered until after the service of the writ of garnishment on me."

R. L. Campbell, for the defendant, testified as follows: "I know that Mr. Wheeler's connection with the Jumbo was solely through

the paper he has produced as his authority. I gave him such instructions as he received. I did not tell him that there was any lien on the Jumbo. I knew of the existence of none. Did not know of it until after the service of the writ of garnishment on Wheeler. He rendered us an account in the matter, which showed that he held \$250 under the garnishment of W. F. & J. E. Creary. This account was not rendered until after the service of the writ of garnishment, which had been previously brought to my attention. Of this I am sure. How I can be sure I can only explain by stating that I recollect it as a matter of memory only." This comprises the entire evidence.

The court then gave the following instructions to the jury: "(1) You are the judges of the weight of the evidence and the credibility of the witnesses. In determining the latter, you may take into consideration their interest in the suit and their manner upon the stand. If you believe that Wheeler, although agent or trustee, made the representation alleged in the declaration, and that he made it to induce the alleged purchase, and the representation was not true, and the purchase was made upon the representation, his principal would not be bound, but he would be. (2) If you find that Wheeler, for the purpose of obtaining a higher price, represented to Elias that there was no lien on the boat, and the representation was of a character to impress Elias with the fact that there was no lien, and the representation afterwards turned out false, Wheeler would be responsible. (3) Written declarations made at, before, or soon after a transaction are entitled to greater weight than an oral statement, unless the oral statement is of such character as to show that the written statement was made through mistake."

The following instructions, requested by the defendant, were refused by the court: "(1) To authorize the jury to find a verdict against the defendant upon the charge that he falsely represented at the time of negotiating the sale of the steamer Jumbo to the plaintiff or his agent that there existed no claim or lien against or upon the said steamer other than that which defendant was about to sell her to satisfy, it must be proved to the satisfaction of the jury—First, that there was such claim or lien at the time of said negotiation; second, that defendant did, at the time of the negotiation, represent to the plaintiff or his agent, Elias, that there was no such claim or lien; third, that at the time defendant made such representation he knew it to be false; and, in the absence of satisfactory proof on any one of these points, the jury must find for the defendant upon the count in the declaration charging him with such false representation. (2) That the defendant, in becoming trustee under the deed of trust which is in evidence, had no legal duty to perform under said deed except to take possession of and sell the

mortgage property, and pay the proceeds over to R. L. Campbell to the extent of his mortgage debt, and the residue, after paying expenses, to the Plaggios; and though the writ of garnishment in the case of Creary against Plaggio, which is in evidence, might have bound the funds in defendant's hands while it was in force, yet, when the garnishment proceeding was dismissed, defendant's legal duty was to pay over the money to his principal, and therefore plaintiff in this case can base no right to a verdict upon said garnishment suit, or anything done therein before said dismissal. (3) In order to enable the jury to find a verdict against the defendant, Wheeler, they must be satisfied that the testimony before them proves that at the time of the negotiations between said Wheeler and Elias, the agent of plaintiff, for the sale of the steamer, said Wheeler had knowledge of the existence of the Creary claim upon the steamer Jumbo, and with that knowledge, and with the intention to cheat and defraud the plaintiff, represented to the plaintiff's said agent that no such lien or claim of a like kind existed at the time of such negotiation. (4) Proof that such a lien existed at the time of the negotiations for the sale, and even that defendant represented that there was no such claim, does not make out the plaintiff's case, unless it is further proved that the defendant, Wheeler, knew, when he made the representation, that such a claim existed. * * * (6) In order for any warranty or representation made by Wheeler to Baars to avail Baars, you must find that Baars had knowledge of the warranty or representation, for such warranty or representation made to Elias, and not communicated to or acted upon by Baars, would not avail him in this suit unless you find from the evidence that Elias was authorized to and did consummate the purchase without further communication with Baars after his interview with Wheeler. (7) The warranty, if you find one was made to Elias, must have been communicated to Baars before the sale to him, in order to avail him in this suit, unless Elias was authorized to and did consummate the purchase upon such assurance by Wheeler without further authority from Baars. If Elias was not authorized to purchase, and did not communicate the warranty to Baars before the sale, you will find for the defendant."

The following instruction, numbered 5, requested for defendant, was given by the court: "If you find from the evidence that Wheeler stated to Elias, acting for Baars, that there was no lien or claim against the Jumbo other than that he named at the time, and that in so doing he gave his reason for the statement, that reason is to be taken as a part of the statement or representation, and was notice to Elias that the representation or statement was to be limited by the reason given."

Upon the rendition of the verdict against the defendant, he moved for a new trial, the grounds thereof being that the verdict was contrary to the evidence, and against its weight and preponderance, and contrary to the charge of the court; and that the court erred in refusing the instructions requested by defendant and quoted above; and because the court erred in giving the first, second, and third instructions quoted above as having been given. The refusal of the motion for a new trial, and the refusal of the instructions requested by defendant, and the giving of the first, second, and third instructions are the errors assigned.

The charges refused by the court, on the defendant's request, that embody the idea that the representation alleged to have been falsely made must have been known to be false at the time it was made by the defendant in order to warrant a recovery, make it necessary to consider the rules of law applicable to actions of this kind. The action is clearly one for deceit. The elements essential to a recovery in such cases are thus tersely formulated in 1 Bigelow, *Frauds*, p. 466: "A false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position, is a fraud of which the law will take cognizance." As to the scienter—the knowledge—by the maker of the representation of its falsity, the same author (*Id.* p. 509) says: "A false representation made with knowledge of its falsity—made scienter, in technical phrase—affords, if other elements of liability are present, a right of action in damages. A false representation may be made scienter, in contemplation of law, in any of the following ways: (1) With actual knowledge of its falsity; (2) with knowledge either of its truth or falsity; or (3) under circumstances in which the person making it ought to have known, if he did not know, of its falsity. No action for damages can be maintained without proof of the scienter in one of these three phases." If the first phase of the scienter is relied upon for a recovery, the plaintiff must show that the representation was made with actual knowledge of its falsity, unless it be a case where the defendant, in making the representation that was false, couches it in such positive and unqualified terms as to amount to an affirmation of his knowledge of its truth. The second phase of the scienter includes all those cases where the misleading and false statement has been made in such absolute, unqualified, and positive terms as implies knowledge on the part of the person making it, and, if the party making such positive statement has no knowledge whether it is true or false, he has knowingly told what is untrue in putting his statement in such form as to amount to an assertion that he has knowledge of its truth, when in fact he has

not. When one party seeks information of another upon a material matter upon which he is about to act, and the party from whom the information is sought is ignorant and has no information on the subject, the demands of truth would require him to disclose and affirm such ignorance; but, in such case, if he conceals or withholds his ignorance, and positively asserts thus or so to be true, when in fact he knows not whether it be true or false, he is as culpable a deceiver, if his statement proves to be false, as the party who willfully asserts that to be true that he absolutely knows to be false. The third phase of the scienter embraces those cases where, from the party's special situation or means of knowledge, it becomes his duty to know as to the truth or falsity of the representation made; and, in cases of this kind, the plaintiff can generally satisfy the rule in regard to proof of the scienter by showing that the situation of the defendant was such as to possess him with special means of knowledge as to the truth or falsity of his assertions. *Evans v. Edmonds*, 13 C. B. 777; *Lynch v. Trust Co.*, 13 Fed. 486; *Litchfield v. Hutchinson*, 117 Mass. 195; *Bristol v. Braidwood*, 28 Mich. 191; *Arkwright v. Newbold*, 17 Ch. Div. 801; *Dunn v. White*, 63 Mo. 181; *Marsh v. Falker*, 40 N. Y. 562. From what has been said, and under the proofs in this case, we do not think that the charges requested by the defendant upon the question of the scienter were erroneously refused. As an abstract, broad, general proposition of law it is quite true that no recovery can be had in an action of this kind unless the maker of the representation knew it to be false when made, and that he made it with intention to deceive; but the proof of such knowledge or scienter is sufficient if it establishes a case falling within either of the three phases already pointed out, and the intent to deceive is to be inferred from the facts in proof. 1 Bigelow, *Frauds*, p. 537. It was not enough, therefore, for the court, under the proofs here, to simply say to the jury, in the language of the refused instructions, "that the plaintiff could not recover in the absence of satisfactory proof that the defendant made the representation knowing it to be false." Had these charges proceeded further after the announcement of the general proposition that scienter must be shown, with an explanation of the rules touching the three phases of proof that the law deems sufficient to establish such scienter, then it would have been proper to have given them; but, in the form presented, they are too general, and calculated to mislead.

It is contended, further, for the appellant that the judgment should be reversed because the proofs show that the lien whose existence produced the plaintiff's damage was a matter of record and that it was the plaintiff's duty to search those records for himself, the access thereto being easy, and that he had no right to rely upon the defend-

ant's representations contrary to the facts that would have been disclosed by such record. There are some authorities that sustain this view of the law, but we are satisfied that the great weight of the authorities, English and American, supported by the soundest reasoning, establish a contrary doctrine that is thus forcefully expressed by Zollars, C. J., in *West v. Wright*, 98 Ind. 335: "There may be good, prudential reasons why, when I am selling you a piece of land, or a mortgage, you should not rely upon my statement of the facts of the title, but if I have made that statement for the fraudulent purpose of inducing you to purchase, and you have in good faith made the purchase in reliance upon its truth, instead of making the examination for yourself, it does not lie with me to say to you: 'It is true that I lied to you, and for the purpose of defrauding you, but you were guilty of negligence—of want of ordinary care—in believing that I told the truth; and, because you trusted to my word, when you ought to have suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without remedy.'" *McClellan v. Scott*, 24 Wis. 81; *David v. Park*, 103 Mass. 501; *Upshaw v. Debow*, 7 Bush, 442; *Linington v. Strong*, 107 Ill. 295; *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Olson v. Orton*, 28 Minn. 36, 8 N. W. 878; *Parham v. Randolph*, 4 How. (Miss.) 435. As there must be a reversal of the judgment appealed from because of another error in the charge of the court, presently to be noticed, we do not think it necessary further to discuss the main points presented by the instructions given or refused, since, from what has been said, any defects or omissions therein can, upon another trial, be rectified.

The proposition contained in the first charge of the court, to the effect that "a principal is not liable civilly for the frauds and deceits of his agent committed in the course of his employment," was clearly erroneous. It is well settled that for deceit and false representations made by an agent in the course of his employment both the agent and his principal are civilly liable; and, so far as the liability of the principal is concerned, it makes no difference whether he authorized or was cognizant of the misrepresentation and deceit of his agent or not. 1 *Lawson, Rights, Rem. & Pr.* §§ 112, 114, and authorities cited.

The third charge of the court to the jury, as follows: "Written declarations made at, before, or soon after a transaction are entitled to greater weight than an oral statement unless the oral statement is of such character as to show that the written statement was made through mistake,"—in view of the evidence in the cause, was fatally erroneous. The written statement or account of the sales made by the defendant and introduced in evidence contained an item of \$246.02, stated to have been reserved to await result of suit of *W. F. & J. E. Creary* for re-

pairs. It also contained three dates that indicate that the items and assertions of fact therein were in existence and were known to the defendant on March 31, 1884, several days prior to the issuance and service of the writ of garnishment on him in the suit of *W. F. & J. E. Creary* against *Plaggio Bros.*, all of which tended to show that the defendant did have knowledge, prior to the service of such writ of garnishment on him, that there was a claim against the boat he was selling in favor of *W. F. & J. E. Creary*. The defendant, however, and *R. L. Campbell* both testified orally, but positively, that the appearances from the paper itself to the effect that it was made out on March 31, 1884, were incorrect, and that such written statement was not in fact made out until after the service of the writ of garnishment, and that defendant did not know of the existence of the *Creary* claim until the writ of garnishment was served on him. Here, then, was oral statement set up in juxtaposition with written, upon a vital point in the case. It was error for the court to invade the exclusive right of the jury to determine how much and what comparative weight they were to give to the different kinds of evidence in the cause by telling them, in effect, as matter of law, that the written statement was entitled to more weight than the oral. *Williams v. Dickenson*, 28 Fla. 90, 9 South. 847; *Williams v. La Penotiere*, 32 Fla. 491, 14 South. 157, and cases cited. For this error in the charge of the court, the judgment appealed from must be reversed, and a new trial awarded, and it is so ordered.

(34 Fla. 33)

STATE, to Use of *GORE, v. MONTAGUE et al.*
(Supreme Court of Florida. June 30, 1894.)
BOND OF COLLECTOR OF INTERNAL REVENUE—LIABILITY OF SURETY.

1. The liability of sureties upon the official bond of a collector of revenue is limited by the terms of the bond, and cannot be extended beyond the reasonably necessary import of the same.

2. The condition of the bond sued upon is that the principal, as collector of revenue, "shall faithfully perform all the duties of his office by the faithful collection of all taxes, both state and county, and the prompt payment thereof to the state and county treasurers, as prescribed by law." *Held*, that a suit could not be maintained upon this bond, against either the principal or sureties, for fees due a publisher for advertising sales of lands for taxes, which had come into the hands of the principal. Such withholding of the moneys of the publisher by the collector is an instance of official misconduct, but not a breach of the official bond.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Action by the state of Florida, for the use of *Mahlon Gore*, against *J. R. Montague* and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Wm. H. Jewell, for appellant. *Beggs & Palmer*, for appellees.

LIDDON, C. J. The appellant, plaintiff below, brought his suit in the circuit court of Orange county against the appellees, defendants below. The suit was brought upon the official bond given by the defendant Montague, as collector of revenue of Orange county, and the other defendants were sued as sureties upon said bond. The declaration alleged the appointment of the defendant Montague as collector of revenue, the giving of an official bond, and the entry of said defendant Montague upon the performance of his official duties. The other defendants are alleged to have executed said bond as sureties upon the same, and the amount for which each, respectively, became bound, is stated. The condition of said bond is stated in the body of said declaration to be, in substance, that the defendant Montague, as said collector of revenue, shall diligently and faithfully perform all the duties of his said office as prescribed by law. A copy of the bond is attached to the declaration, and made a part of it, and was evidently so regarded in the court below, and is so regarded in this court. The copy of the bond shows the condition of the same to be that the said Montague shall faithfully perform all the duties of his said office, by the faithful collection of all taxes, both state and county, and the prompt payment thereof to the state and county treasurers, as prescribed by law. The due execution and approval of said bond is alleged. The breach of said bond alleged is that the defendant Montague did not pay over and duly account for all the moneys which came into his hands as such collector, to wit, the sum of \$1,735.89, the same being part of the charges and expense for advertising the sale of certain lands in said Orange county for delinquent taxes, as provided by law. The declaration alleges that payment for said advertising is a part of the duty of said collector, and that the cost thereof is by law a part of such delinquent taxes due said state and county, and which taxes, with costs and charges of advertising and sale, it is made the duty of said official to collect and pay over; that the said advertising was duly made by the defendant Montague as collector; that he made sales of the lands in pursuance thereof, and collected from the purchasers the costs of such advertising, but neglected and refused to pay the same over to the state of Florida or county of Orange, or to the said Mahlon Gore, the publisher and proprietor of a newspaper known as the Orange County Reporter, published in said county, in which such advertisement was made; that said defendant Montague still fails and refuses to pay over said sum of money, or any part thereof, in violation of the condition of said bond; and that said defendant, and the other defendants sued as sureties, still refuse to make such payments. To this declaration the defendants demurred, stating several matters of law to be argued upon the demurrer, the

gist of them being that the claim sued for was not such a liability as would authorize a recovery upon the official bond of the defendant Montague. The circuit court sustained the demurrer, and afterwards, April 10, 1890, the plaintiff declining to amend his declaration, or file other pleadings in the case, rendered judgment against the plaintiff, dismissing the case, and for costs in favor of the defendants. The plaintiff appealed from this judgment, and assigns as error the rulings of the circuit court sustaining the demurrer of the defendants to the declaration, and in entering judgment against the plaintiff.

The question presented by the record is whether a collector of revenue and his sureties are liable upon his official bond for fees due to the publisher of a newspaper for advertising notice of sale of lands for taxes, which had been received by the collector from the purchasers of the land at tax sales. The bond sued upon was made in pursuance of the statute then in force. Acts 1885, p. 3, c. 3557. It is not given to secure the performance generally of all of the official duties of the principal, but the manner in which he shall perform such official duties is distinctly pointed out, to wit, shall faithfully and diligently perform all the duties of his office by the faithful collection of all taxes, both state and county, and the prompt payment thereof to the state and county treasurers, as prescribed by law. The responsibilities of obligees upon an official bond of a collector must be gathered from the bond itself, and, as to sureties upon such bond, the doctrine that sureties are favorites of a court of law prevails, and their liability must be shown upon a strict construction of the bond. Coolcy, Tax'n, p. 712. Examining the bond in question, first as to the liability of the sureties, we ascertain that the extent of their engagement was that the principal should faithfully perform all the duties of his said office by the faithful collection of all taxes, both state and county, and the prompt payment thereof to the state and county treasurers. The bond does not cover the whole range of official duties, but only the proper collection of, and payment of, the taxes. The bond says that the principal shall faithfully perform all the duties of his said office by the faithful collection, etc. The exact duties being specified, certainly the sureties cannot be held for the nonperformance of other duties, the performance of which was not assumed by them. The doctrine of "*Expressio unius est exclusio alterius*" has application to the conditions of an official bond. U. S. v. Cheeseman, 3 Sawy. 424, Fed. Cas. No. 14,790. The sureties cannot be held liable for the failure of their principal to pay the advertising fees sued for to Mr. Mahlon Gore, or to the state or county treasurer, unless those advertising fees can be called taxes which should have been paid over to the state or county treasurer. A "tax" is defined

to be a rate or sum of money assessed upon the person or property of a citizen by government for the use of the nation, state, or municipality. Rap. & L. Law Dict. tit. "Tax." Cooley defines "taxes" to be the enforced proportional contributions from persons and property, levied by the state, by virtue of its sovereignty, for the support of the government, and for all public needs. Cooley, Tax'n, p. 1.

The advertising fees were costs incident to the effort to enforce the collection of taxes by the sale of land. The statute itself, under which the lands are sold, makes a distinction between taxes and the costs of advertising and collecting taxes. Laws Fla. c. 3413, §§ 48-50 (Acts 1883, pp. 33-35). These costs are not required to be paid to the state or county treasurer. They are not taxes, within the purview of the law, or the bond sued upon. The sureties are not liable for the nonpayment of the same. Their liability cannot be extended beyond the scope of their engagement, and the reasonably necessary import of the language of the bond. *Raney v. Baron*, 1 Fla. 327; *U. S. v. Cheeseman*, supra; *Miller v. Stewart*, 9 Wheat. 703; *Robinson v. Epping*, 24 Fla. 237, 4 South. 812. The doctrine of strictissimi juris has special application to the bond of a tax collector. Cooley, Tax'n, p. 708.

The bond required of a tax collector is for the safety of the public, and the protection of the state's revenues. It is not intended as a protection to individuals who may be injured by the official misconduct, trespasses, or neglect of the collector. Cooley, Tax'n, p. 712. In many states, official bonds are different from that sued upon. They are made broad enough in their terms to cover every kind of official misconduct. From this have resulted many suits against tax collectors and their sureties for trespasses for selling property not subject to taxes, or upon which the taxes have been paid, and for other matters. The form of bonds in use in this state excludes liability from every other matter, except a failure to properly collect and pay over the taxes due the state and county. The remedy sought cannot be applied as against Montague, the principal. This action is strictly upon the official bond of Montague. The wrong complained of is not a breach of his bond. The terms of the bond are not to be construed so strictly in his favor as in favor of his sureties, yet there can be no recovery in this action unless the wrongful act alleged is, by a fair construction of the language, a breach of the bond. For reasons already stated herein, when discussing the liability of the sureties, it follows that it was not such a breach. *Murfree, Off. Bonds*, § 475; *Clark v. U. S.*, 60 Ga. 156. It is not meant that the defendant Montague is not liable to an action by reason of what is stated in the declaration, but that he is not liable in the present proceeding. It often happens that an

officer inflicts serious injury upon an individual, and for which he could be held personally liable at law, and yet not commit a breach of his bond at all. Therefore, all that it is intended to say here is that the matters stated in the declaration constitute no breach of the bond. The sureties could not, in any form of action, be made liable for the acts complained of; and, if the principal is liable, some other form of action must be pursued against him. *Murfree, Off. Bonds*, § 475.

The judgment of the circuit court is affirmed.

(34 Fla. 45)

BOND v. STATE ex rel. JARVIS.

(Supreme Court of Florida. June 16, 1894.)

BASTARDY—WRIT OF ERROR—TIME OF TAKING—DISMISSAL.

1. A bastardy case, under our statute, in its inception, partakes of the nature of a criminal case, but in its latter stages, after it has reached the circuit court, becomes a civil action.

2. A writ of error from a judgment in a bastardy case should be sued out within six months of the date of the judgment, as provided by section 1271, Rev. St. Fla.

3. The act of 1893 (chapter 4154, Laws Fla.) does not make a bastardy proceeding a criminal prosecution.

(Syllabus by the Court.)

Error to circuit court, Madison county; John F. White, Judge.

Bastardy proceeding by the state, at the relation of Lula Jarvis, against John T. Bond. From the judgment, defendant brings error. Dismissed.

William B. Lamar, Atty. Gen., for the motion. Benj. P. Calhoun, opposed.

LIDDON, C. J. In a bastardy proceeding against the plaintiff in error in the circuit court of Madison county, on the 20th day of October, 1893, a final judgment was entered. By this judgment the state of Florida recovered of the plaintiff in error the sum of \$50 per annum for the period of 10 years, to be paid in annual installments, commencing on the 1st day of November, 1893, and the sum of \$10 to be paid upon the giving of the bond in said judgment provided for, to cover the expense of the birth of the child. Said judgment also required that the plaintiff in error enter into a good and sufficient bond, with two or more securities, to be approved by the clerk of said court, for the faithful payment of said moneys, and that he stand committed until said bond be executed according to law, or for the period of 12 months. The writ of error, by which it is sought to reverse such judgment, was issued May 17, 1894, more than 6 months after the rendition of said judgment.

The attorney general moves to dismiss the writ of error, because not sued out within the time prescribed by the statute. The motion presents the question whether a bas-

tardy proceeding is a civil case, in which the writ of error must be sued out within six months of the date of the judgment, under section 1271 of the Revised Statutes, or whether it is a criminal case, to which such limitation does not apply. A bastardy proceeding is of rather a nondescript character. It partakes in its inception, under our statute, very much of the nature of a criminal prosecution, but in its latter stages, when it reaches the circuit court, becomes a civil case. *E. N. El. v. State*, 25 Fla. 268, 6 South. 58; *William H. T. v. State*, 18 Fla. 883.

It is contended on behalf of the plaintiff in error that the statute, chapter 4154, Laws Fla. (Acts 1893, p. 77), which has become a law since the decisions above cited were made, has changed a bastardy proceeding into a criminal prosecution. The title of this statute is "An act prescribing the period of time for which a defendant shall be imprisoned for failing or refusing to give bond or comply with the order of the court in bastardy cases." The act provides that in such cases "in which the issue shall be found against the defendant or reputed father, and judgment is rendered against him, the court shall in such judgment specify a certain time for which he shall be imprisoned in case of failure or refusal to comply with such judgment; but in no case shall such term of imprisonment be for a longer period than one year." This act does not purport to give power to the courts to imprison defendants in bastardy cases who fail or refuse to comply with the judgment of the court. It was well recognized that, without the authority of an express statute, the courts already had such power. *Ex parte J. O. H.*, 17 Fla. 362. The act recognizes the power, and, instead of making any grant of further power, places restrictions and limitations upon the power already held and exercised by the courts. The case last above cited held that the court might imprison the defendant until he complied with the order of the court. This imprisonment was not as a punishment for a crime, but to enforce obedience to the judgment of the court. Under this decision, unless prevented by some constitutional guaranty, an insolvent or unwilling and obstinate defendant might be imprisoned indefinitely or for life. The statute, instead of making a criminal prosecution of that which was not criminal before, lessens the liability and danger of the defendant. It puts certainty and a limitation upon the time of his imprisonment, which before was uncertain, and apparently without limit.

A bastardy proceeding is not a criminal case under our statutes, as they were before, or as they are now, since the act of 1893. The judgment against the plaintiff in error was a civil judgment, and the writ of error should have been sued out within six months of the date of the judgment. It was not sued out within such time; therefore the motion to dismiss the writ of error is granted.

(M Fla. 19)

BARTLEY v. BINGHAM.

(Supreme Court of Florida. June 22, 1894.)

APPEARANCE — EFFECT — EJECTMENT — VERDICT — JUDGMENT — VARIANCE — SUFFICIENCY OF DESCRIPTION.

1. A general appearance by the defendant in an action of ejectment cures all defects in the praecipe, the summons, the service thereof, and the statement required to be filed therewith.

2. A verdict as follows: "We, the jury, find for the plaintiff, and that she is entitled to recover from the defendant the following premises in fee simple,"—and describing the premises, is a sufficient finding of a right of possession of the plaintiff to the land described to authorize a judgment in her favor for the recovery of the same.

3. Slight variations in the verdict and judgment, in the description of the land sued for, from the description stated in the praecipe and declaration, will not vitiate a judgment for possession of the same where it appears with sufficient certainty that the lands are practically the same as those sued for.

4. A description of land in a pleading or in a judgment or writ is sufficient if a surveyor can, by use of such description, locate the land.

5. A judgment for plaintiff in an action of ejectment should not be reversed because that portion of it awarding a writ to enforce the judgment may describe the writ in language not technically exact.

(Syllabus by the Court.)

Error to circuit court, Duval county; James M. Baker, Judge.

Action by Harriet E. Bingham against Henry Bartley. Judgment for plaintiff. Defendant brings error. Affirmed.

H. H. Buckman, for plaintiff in error. Jas. R. Challen, for defendant in error.

LIDDON, C. J. The defendant in error, the plaintiff in the court below, brought an action of ejectment against the plaintiff in error. The praecipe was filed May 22, 1888, and a summons was issued returnable to the rule day in June, 1888, at which time the defendant, by his attorney, entered his general appearance in the case. The declaration, in the usual statutory form, was filed to the rule day in June, 1888. Upon his failure to file any plea, demurrer, or answer to the declaration, a default was entered against the defendant on the following rule day; and afterwards, at a term of court held on June 19, 1889, a jury was impaneled, a verdict rendered in favor of the plaintiff, and a final judgment rendered in favor of the plaintiff, from which the writ of error is taken.

Five assignments of error are made. The first is that no rule day was named in the praecipe. A praecipe is a written direction to the proper officer to issue a writ. The record shows that a writ of summons did issue in the case, and properly stated the rule day to which it was returnable, and that defendant, by his attorney, properly entered his general appearance on that rule day. This general appearance cured all defects in the issuing and serving of the writ. The purpose of issuing and serv-

ing a writ is to give the court jurisdiction over the person of the defendant. The defendant having entered a general appearance in the case, the purpose of issuing and serving the writ is accomplished; and we cannot thereafter question the validity of the praecipe for summons, the summons itself, or the service thereof. *Baars v. Gordon*, 21 Fla. 25; *Smith v. Bulkley*, 15 Fla. 64; *Pearce v. Thackeray*, 13 Fla. 574; *Mercer v. Booby*, 6 Fla. 723; *Wood v. Bank*, 1 Fla. 378.

The second assignment is that no description of the lands sued for was attached to the summons. This, also, was an irregularity, which was cured by the general appearance of the defendant.

The fourth assignment is that the verdict of the jury does not find that the plaintiff is entitled to the immediate possession of the land sued for. We do not think the word "immediate" need appear in the verdict. The verdict should have found, before judgment could have been entered upon the same, the right of possession of the plaintiff to the land sued for; and such right would, of course, be construed to be an immediate right. The verdict is as follows: "We, the jury, find for the plaintiff, and that she is entitled to recover from the defendant the following premises in fee simple,"—and describes the premises. We consider this statement fully equivalent to a statement that the plaintiff is entitled to the possession of the land described in the verdict, and the verdict, in this respect, is in sufficient form to authorize a judgment to be entered upon it. The verdict in the case of *Asia v. Hiser*, 22 Fla. 378, cited by counsel, was quite different from the verdict now under consideration. The jury in that case simply said: "We, the jurors in the case of *Hiser v. Asia*, find the fee-simple title in the plaintiffs to the lands described," etc. The verdict in that case did not say that the plaintiffs were "entitled to recover."

The third and fifth assignments of error relate to variances appearing in different portions of the pleadings in the description of the land sued for and recovered. The principal contention upon this subject is that in the praecipe the eastern boundary of the land in question (the northeastern corner of which is shown to begin at a point in township 2 south, of range 27 east, in Duval county, upon the eastern line of the F. Richards mill grant, east of the head of Bryant's creek) is said to have a variation of "5 east," while in the verdict and judgment, in describing the same boundary, the degree mark, °, appears after the figure 5, making the variation five degrees, or 5°. This was probably added in correction of an error purely clerical. This eastern boundary line, with which fault is found, is described twice in each the praecipe, declaration, verdict, and judgment. Beside

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describing it by stating the place where it begins, and the direction and distance which it runs, it is also described as running along the grant line; and, further, in stating the boundaries of the tract everywhere they are stated in the praecipe, the declaration, the verdict, and the judgment, the eastern boundary is stated to be the eastern line of the F. Richards grant. This line is one appearing upon the public maps of the lands of the state and United States, and can be easily located. As to the fifth assignment, as to the description of the land being uncertain, there is no doubt but that the description could be improved upon. The southern boundary would appear to be incorrectly stated. We think, however, that a surveyor, with the description given, could locate the land; and, if this is true, the description is sufficient. *Buesing v. Forbes*, 33 Fla. —, 15 South. 209.

It is also alleged as error that the judgment directed a writ of ejectment, instead of a writ of habere facias possessionem. The writ itself, if any issued, is not brought up in the record, so that we can see what it is. The technical name of the writ in an action of ejectment is not a writ of ejectment, although an "ejectment," in its ordinary definition, of an expulsion or ouster of the defendant, result from the writ. The purpose of a judgment was to have a judicial determination of the title and right of possession of the land sued for. This has been done in this case. It should not be reversed because it uses terms not technically exact in reference to the writ to be issued to enforce it, nor should it be reversed even if it failed to award a writ of possession. *Minkhart v. Hankler*, 19 Ill. 47. We think the judgment in this case sufficient to authorize a writ of possession. If a writ that is not authorized by law issues upon it, the proper remedy is by motion to quash the writ in the court below.

We see no error in the record. The judgment of the circuit court is affirmed.

(34 Fla. 24)

BARTLEY v. BINGHAM.

(Supreme Court of Florida. June 22, 1894.)

EJECTMENT—JUDGMENT—VERDICT.

The judgment of the court below in this case is affirmed, for reasons stated in the case (decided at the present term) of *Bartley v. Bingham*, 15 South. 592.

(Syllabus by the Court.)

Error to circuit court, Duval county; James M. Baker, Judge.

Action by Harriet E. Bingham against George Bartley. Judgment for plaintiff. Defendant brings error. Affirmed.

H. H. Buckman, for plaintiff in error. Jas. R. Challen, for defendant in error.

LIDDON, C. J. In this case the record is almost identical with that of *Bartley v.*

Bingham (decided at the present term) 15 South. 592. The very same questions are presented for adjudication in each of the cases, and both cases were submitted upon the same briefs by both parties. For reasons stated in the opinion in the case decided, the judgment of the circuit court is affirmed.

(106 Ala. 254)

SYLLACAUGA LAND CO. v. HENDRIX.
(Supreme Court of Alabama. May 17, 1894.)

BOND FOR TITLE—CONSTRUCTION.

A bond for a deed, after reciting the sale of the land for \$166.66 cash, and \$333.35 payable in one and two years, respectively, provided for the making of a deed on the payment of the notes for the deferred payments at maturity, and also provided that the grantee should erect certain manufactories, or have them in "diligent course of construction" at the maturity of the first of the notes, and that, on its failure so to do, both of the notes should be forfeited. *Held*, that the grantee was entitled to a conveyance of the land at the price of \$166.66 if the mills were not built or in course of diligent construction at the maturity of the first note.

Appeal from chancery court, Talladega county; S. K. McSpadden, Chancellor.

Action by J. M. Hendrix against the Syllacauga Land Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On December 3, 1892, the appellee, J. M. Hendrix, filed his bill against the appellant, the Syllacauga Land Company, to enforce the specific performance of a contract for the sale of a certain lot in the town of Syllacauga, in Talladega county, Ala. The bill avers that on April 9, 1892, the complainant purchased a lot from the Marble City Land & Furnace Company for \$500, one-third of the purchase money to be paid in cash, and the balance payable in equal installments of one and two years; that he paid the cash payment, and executed his promissory notes for each of the others; and that thereupon there was given to him a bond for title evidencing the contract of sale, which instrument is copied in the opinion. It was also averred that, upon the maturity of the first of said notes, he was ready and willing to pay the same upon the compliance by the said Marble City Land & Furnace Company of the agreements and conditions contained in said bond for title, but that said company wholly failed to keep this agreement, and did not comply with the stipulations and requirements of said contract, and also refused, upon demand, to execute to the complainant a deed to the lot in question. The bill also averred that, since the execution of said contract, the Marble City Land & Furnace Company had changed its name to that of the Syllacauga Land Company. The prayer of the bill was that, upon the final hearing, the chancellor should cancel both of the notes given for the deferred payments, and divest the title to the said lot in question out of the Syllacauga Land Company, and

invest it in the complainant. The respondent demurred to the bill, assigning several grounds, among which were the following: (1) That the bill contained no equity; (2) that it does not show that the defendant authorized the execution of the said contract; (3) that the stipulation to erect certain manufactories and industrial establishments, etc., or to cause the same to be erected, is not supported by any consideration, and is invalid; (4) that it is not averred that there were any false representations made to the complainant, and no contract is shown on the part of the defendant to convey the lot to the complainant upon the payment of the first installment of the purchase money; (5) that the bill shows that the complainant has not paid the purchase money in full, and contains no offer to pay the same, and shows no state of facts that entitles the complainant to the specific performance of the contract as prayed for.

O. C. Whitson, for appellant. Otts & Dixon and Cecil Browne, for appellee.

MCOLELLAN, J. In the view we take of this case, but little need be said in disposing of it. To our minds the sole question in it has reference to the intention of the parties, to be gathered from the terms of the bond for title which the land company executed, and which the complainant below accepted. It is as follows: "State of Alabama, Talladega County. Know all men by these presents, that the Marble City Land and Furnace Company, a corporation incorporated under the laws of Alabama, is held and firmly bound unto J. M. Hendrix in the sum of one thousand dollars. The condition of the above obligation is such that, whereas, for the consideration of \$166 66/100 dollars, this day paid the said Marble City Land and Furnace Company by the said J. M. Hendrix, and the further sum of \$333 35/100 dollars, to be paid to the Marble City Land and Furnace Co., by the said J. M. Hendrix, payable in one and two years, respectively, with interest from date, at the office of the Marble City Land and Furnace Company in Syllacauga, Alabama, the Marble City Land and Furnace Company has this day bargained and sold to the said J. M. Hendrix certain real estate situated in the city of Syllacauga, Talladega county, state of Alabama, known and designated on the map of the said Marble City Land and Furnace Company as follows: 'Lot No. 3, in block No. A, fronting 60x70 feet on Ourran street, and running back with equal width.' Now, if, upon the payment of said notes promptly at maturity, and interest, as herein stipulated, the said Marble City Land and Furnace Company causes to be made or makes to the said J. M. Hendrix, or his heirs, a good and sufficient title, with covenants of warranty, to the aforesaid real estate, then this obligation to be void; otherwise to remain in full force and effect. The

Marble City Land and Furnace Company guaranties and pledges to the purchaser hereof that it will erect, or cause to be erected, at Syllacauga, Alabama, the following manufacturing, to wit: One ten thousand spindle cotton mill; one rolling mill; one furniture factory. If the company fails to erect, or to have in diligent course of construction, said manufacturing plants at the maturity of first of said notes, above described, then both of said notes shall be forfeited, and the purchaser hereof shall be released from the payment hereof; but no other penalty or liability shall be visited upon said company on account of failure to erect said manufacturing plants as aforesaid, other than the forfeiture of the balance of the purchase money for said land, evidenced by said notes as aforesaid. In testimony whereof, the said Marble City Land and Furnace Company has hereto signed its corporate name, and caused its corporate seal to be herunto affixed by its president, who is authorized thereto, on this, the 9th day of April, 1891. Marble City Land & Furnace Company. S. E. Noble, Vice President."

The parties could not have intended that, notwithstanding the failure of the vendor to erect the cotton mill, rolling mill, and furniture factory stipulated for and guaranteed in the bond, the vendee would not be entitled to the land except on payment of the notes, as well as the cash installment of the purchase money, for this would have been to destroy the guaranty altogether, and to require complainant to pay the sum evidenced by the note when the defendant had expressly released his claim in that regard. Nor could it have been in the minds of the parties that the bond should become mere waste paper, and the sale of land be avoided, because of the failure of the maker of the bond to perform one of its express stipulations. This would be to convert a stipulation manifestly intended for the vendee's benefit into a stipulation for the benefit of the vendor, and to enable the latter to take advantage of its own wrong and default, to the direct injury of the vendee, in the loss of the cash payment. It cannot be that it was in the contemplation of the parties that the guaranty should operate collaterally, affording the vendee an action for damages, after paying the notes, but requiring him to pay them for a breach of it; for, if any one matter is plainer than another in this instrument, it is that, upon breach of the guaranty, the notes should become at once forfeited; i. e. the money the vendor would otherwise have been entitled to under them should be forfeited to the vendee, and that the purchaser should be released from the payment thereof. And how there could be any duty resting on the vendee to pay money which was thus forfeited to him, and his obligation to pay which is thus the condition transpiring, expressly released, is not conceivable. There is to our minds but one possible construction to put on the

contract evidenced by this bond,—but one possible conclusion as to what the parties intended in entering into it,—and that is this: The defendant sold and agreed to convey, and the complainant purchased and was to receive a conveyance of, the land, at the price of \$166.66 if the specified mills and factory were not built, or in course of "diligent construction," at a certain future day, and at the price of \$500 if said mills and factory should be built, or in course of diligent construction, at said day. This is the essence of the contract. To so interpret it offends none of its terms, nor contravenes any of them, except to the extent other of its stipulations authorize and require; and it is the only construction of it which can at all be justified by the language the parties have used to express their purposes and agreements. The sale was upon the consideration of \$500 in the event the mills, etc., were built, etc., by the day named, and upon the consideration of \$166.66 if they were not so built. The condition upon which the larger consideration was to be paid has not and can never occur. The time has passed, and the mills and factory nor any of them had not then been erected, nor were they or either of them then in course of erection. The state of facts upon which the other and smaller sum was to be taken as full consideration transpired before and was existent at the time of bill filed. That full consideration had then been fully paid, and the complainant was entitled to the relief prayed in his bill,—the specific performance of the contract to convey, evidenced by the defendant's title bond. The foregoing disposes of all the assignments of error discussed in the brief of counsel for appellant. Others will not be considered, although there is a statement in the brief that "each and every assignment of error is urged." *Williams v. Spragins* (Ala.) 15 South. 247. The decree overruling the demurrer is affirmed. Affirmed.

(108 Ala. 308)

WHITE et al. v. KAHN.

(Supreme Court of Alabama. May 18, 1894.)

GARNISHEE'S ANSWER—EFFECT—STOCK SUBSCRIPTION—CONSTRUCTION—PAROL EVIDENCE.

1. If a garnishee's general denial of liability is inconsistent with the particular facts stated by him, such facts control, and judgment may be entered without contesting the answer.

2. Garnishee subscribed for \$5,000 worth of stock of a railroad company, with the privilege of changing his subscription if he desired. The corporation was not then formed, and the persons who took the subscription were not authorized by law to take it, and it was merely taken, along with others, to find, in a general way, how much stock would probably be taken when the corporation was formed. When the corporation was formed, garnishee took and paid for \$2,500 of stock. Held, that he was not liable on the \$5,000 subscription.

3. The rule that contemporaneous stipulations cannot be shown, to alter a written contract, does not apply to cases where the execution and delivery of the writing are in issue.

Appeal from circuit court, Montgomery county; John R. Tyson, Judge.

Action by J. M. White and others against the Alabama Terminal & Improvement Company, on a note. Maurice Kahn was summoned as garnishee. From a judgment for the garnishee, plaintiff appeals. Affirmed.

On January 12, 1893, the plaintiff recovered a judgment against the defendant, the Alabama Terminal & Improvement Company, for \$6,200. At the same term of the court the garnishee answered in writing, denying very fully any indebtedness to the defendant, but on motion of the plaintiff he was required to answer orally. The facts, as disclosed by his oral answer, are stated in the opinion. The paper which the garnishee testified he signed when in the office of Mr. Wiley was in words and figures as follows:

"We, the undersigned, subscribe to the capital stock of the Alabama Terminal and Improvement Company the amounts opposite our respective names:

David Well, Montgomery, Ala...	\$ 1,000 00
R. P. Tattman and associates, Montgomery, Ala.....	23,000 00
Fox Henderson, Troy, Ala.....	15,000 00
Joel D. Murphy, Troy, Ala.....	5,000 00
L. & W. J. Henderson, Troy, Ala.....	10,000 00
J. C. Haas, Montgomery, Ala....	5,000 00
S. Roman, Montgomery, Ala....	4,000 00
M. Kahn, Montgomery, Ala....	5,000 00"

On the facts disclosed by the garnishee in his oral answer, the plaintiffs moved the court for a judgment against him for \$2,500. This motion was overruled, and the plaintiffs excepted. On motion of the garnishee, he was discharged, and judgment was rendered accordingly, and the plaintiffs duly excepted to this ruling.

Tompkins & Gray and Roquemore, White & Dent, for appellants. Brickell, Semple & Gunter, for appellee.

HEAD, J. This appeal is from the refusal of the circuit court to grant plaintiffs' motion for judgment against the garnishee, Kahn, on his answer. The plaintiffs accepted the answer as true, interposing no contest, and relied upon its terms, as showing, in judgment of law, an admission of indebtedness due and owing by the garnishee to the defendant, the Alabama Terminal & Improvement Company. The sole question then is, does the answer show an admission of indebtedness, entitling plaintiff to judgment? The answer was given orally upon the stand, and reduced to writing under the eye of the court. Its general response is a positive, complete denial of any indebtedness whatsoever. But, as required by plaintiffs, who were present, at the time it was made, the garnishee disclosed the facts, in detail, in reference to a particular transaction supposed to have been had by him with the defendant; and these facts, as so disclosed, the plaintiffs insist,

explain and overcome the general denial, and show that in law the garnishee was indebted to the defendant. It is a principle of law that such a denial may be overcome, and the plaintiff, if the facts warrant, be entitled to judgment upon the answer, without contesting it; but, in order to that result, the particular facts stated must clearly and distinctly disclose the liability of the garnishee. The facts stated will be taken as strictly true. *Allen v. Morgan*, 1 Stew. (Ala.) 9; *Robinson v. Rapelye*, 2 Stew. (Ala.) 86; *Presnall v. Mabry*, 3 Port. (Ala.) 105; *Smith v. Chapman*, 6 Port. (Ala.) 365; *Stubblefield v. Hagerty*, 1 Ala. 38; *Mims v. Parker*, Id. 421; *Foster v. Walker*, 2 Ala. 177; *Fortune v. Bank*, 4 Ala. 385; *Blair v. Rhodes*, 5 Ala. 648; *Price v. Thomason*, 11 Ala. 875. If an answer is evasive, it may be stricken from the file for that cause, and judgment nisi rendered, but no judgment can be rendered upon it. *Mims v. Parker*, supra.

The inquiry then recurs, do the statements of Kahn's answer show, in judgment of law, a clear, distinct admission of an indebtedness due and owing by him to the defendant? Appellants' counsel have not argued the question upon which, it seems to us, the controversy turns. It is not a question, we conceive, upon the facts disclosed by the answer, whether the garnishee had been released by the corporation from a binding contract of subscription for \$2,500 of the capital stock of the Alabama Terminal & Improvement Company, but rather whether he had ever entered into such a contract. Without deciding anything touching such a release, it would seem to the writer that the assent or acquiescence of existing corporate creditors would be necessary, in order to bind them, when the release is founded upon no other consideration than a mere relinquishment of the stock by the subscriber. We let it be conceded, for the purpose of this case, that no such release of the kind occurred, had the garnishee entered into a contract binding him to take and pay for the \$2,500 of the capital stock of the defendant corporation as the plaintiffs contend. Assuming (as we may, in favor of the garnishee) that the Alabama Terminal & Improvement Company was organized as a corporation under the provisions of the Code, then in force, regulating the formation of general business corporations, the law required that the persons desiring to form the corporation should file with the probate court of the county of the only or principal place of business of the company a declaration, in writing, signed by themselves, setting forth their names and residences, and other matters specified in the statute, whereupon the probate judge was required to issue to the parties, or any two of them, a commission constituting them a board of incorporators, giving them authority to open books of subscription to the capital stock of the proposed company, and requiring them to give notice,

to be prescribed by the judge, of the times and places of opening the books of subscription. Upon obtaining bona fide subscriptions for at least 50 per cent. of the authorized stock, the board of corporators was required to call the subscribers together, who should proceed to organize the company by electing directors, who should, in turn, elect specified corporate officers. Upon the completion of this organization, and the payment by the subscribers to the treasurer, or other designated person, of 20 per cent. of the amounts subscribed, the board was required to certify the facts to the judge of probate, who should thereupon issue to the company a certificate of due incorporation. Thus, we see, the persons composing this board were the lawfully appointed agents to make, with others, in behalf of the proposed corporation, contracts of subscription for its capital stock. They alone were authorized to bind the company in that behalf, and any such contracts shown to have been entered into by them would bind both the company and the subscriber. A subscription taken by a person or persons, other than this board, during the process of organization, would be unauthorized, possessing no binding efficacy upon the corporation, unless and until by it ratified and adopted in a lawful way. On the part of the subscriber, it could rise no higher than an offer to take the stock, revocable by him at any time before adoption or acceptance by the corporation. The answer of the garnishee discloses the following facts: Some time in the summer of 1887 a Mr. Stern went into the store of garnishee, and said to him: "Let us go over to Mr. Wiley's office, and meet a few gentlemen. They are going to start a company to build a railroad. We want to see how much stock we can get up for it." Garnishee went to Mr. Wiley's office with him, and they there met Mr. Roman, Mr. Woolfolk, and E. B. Joseph. These gentlemen were talking about there going to be millions and billions in it. They then handed around a paper (which is attached to the answer, and will be set out in the statement of facts by the reporter), and said, "Put down whatever you want, with the privilege to change the amount any time, whenever you wish." Thereupon, garnishee signed the paper, saying he would take \$5,000, with privilege of changing it when the time came for settlement. Roman and Joseph subscribed at same time. He then left the office. Afterwards, and before the time came for settlement, he told the president of the company, Mr. Woolfolk, that he would only take \$2,500. Woolfolk replied that it mattered not, as they could place all their stock. Afterwards, in August, 1887, garnishee gave his note to the company for \$2,500, payable on a contingency, and showing on its face that it was for garnishee's entire subscription to the capital stock of said company. This note was accepted by the company, by it assigned to another, and

by the assignee collected of the garnishee by suit. Garnishee never signed any book of subscription, or other paper than as above stated. Two calls of 5 per cent. on \$2,500 were severally made on him by the company, which he paid before paying the note to the assignee. The company never claimed of him any more than the \$2,500 for which he gave his note. Garnishee was not present at the organization of the company. Was present at only one meeting of the company, which was in the fall of 1891. He then saw Woolfolk preside, as president of the company.

The foregoing comprises every material fact disclosed by the answer, and they leave the case, it seems to us, scarcely within the pale of discussion. In the first place, there is nothing to show that Roman, Woolfolk, Joseph, and Stern, at the time of the meeting in Wiley's office, had any legal connection whatever with the organization of the corporation, or were authorized, in any manner or form, to receive subscriptions to its capital stock. On the contrary, what they said at the time repels all inference that they were acting, or professing to act, as representatives of the corporation, but shows, by a just inference, that the paper signed by garnishee and others was not intended to be effectuated into a binding contract of subscription by delivery to, and adoption of, the corporation; and there is nothing in the answer tending to show that it was ever delivered to, or ratified or adopted by, the corporation. It was a paper, we may justly infer from what was said at the time, designed merely as a test of what might be done towards getting up a requisite amount of subscriptions to form a corporation to build a railroad; and, so far as we are advised, it remained in the private possession of the gentlemen who took it, or some or one of them, until the present plaintiffs got it into their possession. How or from whom they obtained it, does not appear. So far from being shown that Roman, Woolfolk, Joseph, and Stern, or either of them,—we know not whom,—constituted a board of corporators to receive subscriptions for the company, it is not made to appear that a declaration for incorporation, even, had at that time been filed. The inference from what Stern said when he invited garnishee into Wiley's office is that it had not. When the declaration was filed, who the corporators were, who the board to receive subscriptions, and when the company was organized, we are not informed. Upon these facts, we are bound to hold that the paper supposed by the plaintiffs to be a contract of subscription by garnishee for \$5,000 was never executed and delivered by the garnishee so as to become binding upon him. Suppose the stock had risen largely in value, and Kahn, upon the facts he discloses, was now claiming the additional \$2,500. With what grace could he make such a demand on the company? If the company was

not bound by a contract of subscription, he was not.

It is argued that what was said at the time the paper was signed cannot be considered, by reason of the general rule that antecedent and contemporaneous oral stipulations cannot be received to alter or vary the terms of a written contract. The rule has no application when the execution of the writing is the subject of inquiry. It presupposes the due execution and delivery of the writing in a way to bind both parties to its terms. Upon the issue of execution vel non, what was said and done at the time, and by whom done, are the very vital facts. Affirmed.

(108 Ala. 324)

RODEN et al. v. BROWN.

(Supreme Court of Alabama. May 16, 1894.)

EXEMPTIONS IN GARNISHMENT—FILING INVENTORY—BEST AND SECONDARY EVIDENCE.

1. Code, § 2525, providing that a debtor claiming property as exempt shall, within the first three days of the following term, file a complete inventory of his personal property, does not apply to claim of exemptions in property garnished, which is governed wholly by section 2533, providing that the debtor may file a claim thereto, with the inventory required in section 2525, at any time before condemnation.

2. On an issue as to the market value of certain stock at the time of claiming exemptions, a witness cannot testify for what price defendant transferred the stock, when the time of transfer does not appear.

3. A bank officer cannot testify as to the contents of books of the bank, without producing them.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by B. F. Roden & Co. against D. H. Brown. From a judgment for defendant, plaintiffs appeal. Affirmed.

On the 4th day of May, 1888, B. F. Roden & Co. recovered a judgment against D. H. Brown, in the city court of Birmingham, for the sum of \$568.66. On May 10, 1892, the said Roden & Co. sued out a writ of garnishment on said judgment against the Louisville & Nashville Railroad Company. Upon the garnishee answering, showing its indebtedness to the defendant, the said D. H. Brown, on May 30, 1892, filed his claim of exemptions, which contained the following description of the property claimed as exempt: "The sum or sums of money that may now be due or may become due to me from the Louisville & Nashville Railroad Company for the month of May, 1892." This claim also contained the following recital: "In addition to the foregoing, which does not exceed \$125, affiant owns and claims the following property, to wit: 1 horse, worth \$125, and one watch, worth \$10, all of which he claims as exempted to him." On June 1, 1892, the said B. F. Roden & Co. filed their contest of exemption, and on June 7th demanded from the said Brown "a full and complete inventory of all of his property,

except such as is exempt from levy and sale, with the value and location thereof, and all moneys, debts, and choses in action belonging to him, or in which he was beneficially interested, with the value of each of them." Notice of the contest of the claim to exemption was accepted by the attorneys of Brown on June 10, 1892. In response to the demand for a complete inventory of his personal property, D. H. Brown, on October 3, 1893, filed the following paper, properly verified: "Inventory of the personal property of D. H. Brown, in the matter of the contest of exemptions in the case of John B. Roden: The salary due to him from the Louisville & Nashville Railroad Company one month, \$125; one horse, value \$125; and one watch, worth \$10,—and that he has no other property." On motion of the plaintiffs the garnishee was required to answer orally; and on October 3, 1892, the Louisville & Nashville Railroad Company, as garnishee, answered orally, in open court, through D. H. Brown, who was authorized to answer for said company. By this answer it was disclosed that, at the time of the written answer of the garnishee, it was indebted to the said Brown in the amount of \$125 for May salary, which had not been paid at the time of making his oral answer; that the garnishee had paid Brown his salary for June, July, and August; and that at the time of the answer they were indebted to him for his salary due September, which was \$125. On October 17, 1892, the said Brown filed his claim of exemption, and claimed as exempt to him the salary from the garnishee for the months of June, July, August, and September, in addition to the salary already claimed. In this claim he also claimed the horse and watch which were contained in his former claim of exemptions, and stated that he owned no other personal property. The plaintiffs contested this claim of exemption by alleging (1) that the debt due the defendant by the garnishee, as shown by his answer, is not exempt from plaintiffs' demand; (2) that the horse claimed by defendant is not exempt from plaintiffs' demand; (3) that the defendant has other personal property subject to levy and sale under process, which he has not claimed or set out in his claim of exemptions or inventory. For answer to this contest the defendant replied (1) that the debt due by the garnishee to him was exempt to him under the constitution; (2) that the horse claimed to him is also exempt; (3) he denies that he has any personal property subject to levy and sale under the process.

The cause coming on to be heard, the plaintiffs declined to tender issue, and moved for judgment by default against the defendant, on the ground that the defendant had failed to file within the time prescribed by law an inventory, as required by the written demand of the plaintiffs given to the defendant. The court overruled this motion, and the plaintiffs duly excepted. The plain-

tiffs then moved for judgment against the garnishee on its answer, upon the grounds (1) that no sufficient claim of exemptions had been filed; (2) because the claim of exemptions, as filed, was too indefinite. But the court overruled this motion, and the plaintiffs duly excepted. The plaintiffs moved to strike the inventory filed on October 8d from the file, on the ground that it came too late, and that it was insufficient, and too indefinite. The court overruled this motion, and the plaintiffs duly excepted. The plaintiffs also moved to strike the original claim of exemptions from the file, and the amendment, on the grounds that they were insufficient and too indefinite. To the court's overruling this motion the plaintiffs duly excepted. Upon issue formed upon the contest of exemptions, the contestants introduced in evidence the record of the incorporation of the Mt. Pinson Ore Company, showing that said company was incorporated on September 6, 1892, and that D. H. Brown, Robert Warnock, and D. J. Fox were the incorporators; that Brown subscribed for 45 shares of the capital stock, and was regularly elected president of the incorporation. Upon the examination of D. J. Fox as a witness, he testified as to the incorporation of the Mt. Pinson Ore Company, but could not say what was the market price of the stock. The plaintiffs asked him, "How much did he transfer his stock for?" The defendant objected to this question on the ground that it was irrelevant and immaterial. The court sustained the objection, and the defendant duly excepted. Upon the introduction of Ed Carriere as a witness for the contestants, and after testifying that he was the bookkeeper in the Alabama National Bank, he was asked the following question: "Do the books of the bank, which you have charge of, show an account between the bank and the defendant, D. H. Brown?" The defendant objected to this question on the ground that the question was illegal, and called for secondary evidence, the books not being produced. The court sustained the objection, and the plaintiffs duly excepted. D. H. Brown, as a witness, testified that he was one of the incorporators of the Mt. Pinson Ore Company; that the plans of the company did not mature; that the property consisted of a leasehold interest in the lands, which had been forfeited; that he had never sold any of the stock, and had none to sell, as he had never been able to pay for it, and none was delivered to him. He also testified that he had a pistol, but that he could place no value on it. This was substantially all the evidence introduced upon the trial of the contest, and at the request of the defendant the court instructed the jury, in writing, as follows: "If the jury believe the evidence in this case, they will find the issues in favor of the contestee, D. H. Brown." The plaintiffs excepted to the giving of this charge, and also separately excepted to the court's

refusal to give the several written charges requested by them.

John H. Miller and F. E. Blackburn, for appellants. J. W. Bush and Chas. G. Brown, for appellee.

BRICKELL, C. J. 1. The several motions of the appellants for a judgment against the garnishee, and for a judgment against the appellee on the claim of exemption, were properly overruled. If of any force, they are founded on the erroneous supposition that the procedure in the present case was governed by section 2525¹ of the Code, when it is governed wholly by section 2533,² save so far as that section refers to the former section as a guide for what the statement or inventory the appellee was required to file should contain. *Tonsmere v. Buckland*, 88 Ala. 312, 6 South. 904. If the statement or inventory incorporated in the original claim of exemption was insufficient,—a matter unnecessary to consider,—the appellants avoided all possible injury from the insufficiency by demanding a full and complete inventory, which was filed before the issues on the contest were formed. The claim of exemption could have been filed at any time before the judgment of condemnation against the garnishee. Until the rendition of such judgment the proceedings were in fieri, and the claim of exemption, or the inventory, if found in any respect defective or insufficient, was amendable.

2. The purpose of the evidence of the witness Fox, which the appellants offered to introduce, was, we suppose, to show the value of the stock of the Mt. Pinson Ore Company. If the value of that stock was material, and relevant to the issues formed, it was its market value at the time the exemption was claimed, or, it may be, at the time of the trial. The witness disclaimed all knowledge of its market value, and it was not shown when the transaction occurred by which he transferred his stock to the company. The consideration he may have received for the transfer from the company was not a fact on which any reasonable inference as to the market value of the stock, either at the time the claim of exemption was interposed, or at the time of the trial, could be based. As we understand the bill of exceptions, the witness Carriere had no knowledge of the fact proposed to be proved, other than such as he

¹ Code, § 2525, provides that on demand of plaintiff a debtor claiming personal property as exempt shall, within the first three days of the following term, file a complete inventory of his personal property.

² Code, § 2533, provides that a debtor claiming property garnished as exempt shall file a claim thereto, accompanied by such an inventory as is required by section 2525, which claim, if the debtor has notice of the garnishment, must be filed before condemnation, but if no notice is given the judgment shall not affect the claim of exemption.

derived from the books of the bank. How far the entries on these books would be admissible for or against either of the parties is a question not now before us. If the fact of their existence was material, the books—or, it may be, compared and verified copies from them—were the primary evidence of the fact. *Crawford v. Bank*, 8 Ala. 79.

3. The issues formed raised three questions; the first was whether the debt owing by the garnishee was exempt; the second was whether the horse was exempt; the third was whether the defendant had personal property, other than that embraced in the inventory, subject to the payment of debts. The main contention of the appellants seems to have been that the description of the debt and of the horse, in the inventory, were imperfect,—a contention, as we have already said, not well founded. There was no disputation of the facts necessary to support the claim of exemption in this respect. The value of the debt and the horse amounted to the sum of \$750, and the residence of the defendant in the state was undisputed. There was a want of evidence that the defendant had personal property, the subject of levy or sale, not embraced in the inventory, except a pistol, the value of which was not shown. The value not being shown, the pistol could not be considered in ascertaining the amount of the exemption. Taking the evidence, which is free from conflict, and every and all reasonable inferences or intendment it will support, the claim of exemption was well established; and it was the duty of the court, on request, so to instruct the jury. 3 Brick. Dig. 109, §§ 41-45. This conclusion renders unnecessary a consideration of the exceptions to special instructions given or refused. If there should be found error in any of them, it would be error not of injury to the appellants. The judgment must be affirmed. Affirmed.

(108 Ala. 385)

BELLINGER v. LEHMAN, DURR & CO.
(Supreme Court of Alabama. May 17, 1894.)
REVIEW ON APPEAL — FINDING BY REGISTER —
EQUITY JURISDICTION—RELIEF OF MORTGAGEE.

1. A finding of fact by the register, confirmed without exception, is conclusive on appeal.

2. After filing a bill to foreclose a mortgage on crops, complainant may by amendment claim the proceeds of a sale of such crops made by the mortgagor's administrator, and the right to enforce such equity in a court of chancery is not affected by the fact that complainant might have sued the administrator for money had and received.

Appeal from chancery court, Montgomery county; John A. Foster, Chancellor.

Action by Lehman, Durr & Co. against Robert H. Bellinger, administrator. From a decree for complainant, defendant appeals. Affirmed.

Arrington & Graham and John W. A. Sandford, Jr., for appellant. Tompkins & Gray, for appellee.

HEAD, J. In 1883 Moses T. Ray and W. C. Ray were partners in a farming business. In February of that year Moses T. Ray executed to Lehman, Durr & Co. a mortgage to secure a debt of \$2,000, which had the effect to pass to them his interest in the partnership crops to be grown that year, to be ascertained upon a settlement of the partnership. After the crops had been commenced, to wit, in March 1883, Moses T. Ray died, and on April 4th thereafter William Bellinger was appointed his administrator. The partnership rights and interests thus devolved on W. C. Ray, as surviving partner, for the purposes of completion of the crops, and liquidation and final settlement. Instead of making formal settlement with W. C. Ray, Bellinger, as administrator, agreed to accept from him \$500 for his intestate's interest in the crops, and that sum was paid to him by W. C. Ray, the surviving partner, therefor. Lehman, Durr & Co. had other security for said debt, viz. a pledge of certain capital stock of the Merchants' & Planters' National Bank; and, on September 22, 1884, they filed this bill to enforce and foreclose that pledge, as well as their mortgage on the crops. In the progress of the cause, they realized upon the pledge, by sale of the stock, under a decree of the court, leaving only the crops a subject of contest. Pending the cause, William Bellinger died, and Robert H. Bellinger, the appellant, was appointed his administrator, and, as such, was brought in as a party defendant. By an amendment of the bill, the complainants elected to claim the \$500, which the surviving partner had paid William Bellinger for his intestate's interest in the crops, instead of demanding a formal settlement of the partnership and claiming what might be developed to be due them thereon; and, on final hearing, the chancellor rendered a personal decree in their favor for the same against Robert H. Bellinger, as administrator of William Bellinger, deceased. That decree is the matter assigned as error. The contention of appellant is that the sale by William Bellinger to W. C. Ray of his intestate's interest in the crops was made subject to the complainant's mortgage. In other words, it was a sale of intestate's equity of redemption only, the price received not representing the value of intestate's entire, unincumbered estate or property in the crops. In the consideration of this question, we are concluded by the finding and report of the register, which was confirmed without exception. That report is as follows: "The register is of opinion, and finds and reports, that W. C. Ray had one-half interest in such crops, and that Moses T. Ray had one-half interest therein; that the value of such interests in said crops has not been shown by evidence, but that W. C. Ray paid to William Bellinger, the ad-

ministrator of Moses Ray's estate, \$500 or \$550 for M. T. Ray's interest for 1883, exclusive of the cotton seed and oats heretofore referred to." This language leaves no room for doubt that the sale was of the entire interest of Moses Ray, without regard to any incumbrance thereon. The money received by William Bellinger, therefore, constituted proceeds of property upon which complainants held a mortgage, which proceeds they could lawfully elect to claim in lieu of the property itself. Such an election ratified the disposition made by Bellinger, and was a renunciation by complainants of all right to further pursue the property itself or the surviving partner. The amount received, then, by William Bellinger, the administrator, on his sale of his intestate's interest in the crops, became money in his hands, which *ex aequo et bono* belonged to complainants by virtue of their mortgage on the crops.

It is contended, also, that complainants had an adequate and complete remedy at law. It is true they might have maintained the equitable action for money had and received against William Bellinger in a court of law, but that does not take away the right to enforce the equity in a court of chancery, as we held in *Westmoreland v. Foster*, 60 Ala. 448. Besides, the enforcement of complainant's mortgage security, in its original form, involved a foreclosure of the mortgage itself, involving a settlement of the partnership, and the corporate stock, held in pledge for the same debt, had to be disposed of. The bill was properly filed for these purposes. Jurisdiction was properly assumed, and it was competent for the court to do complete justice in the cause, even had it been necessary, in some respects, to grant relief for which legal remedies were adequate.

It is said the estate of William Bellinger is insolvent. It has not been so declared, and there is no plea of *plene administravit* by Robert Bellinger. The decree of the chancellor is affirmed.

(108 Ala. 305)

Ex parte GOUCHER.

(Supreme Court of Alabama. May 17, 1894.)

CRIMINAL LAW — SENTENCE TO HARD LABOR — RIGHT TO DISCHARGE — UNAUTHORIZED DETENTION BY SHERIFF—VALIDITY OF SENTENCE.

1. Where a convict, having been sentenced to hard labor for the county, is detained in the custody of the sheriff for 20 days, the sentence not having been suspended, on account of a failure to provide for the reception of such convict, he is entitled to be discharged on habeas corpus, though he obtained an order at the time of his conviction granting him a certain time to file his bill of exceptions for an appeal, which has not expired.

2. A court has no authority to receive a verdict, assessing defendant's punishment at one year of imprisonment in the penitentiary, until corrected, as Code, § 4492, forbids such punishment.

Application by Joseph Goucher for a writ of habeas corpus. Granted.

COLEMAN, J. On the 27th of March, 1894, the petitioner was tried and convicted of manslaughter in the first degree, and sentenced to hard labor for the county for 12 months. Whether the sentence was authorized by the verdict of the jury we will not now consider. On the 18th of April, following, the petitioner applied to the judge of the circuit court for the writ of habeas corpus, which was denied. The grounds of the refusal of the writ of habeas corpus, as shown by the judgment thereon, are that petitioner applied for and obtained an order, at the time of his conviction, granting him 30 days within which to "prepare a bill of exceptions for an appeal to the supreme court, and the thirty days not having expired by thirteen days." The facts stated in the petition for the writ are admitted to be true. Without undertaking to state them in detail or fully, it appears that petitioner was in the custody of the sheriff, and had not been delivered to the superintendent of hard labor for Dale county, or the person designated as the proper person to whom convicts should be delivered when sentenced to hard labor for the county. It also appeared that the contract for the hire of convicts for Dale county expired on the 1st day of April, 1894; and since that time no order, contract, or provision for the disposition of convicts had been made by the court of county commissioners. The trial of the petitioner, verdict of the jury, and sentence of the law pronounced by the court upon the verdict of the jury are made an exhibit to the petition. These show that no question of law which should appear of record was reserved by the petitioner during his trial. No bill of exceptions had been prepared and signed by the court. The court made no order by which the execution of the sentence of the law was suspended. Code, §§ 4511, 4508, 4510. The sentence of the law went into immediate operation, and should have been executed according to its mandate. This question was fully considered and settled in the case of *Ex parte Knight*, 61 Ala. 482. If the court had made an order suspending the execution of the sentence, we would have for consideration a different question. When a party has been sentenced to hard labor for the county, or to suffer imprisonment in the penitentiary, a sheriff must not detain the convict for an unreasonable length of time in the county jail. Any unreasonable detention entitles the prisoner to be discharged, by reason of a "subsequent act, omission, or event." *Ex parte King*, 82 Ala. 59, 2 South. 763; *Ex parte Crews*, 78 Ala. 457. According to the record, there was no proper person to receive convicts sentenced to hard labor for Dale county. Certainly, this neglect or omission of duty by the court of county commissioners would not authorize the sheriff to detain the convict

unreasonably in the county jail. *Ex parte Crews*, supra; *Harrington v. State*, 87 Ala. 1, 3, 5 South. 831; *Kirby v. State*, 62 Ala. 51.

The form of the verdict returned by the jury, and the authority of the court to render sentence upon such a verdict, were not made a ground for the writ of habeas corpus. The verdict is as follows: "We, the jury, find the defendant guilty of manslaughter in the first degree, and further find that he be imprisoned in the penitentiary for the period of one year." The jury have no authority to render such a verdict, and the court ought not to have received it until corrected. The law does not authorize imprisonment in the penitentiary for a period of one year or less. Code, § 4492. The sentence of the court was to hard labor for the county, and which was proper; but the sentence of the law, to stand, must be supported by a legal verdict. The record shows reversible error, available by appeal or writ of error. We need not say whether the judgment was absolutely void or merely irregular, and not available on the collateral proceeding by the writ of habeas corpus. See *Ex parte McKivett*, 55 Ala. 236; *Kirby v. State*, 62 Ala. 51; *Ex parte Simmons*, Id. 416; *Zaner v. State*, 90 Ala. 651, 8 South. 698; *Gunter v. State*, 83 Ala. 96, 3 South. 600; *Dover v. State*, 75 Ala. 40; *Cobia v. State*, 16 Ala. 781; *Allen v. State*, 52 Ala. 391.

It being admitted that the facts stated in the petition were true, the prisoner was entitled to his discharge. The writ of habeas corpus will be accorded by this court, unless the petitioner, being advised, is content to renew his application before a court or judge of primary jurisdiction. Application granted.

(102 Ala. 179)

Ex parte BROWN.

(Supreme Court of Alabama. May 15, 1894.)
CRIMINAL LAW—IMPRISONMENT FOR ONE YEAR—
PLACE OF CONFINEMENT—VOID VERDICT—ER-
ROR.

1. Code 1886, § 3733, providing that any one convicted of manslaughter in the first degree must be imprisoned in the penitentiary for not less than one, nor more than ten, years, is qualified by section 4492, enacted later, providing that, where the sentence is to hard labor for 12 months or less, the convicted person must be sentenced to imprisonment in the county jail, or to hard labor for the county.

2. Though the jury returned a verdict upon which no lawful judgment could be entered, their discharge without the prisoner's consent does not operate as an acquittal.

Petition by Jim Brown for writ of habeas corpus. Writ granted.

W. S. Reese, Jr., for petitioner. Wm. L. Martin, Atty. Gen., for respondent.

HEAD, J. The petitioner was regularly tried in the city court of Montgomery for the offense of manslaughter, and thereupon a verdict was returned and recorded in the following words: "We, the jury, find the

defendant guilty of manslaughter in the first degree, and fix his punishment at one year in the penitentiary." And thereupon the court pronounced sentence, adjudging that the petitioner be imprisoned in the penitentiary for the term of one year. Being detained by the Tennessee Coal, Iron & Railroad Company, under contract with the state made in pursuance of the statute, he applies for the writ of habeas corpus, and prays to be discharged, upon the alleged ground that the said sentence is void. By statute, it is provided "that any person who is convicted of manslaughter in the first degree must, at the discretion of the jury, be imprisoned in the penitentiary for not less than one year, nor more than ten years." Code, 1886, § 3733. But this provision is qualified by a later legislative enactment, now found in section 4492 of the Code of 1886, by which it is provided that, in all cases in which the imprisonment or sentence to hard labor is 12 months or less, the party must be sentenced to imprisonment in the county jail, or to hard labor for the county. Under the construction these statutes have received in this court, the jury was not authorized to prescribe the punishment of the petitioner to be imprisonment in the penitentiary for one year. Desiring to fix one year as the period of punishment, there was no alternative but to prescribe imprisonment in the county jail, or at hard labor for the county. *Steele v. State*, 61 Ala. 213; *Herrington v. State*, 87 Ala. 1, 5 South. 831; *Zaner v. State*, 90 Ala. 651, 8 South. 698; *Ex parte Simmons*, 62 Ala. 417; *Ex parte Goucher* (at present term) 15 South. 601. We held in *Zaner v. State*, supra, which was a direct proceeding by appeal, that a verdict like the present one would not support a legal sentence, and have no doubt of the correctness of that conclusion. But the authorities are uniform, so far as we have seen, to the proposition that the reception of such a verdict by the trial court, and discharge of the jury thereon, do not operate as an acquittal, and the prisoner, upon the void verdict being set aside or expunged, or judgment thereon arrested or reversed, may be tried anew. 1 Bish. Cr. Law, § 998; *State v. Sutton*, 4 Gill, 494; *Wright v. State*, 5 Ind. 527; *Gibson v. Com.*, 2 Va. Cas. 111; *Com. v. Smith*, Id. 327; *Com. v. Gibson*, Id. 70; *State v. Valentine*, 6 Yerg. 533; *State v. Spurgin*, 1 McCord, 252; *Com. v. Hatton*, 3 Grat. 623; *State v. Redman*, 17 Iowa, 329 (per Dillon, J.); *State v. Walters*, 16 La. Ann. 400; *Murphy v. State*, 7 Cold. 516; *Cobia v. State*, 16 Ala. 781; *Turner v. State*, 40 Ala. 21; *Waller v. State*, Id. 325; *Allen v. State*, 52 Ala. 391; *Gunter v. State*, 83 Ala. 96, 3 South. 600; *Herrington v. State*, 87 Ala. 1, 5 South. 831; *Zaner v. State*, 90 Ala. 651, 8 South. 698; *Ex parte Simmons*, 62 Ala. 417.

Howsoever cogent the argument may ap-

pear that a discharge of a jury without the prisoner's consent, upon a return by them of a verdict upon which no lawful judgment or sentence can be pronounced,—a return which is a nullity,—should operate as an acquittal, we do not feel at liberty to depart from the unbroken current of authority to the contrary, but, notwithstanding this, it is most manifest that the city court was and is without any authority of law whatever to impose upon any person, in any case, imprisonment in the penitentiary for the term of one year or less, and that, therefore, such a sentence must necessarily be void. The proposition is self-evident, and needs no argument. It follows, of course, that the detention of petitioner by the penitentiary authorities is unlawful, and he is entitled to his discharge.

The writ of habeas corpus will be granted, unless the petitioner, upon being certified of this opinion, shall be content to renew his application before a judge of primary jurisdiction. We do not indicate what our ruling would be on habeas corpus if the city court had, upon the reception of the improper verdict, sentenced the petitioner to imprisonment in the county jail or at hard labor for the county, these being the alternative punishments to which a person may be subjected, on conviction, when the period of punishment is fixed at one year or less.

(103 Ala. 245)

REYNOLDS v. COLLIER.

(Supreme Court of Alabama. May 17, 1894.)

JUDGMENT LIEN—CERTIFICATE OF CLERK—WAIVER OF EXEMPTIONS.

Under Act Feb. 23, 1887, which provides that the record of the certificate of the clerk in the office of the probate court—which shows the court in which a judgment was rendered, the amount and date thereof, the amount of costs, and the names of the parties, and plaintiff's attorney—shall be a lien on all defendant's property, and notice to all persons of the existence of such judgment lien, the certificate need not recite a waiver of exemption contained in the judgment, in order to entitle the judgment creditor to enforce his lien against a subsequent purchaser from the judgment debtor of property ordinarily exempt from execution.

Appeal from circuit court, Barbour county; J. M. Carmichael, Judge.

Trial of right to property seized under execution on a judgment in favor of appellee, G. C. Collier, to which J. B. Reynolds interposed a claim. From a judgment against claimant, he appeals. Affirmed.

The claimant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If they believed the evidence they must find for the claimant." (2) "If they believed from the evidence that but one execution had been issued on the judgment in the case of G. C. Collier v. M. W. Faulk prior to October 14, 1890, and that such prior execution had been

issued in June, 1889, then an entire term of the said court had intervened between the said two executions, and in January, 1890, there was no execution on the two mules in favor of said Collier; and that if Reynolds bought the two mules in January, 1890, and paid a fair and adequate price for them, then the verdict must be for the claimant." (3) "If they believe from the evidence that said defendant Faulk had or owned less than one thousand dollars, worth of personal property in January, 1890, at the time he sold the mules to Reynolds, and that at such time Faulk was a bona fide resident citizen of Barbour county, and that he sold and delivered the mules to Reynolds at said time for a fair and adequate price, and that Reynolds bought them in good faith, then the verdict must be for the claimant." (4) "If the plaintiff, Collier, in January, 1890, had any lien at all upon the two mules, it was by virtue of the judgment recorded in the office of the probate judge of Barbour county, and that judgment did not show that it was founded on any instrument in writing in which the defendant waived his right under the laws of Alabama to claim one thousand dollars' worth of personal property exempt to him from sale under execution; and that if at the time of the alleged sale to Reynolds, Faulk was a bona fide resident citizen of Barbour county and he did not own or possess personal property and effects exceeding one thousand dollars in value, and that Reynolds bought and took the mules from Faulk at such time, in January, 1890, in good faith and at a fair and adequate price, then the verdict must be for the claimant."

H. D. Clayton, for appellant. Alston & Peach, for appellee.

HARALSON, J. A judgment was obtained by appellee, G. C. Collier, in the circuit court of Barbour county, on the 24th May, 1889, against M. W. Faulk, for \$458.35 and costs, on which an execution issued on the — day of June, 1889, and no execution is shown to have been issued thereon afterwards, until the 14th day of October, 1890. The judgment contained this provision, at its conclusion, "It appearing to the court that the instrument of writing upon which this judgment is rendered, contained the defendant's waiver of exemptions as to personal property, the defendant will not therefore be allowed any exemptions as to personal property as to this judgment." The execution issued on the 14th October, 1890, contained an order of the clerk of the court, written on the execution, reciting that "the note upon which the judgment is founded contained a waiver of exemptions as to personal property in the collection of this execution." This execution was levied by the sheriff on the mules, which were claimed by J. B. Reynolds, the appellant. Issue was made up between him and the plaintiff in the execution, and on trial had, judgment was rendered in favor of the

plaintiff against the claimant. On the trial it was shown that, on the 15th June, 1889, the clerk of the court, certified to the amount and date of said judgment, the amount of the costs, the court by which said judgment was rendered, the names of the parties to it, and the name of the plaintiff's attorney, which certificate of the clerk, as shown by the certificate of the probate judge of the county of Barbour, was filed for registration in his office, on the 15th day of June, 1889, and was recorded in a book kept by him for that purpose. The registry did not show the name of the owner of the judgment, except as would be inferred from the certificate of the clerk. In the clerk's certificate, there was an omission as to the waiver of exemptions as to personal property and of any reference hereto. It was shown by the claimant, Reynolds, the appellant, that he purchased said mules so levied on from defendant, Faulk, in January, 1890, and paid him therefor, a full and fair value, and they were delivered to him at the time he purchased them; that in January, 1890, and in 1889, said Faulk was a bona fide resident of the county of Barbour, and during those years, did not own or possess personal property, or effects worth \$1,000; that Faulk rented a farm from Reynolds for the year 1890, after he had sold the mules to Reynolds in January, and Reynolds hired them to him for that year, to cultivate the farm. The claimant requested several charges, which the court refused to give, one of which was the general charge in his favor. Judgment was rendered for the plaintiff. The only question in the case we need to consider is, whether the filing and registration of the certificate of the clerk in the probate court, before the claimant purchased the mules, was notice to him of the waiver of exemptions as to personal property as shown in the body of said judgment.

Before the statute of 1886-87 (Code, p. 635, note), judgments were not liens on the real or personal property of the defendant. But, a writ of fieri facias was a lien, within the county in which it was received by the officers authorized to execute it, on the property of defendant subject to levy and sale (Id., § 2892), from the time only that the writ was received by such officer; which lien continued as long as the writ was regularly issued and delivered to such officer, without the lapse of an entire term. Id. § 2894. This section of the Code was not repealed by said act of 1886-87, and is still in force, so that a plaintiff may acquire and keep alive his lien on defendant's property in the county, by issuing execution on his judgment, and keeping it alive in the manner prescribed therefor, by said section 2894 of the Code, or else, he may save himself that trouble and risk of keeping it regularly issued, and proceed under said act of 28th February, 1887, and record in the office of the probate court, a certified statement of his judgment, such as is

required, and in the manner directed by said act of 1887, and the same will be accomplished, as if he had issued executions and kept them up,—the language of the statute being, "and every judgment or decree, so filed and registered, shall be a lien upon all the property of the defendant in such county, which is subject to levy and sale under execution." In *Chemical Works v. Moses*, 89 Ala. 542, 7 South. 637, this court construed said act of 1887, holding that it was intended to take the place and have the effect of an execution in the hands of the sheriff, as an instrumentality of creating and preserving a lien. The record of such judgment, then, gave the plaintiff therein the right to enforce the same, on an execution issued thereon, at any time within 10 years, just in the same manner and to the same extent, as if executions had been regularly issued on the judgment, without any lapse up to that time. If a plaintiff's judgment was recovered in an action of tort or on a waiver contract, then the execution would run against all the property mentioned in said section 2892 of the Code. If upon a simple contract, without waiver of exemptions, then against the property therein mentioned, in excess of the exemptions allowed at the date of the contract. It was not the design of the act, to give the plaintiff any less efficacious a lien by recording his judgment, than he would have had, if he had depended on the execution lien and had kept it alive, but one equally efficacious. It will be noticed, that the act providing for the record, does not require the minute entry of the judgment to be recorded. The certificate of the clerk is only required to show, "the court, which rendered the same [judgment or decree], the amount and date thereof, the amount of costs, the names of the parties and the names of the plaintiff's attorney;" and, * * * the registration of such judgment or decree shall be notice to all persons of the existence of such liens." In a judgment rendered for plaintiff in an action of tort, there are no recitals in reference to exemptions, and persons examining it would not be informed whether its recovery was based on tort or contract. To give such notice, the judgment entry would have to contain something not necessary to its validity or completeness, and this would not operate notice of the foreign matter introduced, since the record of that not required by law to be recorded, does not operate constructive notice of such recorded matter. We hold that under the record of the certificate in this case, the claimant was bound to take notice of the character of the judgment rendered, and of all it contained. Faulk's sale of the property to the claimant gave the latter no title to the property which exempted it from plaintiff's lien, and from levy and sale under plaintiff's execution. The charges requested by claimant were properly refused, and the judgment is affirmed. Affirmed.

(103 Ala. 318)

HILLIARD v. BROWN et al.

(Supreme Court of Alabama. May 17, 1894.)

COSTS ON APPEAL—ACTION ON BOND—DISMISSAL OF APPEAL.

1. A successful defendant may maintain an action on the cost bond, to recover all costs of the suit, though not liable for any part thereof.

2. Witnesses and court officers cannot maintain separate actions in their own names upon a cost bond to recover their costs.

3. In dismissing a suit for want of jurisdiction over the subject-matter, costs may be awarded.

4. The fact that final judgment was rendered in the appellate court does not affect liability on the cost bond.

Appeal from circuit court, Pike county; John R. Tyson, Judge.

Action by W. J. Hilliard against T. H. Brown and others on a bond. From a judgment for defendants, plaintiff appeals. Reversed.

This was an action brought by the appellant against T. H. Brown and his sureties on a bond for costs to recover the costs incurred in the proceeding instituted by the said T. H. Brown, contesting the election of said W. J. Hilliard to the office of probate judge for Pike county. The cause was submitted to the jury upon an agreed statement of facts, which was as follows:

"It is agreed in this case: That defendant T. H. Brown instituted a contest, otherwise known as a 'statutory contest,' against the plaintiff, W. J. Hilliard, before Hon. John P. Hubbard, circuit judge, to wit, the 17th day of August, 1892, and gave the following bond or written instrument:

"The State of Alabama, Pike County. Whereas, T. H. Brown, an elector of the county of Pike, in said state, has this day filed in the office of the clerk of the circuit court of said county his grounds of contest of the election of W. J. Hilliard to the office of judge of probate of said county at an election held on the 1st day of August, 1892: Now, therefore, we, the undersigned, hereby acknowledge ourselves to be bound as security for the cost of said contest. In witness whereof, we have hereunto set our hands and seals this 17th day of August, 1892. T. H. Brown. W. A. McBryde. O. R. Dykes. L. M. Treadwell. J. P. Wood. O. C. Wiley.

"Approved August 17th, 1892. O. Worthy, Clerk."

—As security for the costs of said contest, and as an initiatory step for the commencement of said contest. That on the trial of said contest, before said circuit judge, Hubbard, to wit, during the month of September, 1892, a judgment was rendered in favor of said Brown, and against said Hilliard, for said office of probate judge. That thereupon said contestee, Hilliard, appealed from said judgment of the said circuit judge to the supreme court, when and where a judgment was rendered quashing and dismissing said contest proceeding, the supreme court deciding that the circuit judge was without jurisdiction to

try the cause, for and upon the grounds disclosed in and by the petition in that case. That none of the costs sued for in the present action, as particularly set forth in the following cost bill offered in evidence [here follows the bill of costs which was incurred in the said proceeding, and which included the cost of preparing the transcript for the supreme court] were incurred by said Hilliard, and no part thereof has ever been paid, or assumed to be paid, by him. The clerk's fees, \$106.55 (except an item for cost of making transcript in said contest case to the supreme court), were incurred in said contest at the instance of the contestant, Brown. That the sheriff's fees, \$49.44, were incurred by said contestant in like manner. That the witnesses' fees, \$260.35, were and are due exclusively to persons subpoenaed by said contestant as witnesses in his behalf; and so, also, the commissioners' fees were for work and labor done and services rendered by a person named and selected by contestant, and appointed at his instance, in taking the depositions of certain witnesses for contestant, Brown. And that none of the parties interested in said costs ever requested or authorized said plaintiff, Hilliard, to commence this action."

The agreed statement of facts also contained a copy of the judgment rendered by the supreme court in the said contest case on January 3, 1893, and which declared: "That in the proceedings before the circuit judge there was manifest error, and that the prayer of the petitioner be, and the same is hereby, granted, and that the said proceeding be, and the same is hereby, quashed. It is also considered that the respondent T. H. Brown pay the costs herein taxed." It was also stated in said agreed statement that the costs had never been paid by any one.

Upon this evidence the plaintiff requested the court to give the general affirmative charge in his behalf. This the court refused to do, and to such refusal the plaintiff duly excepted, and also excepted to the court's giving, at the request of the defendant, the following written charge: "If the jury believe the evidence, they will find for the defendant." There was judgment for the defendant, and the plaintiff appeals, and assigns as error the refusal to give the general affirmative charge in his behalf, and the giving of the charge requested by the defendant.

Worthy & Foster, for appellant. A. A. Wiley, for appellees.

COLEMAN, J. T. H. Brown instituted proceedings to contest the election of W. J. Hilliard to the office of probate judge. In compliance with the statute, he gave security for the costs of the contest. The undertaking is set out in the statement of the facts of the case. On the trial before the circuit judge the contestant was successful. The case was brought to this court by writ of certiorari, and judgment here rendered (18

South. 125) reversing and annulling the judgment in favor of contestant by the circuit court judge, and quashing the contest proceedings. This court adjudicated that the averments of facts contained in the petition of contestant were not sufficient to give the trial judge jurisdiction of the cause of contest. The judgment by this court was that "T. H. Brown pay the costs herein taxed." The contestee, Hilliard, brought the present action against the contestant, Brown, and his sureties, upon their undertaking to secure the cost of the contest. The case was tried upon an agreed state of facts. These show that no part of the costs of the contest has been paid by any one; that the several items constituting the bill of costs are proper charges; and that every item, except the costs incident to the writ of certiorari, by which the cause was brought to this court, was incurred for and at the instance of the contestant, Brown. The final judgment rendered in this court, quashing the contest proceeding, was in evidence. The contestant was unsuccessful, and he and his sureties became liable on their undertaking to secure the costs. It is contended that as the facts show a large proportion of the costs was incurred by contestant, Brown, and that as Hilliard is not responsible for such costs, and cannot be made to pay the same, these costs cannot be recovered in this action. We are of opinion the law is otherwise. The undertaking covers all the costs of the contest before the trial judge. In the case of Pryor v. Beck, 21 Ala. 393, where the sureties were sued on their undertaking to secure the cost of the suit, the same defense was interposed; and it was held that the bond covered all the costs, and the obligee should recover "all the costs, without regard to the question whether he could be made liable to pay all or not; * * * that he must recover to the extent of all who are designed to be protected by the bond." In the case cited, it appears that judgment for the costs was rendered, as in the case at bar, against the principal alone, and the suit was brought upon the undertaking to secure the costs of the suit. We do not doubt that if the defendant had paid any part of the costs to the person entitled to receive it, or had obtained a release or acquittance from such person, such payment or acquittance would be a good defense, "pro tanto," to the present action.

It is further contended that the parties entitled to the costs should sue in their own names. Doubtless, an action could be maintained in his own name, by any witness attending, or officer performing the service, against the party in whose behalf the witness attended, or for whom such service was performed, and such parties might sue T. H. Brown to recover such cost; but neither witnesses nor officers, in their own names, could maintain separate actions on the undertaking against Brown and his sureties to recover these costs. Unless authorized by statute,

the cause of action given by the undertaking of defendant and his sureties cannot be split up into as many actions as there are persons interested in, and secured by, its provisions. *Smith v. Trust Co. (Ala.)* 14 South. 625. One suit of recovery will be a bar to any other suit. An action is maintainable on a judgment to recover costs. 4 Am. & Eng. Enc. Law, p. 320. Costs in civil cases are awarded in favor of the successful party (Code, § 2837), and execution runs in his name, and not in the name of the parties to whom the costs are payable.

It is further contended by appellee that, as the trial court had no jurisdiction of the subject-matter, it could not render a judgment awarding costs. There are some cases which recognize the rule as thus asserted. *Burke v. Jackson*, 22 Ohio St. 268. We are of opinion the sounder rule, and that which is supported by the great weight of authority, is that the court must decide whether it has jurisdiction or not, and the decision of that question is a judicial act,—an exercise of jurisdiction,—and that costs are a proper and necessary incident of such a judgment. *King v. Poole*, 36 Barb. 242; *Jordan v. Dennis*, 7 Metc. (Mass.) 590; *Hawes, Juris.* § 19 and note; 1 *Freem. Judgm.* § 120. By our statute, costs are awarded to the successful party. Code, supra. The fact that final judgment quashing the proceedings was pronounced in this court, instead of a mandate to the trial judge, to render such judgment, in no manner affects the liability of the unsuccessful party. The judgment rendered here was the judgment which should have been rendered in the first instance. The security given for costs, for instituting an action or contest proceedings, does not include the costs for an appeal to this court, or, if the cause is brought here by writ of certiorari instead of appeal. To recover the costs awarded the appellant by the judgment of this court quashing the contest, the plaintiff may have his remedy upon the judgment rendered in this court against the contestant. It is only the costs before the trial court or judge which are recoverable from the contestant and his sureties by an action on the undertaking. These the plaintiff was entitled to recover. The court erred in giving the affirmative charge for the defendants. Reversed and remanded.

(103 Ala. 196)

ROGERS v. HAINES et al.

(Supreme Court of Alabama. May 18, 1894.)

SUIT BY FOREIGN RECEIVER—SUFFICIENCY OF BILL.

A bill by a receiver of a foreign corporation, appointed in another state to collect or protect the assets in Alabama, must aver that the officers of the corporation, at and prior to the time of filing the bill, either negligently or willfully, or in obedience to a court having jurisdiction of their persons, refused to protect the corporate assets in Alabama, it not appearing that the corporation has been dissolved, or oth-

erwise incapacitated from bringing the suit, and an amendment to a bill which omitted such allegation, averring merely that the officers refuse to do so at the time of filing the amendment, is insufficient.

Appeal from chancery court, Calhoun county; S. K. McSpadden, Chancellor.

Bill by C. H. Rogers, receiver of the New South National Building & Loan Association, against W. S. Haines and others. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

The bill sought to enjoin the collection of several judgments recovered by the respondents against the New South National Building & Loan Association, on the ground that said judgments were irregularly and illegally obtained, and that nothing was due defendants on the claims upon which said judgments were founded. It was alleged in said bill that the New South National Building & Loan Association, a corporation chartered under the laws of the state of Tennessee, had been declared insolvent by the chancery court of that state, and the complainant was appointed as receiver for the purpose of collecting its assets and settling its debts, and had duly qualified as such receiver. After the decree declaring the said building and loan association insolvent, and the appointment of the complainant as receiver, the respondents, who were at that time stockholders of said corporation, brought suit in a justice of the peace court in Calhoun county against the said New South National Building & Loan Association, and service of process was had upon one Vary, who was supposed to be the agent of the corporation residing in Birmingham. The defendant to said suit failing to answer, the several plaintiffs recovered judgment by default against the said building and loan association. To enforce the said judgment the several plaintiffs sued out writs of garnishment against Annie S. Cruesoe, a stockholder in said company, to whom the company had made a loan, and who resided in Calhoun county. It was further averred in said bill that no notice was ever given to the complainant of the pendency of said suit, nor were any notices given the corporation of which he was the receiver, except such as are alleged to have been given to the said Vary, who, the complainant alleged, was not at that time the agent of the corporation. It was also averred in the said bill that the judgments were rendered on a day other than the return of the process, and two weeks prior to the day of the trial, as stated in the summons served on the said John Vary, without notice to the said corporation. The case, with the exception of amendments, is substantially the same as when before this court on a former appeal, reported in 11 South. 651. The amendment which was made to the bill since the decision of that case is copied in the opinion. To the bill as originally filed, the respondents demurred upon

the following grounds: (1) That the bill shows that it is filed by the person who claims to be the receiver appointed by the court of the state of Tennessee, and who is therefore not entitled to sue in this state. The 2d, 3d, and 4th grounds are substantially the same as the 1st. (5) That the bill shows on its face that it was filed by a foreign receiver, who claims to act under an appointment from the courts of Tennessee, for the purpose of enjoining and interfering with the vested or acquired rights of creditors who are residents of this state. To the bill, as amended, the respondents demurred, among others, upon the following grounds: (5) That the said bill, as amended, does not show that at the time suit was brought the officers of said corporation, the New South National Building & Loan Association, either negligently or willfully, or in obedience to the orders of a court having jurisdiction of their persons, failed or refused to take the necessary measures to save the assets of said corporation in this state from spoliation. (6) That said bill is without equity, because it shows that complainant had no right or authority to bring this suit. (7) The dissolution of said corporation by order of the court, made subsequent to the filing of said bill, would not authorize the complainant to maintain this suit, which was brought prior to dissolution. Upon the submission of the cause upon the demurrers, the chancellor rendered a decree sustaining the same. The complainant now prosecutes this appeal, and assigns as error this decree of the chancellor.

Cooke & Cooke, for appellant. S. D. G. Brothers and W. J. Brock, for appellees.

MCLELLAN, J. When this cause was formerly here on appeal from an order dissolving the injunction it was said (Walker, J., delivering the opinion of the court): "The complainant's claim to recognition in the courts of this state for the purpose of protecting and collecting the assets of the corporation found here must be rested upon the fact—not very clearly disclosed by the averments of the bill—that the officers of the corporation, either negligently or willfully, or in obedience to the orders of a court having jurisdiction of their persons, fail or refuse to take the necessary measures to save the assets in this state from waste or spoliation." 11 South. 651. Reaffirming this view, the rulings of the chancellor on demurrer to the bill now present the inquiry whether the bill, as amended, discloses such failure or refusal on the part of the corporate officers to protect and collect the assets in this state of the corporation. The amendment in this regard, made since the case was here, is as follows: "Your orator further shows the officers and agents of said corporation have neglected to take any measures to protect

and save the assets of said association from being subjected to the satisfaction of said fraudulent and unfounded claims of these defendants, and have negligently failed to take the necessary measures to save the assets of said association in the state of Alabama from waste and spoliation." Under rule 46 of chancery practice (Code, p. 818), this amendment is to "be considered as introduced in the bill from the time of its allowance," and it speaks as of and from that time, and not with reference to the time of bill filed. So considered, and construing the averments of the amendment as unfavorably to the complainant as its terms will reasonably admit of, it does not aver that at and prior to the filing of the bill the officers and agents of the corporation had negligently failed to take the steps necessary to the conservation of the company's assets, so that at the time of instituting the suit the receiver had power and authority to sue by reason of the then existing negligence of the officers of the corporation, but only that at the time the amendment was made—long after bill filed—such negligence had intervened as would have authorized this suit, had it been contemporaneous with the institution thereof, or would have authorized the suit at the time of the amendment. The bill, as amended, in other words, fails to show the existence of a state of facts, at the time it was filed, the averment of which was essential to the complainant's right to sue at all; and assignments of demurrer to the amended bill, numbered 5, 6, and 7, were therefore properly sustained. In the absence of such averment, a foreign receiver of a foreign corporation—it not appearing that the corporation had been dissolved, or otherwise itself disabled to bring the suit—is without capacity to sue here for assets, or for the protection of assets, of the corporation; and hence assignments of demurrer numbered 1, 2, 3, 4, and 5, to the original bill, were well taken.

The bill and the exhibits thereto show that the judgments sought to be enjoined were rendered before the day at which the defendant was summoned to appear and make defense to the several actions; and it does not appear by said judgments that the fact of Vary's agency (he being the person upon whom service was made as the agent of the defendant corporation) was proved as an essential condition precedent to the rendition of judgment by default. This fact of rendition of judgment before the day set for the appearance of the defendant, and this omission to show by the judgments that proof of Vary's agency was made, appearing on the face of the papers in the justice court, the corporation itself had an adequate remedy at law for the alleged wrongs and injuries in the common-law writ of certiorari. *American Press Ass'n v. Independent Pub. Co.*, 15 South. —. It would not necessarily follow from this, however, that a suit of this kind could not be brought by the receiver. It

might be that the receiver, not being a party to those causes, would not be let in to prosecute that writ. He was not a party,—indeed, he had not been appointed when those suits were instituted,—and was not only not a necessary party, but could not possibly have been made a party thereto. The decree of the chancellor sustaining the assignments of demurrer, upon which submission was made, must be affirmed.

(108 Ala: 228)

GILMER v. SMITH et al.

(Supreme Court of Alabama. May 16, 1894.)

TAX SALE—REDEMPTION FOR MORTGAGOR—RIGHTS OF MORTGAGEE.

In a suit by a purchaser at a mortgage sale to set aside a subsequent tax sale, no notice of which was given to complainant, it appeared that the tax purchaser notified the mortgagor to redeem, as he did not wish to keep the property from his family, and that, the redemption period of the mortgage having expired, the mortgagor asked the purchaser to hold the land for him, which he declined to do, but he offered to transfer the tax certificate to one of his family, and did afterwards transfer it to the mortgagor's sister, who received a deed to the land. *Held*, that the tax deed should be set aside.

Appeal from city court of Montgomery, Thomas M. Arrington, Judge.

Bill by Lewis Gilmer against Pauline Smith, Burke Miller, Elisha Walker, and Malinda Walker. From a decree for defendants, complainant appeals. Reversed.

The purpose of the bill was to remove certain described deeds and claims to lot 53, on the north side of Adams street, in the city of Montgomery, as a cloud on the title of complainant, and to enjoin the respondent Malinda Walker from interfering with the possession of defendant in said lot. On January 30, 1892, one J. H. Stewart entered into an agreement with Elisha Walker to make title to the said Walker to a certain piece of land, known as "Lot No. 53," on the north side of Adams street, in the city of Montgomery, when the said Walker should complete the payments as provided in the contract. Stewart had bought the said lot, together with other lands, from Hughes and Gunter. That he paid part of the purchase money for said lot, and gave a mortgage to secure the balance. Subsequent to said purchase the said Stewart sold several other lots, in addition to the one involved in this suit. The said Stewart having failed to pay the deferred payments, and demand being made for the payment of the indebtedness secured by the mortgage executed to Hughes and Gunter, the said Walker and the other purchasers from Stewart entered into an agreement on May 31, 1881, by which one Burke Miller acquired title to all of the lots, including lot 53, with the understanding and agreement that said Miller should mortgage all of said lots to one Matthews to secure the balance due on said mortgage to said Hughes (he having pur-

chased the interest of Gunter). This agreement also further provided that, when the said mortgage to Matthews should be fully paid, Burke Miller was to reconvey to the said Walker and others their respective lots. This mortgage was fully paid on January 3, 1883, and discharged of record, but Walker never received any deed from Stewart. On May 3, 1882, Elisha Walker and Malinda Walker, his wife,—she acknowledging the execution thereof separate and apart from her husband, according to the form provided for the conveyance of the homestead,—executed to one Segars a mortgage on the said lot No. 53 on the north side of Adams street, which said mortgage was to secure money loaned by said Segars to Elisha Walker, and it was duly recorded in the office of probate. On December 4, 1882, the said Segars delivered and assigned his said mortgage, made by Walker and wife, to one Cyrus. The mortgagors having failed to pay the debt secured thereby, the said Cyrus, at the maturity of said mortgage, sold the lot conveyed therein, on September 17, 1884, under the power of sale contained in the mortgage, and, at this sale, Jacob Griel became the purchaser. A deed was duly executed to said Griel, conveying said lot. In October, 1886, Griel commenced an action of ejectment against said Elisha Walker and his wife, Malinda Walker, for the recovery of said lot No. 53; and at the January term, 1889, the said Griel recovered a judgment for the possession of said lot in said suit, and was put in the possession thereof under a writ of possession. Griel afterwards sold the said lot to Cyrus, and he, on the 8th of June, 1889, sold the lot to Gilmer, the complainant in the original bill; and the said Gilmer went into possession and has been in possession ever since, having erected improvements thereon. Since Walker bought the lot from Stewart, the same had been assessed in his name for taxation up to and including January, 1886. At the date last aforesaid, or about that time, Elisha Walker directed the tax assessor to list the said lot to Malinda, his wife; and the assessment for 1886, which had before that time been made against Elisha Walker, was marked out, and a new assessment against Malinda Walker for taxes on the said lot was made. In December, 1886, the said Burke Miller, who was under obligation to make deed to Elisha by virtue of the agreement entered into, just prior to the execution of the mortgage to Matthews, by direction of the said Elisha, executed a deed to the said lot to the said Malinda Walker, instead of to the said Elisha; and the said Elisha and Malinda were in possession of the lot at the time, as they had been since the purchase from Stewart, and as they were up to the time they were dispossessed by Griel, as their homestead. Malinda Walker was a party defendant to said ejectment suit of Griel's. Prior to 1886 the taxes on the said lot had

been promptly paid and discharged, but the taxes for 1886 remained unpaid, and in 1887 (June 25th) the said lot was sold for taxes, as the property of Malinda Walker. There was no notice of the proceedings in the probate court for the sale of the said lot for taxes given to any one, except the said Malinda. At the tax sale the said lot was bought by one Brown, who also paid certain city taxes on the said lot. A certificate of purchase was given to said Brown by the tax collector of Montgomery county, but the possession of the said Elisha and Malinda was in no wise disturbed. After the execution of the writ of possession in the ejectment suit of Griel against Elisha Walker, and after the execution of the deed by Griel to said Cyrus, viz. on the 7th June, 1889, the said Brown transferred his certificate of purchase at tax sale of the said lot to Pauline M. Smith, the appellee, who was a sister of Elisha Walker. Just before this transfer of said certificate to said Pauline M. Smith, the said Brown had seen the said Elisha Walker, and called his attention to the fact that the two years for redemption of the said lot had almost expired, and had requested the said Elisha to get some of his family to pay to him (Brown) the money he was out on the lot, as he (Brown) did not desire to keep the lot from Elisha's family. Shortly afterwards the said Pauline M. Smith saw the said Brown, and informed him that she desired to redeem the said lot for her brother. She paid the said Brown his money, and the transfer of the certificate was made. Neither Griel, Cyrus, nor Gilmer knew that the said lot had been sold for taxes until a short time before the 25th June, 1889, when the two years for redemption ran out. Gilmer then filed his application for redemption of the said lot in the probate court of Montgomery county, and before the 25th June, 1889, offered to pay the money required for said redemption. The judge of probate was absent from the city, but returned before the 25th June, 1889. On July 30, 1889, the judge of probate, while Gilmer's application to redeem said land was still on file in his office, signed a paper purporting to convey to said Pauline Smith the said lot; but this paper was not acknowledged or recorded until some time in February, 1890. In September, 1889, the judge of probate permitted the said Gilmer to redeem the said lot, accepted his money therefor, and executed and delivered to the said Gilmer a certificate of redemption. Later, in 1889, the said Gilmer filed the bill of complaint in this case against the said Miller, Malinda and Elisha Walker, and Pauline M. Smith; praying that the deed executed by the said Miller to the said Malinda Walker, and that the said tax proceedings, by which the said Pauline M. Smith claimed to own the said lot be set aside and annulled, and given up to be canceled as clouds on his title. The defendant Pauline M. Smith answered said

bill, denying any collusion, and set up, by way of a cross bill, that she was entitled to the possession of the lot in controversy, having purchased the legal title thereto under a tax sale, and prayed, in said cross bill, that the title be divested out of the complainant into her, and that the complainant be enjoined from interfering with her right to the property, and possession thereof.

This is the same case which was on appeal to this court before, the decision of which is to be found in 93 Ala. 224, 9 South. 588. Since that decision the original bill, has been materially amended, so as to show the relationship between the said Malinda and Pauline, and so as to allege that the purchase of the said certificate by the said Pauline was really for the benefit of the said Elisha and the said Malinda, and that the said Pauline Smith had demanded possession of the said lot of the complainant, and threatened to eject him from the said lot, and that the object and purpose of the said Pauline Smith was to get the said lot for the said Elisha and the said Malinda. Fraud was also charged on the part of the said Miller, Elisha, Malinda, Brown, and Pauline, in that it was alleged that they had all entered into a scheme to defeat the rights of the persons claiming under the mortgage executed by the said Elisha and Malinda to the said Segars, by and through which the said Gilmer claims. The complainant, in his bill, offered to pay to the said Pauline M. Smith all the taxes and other expenses she had been put to in reference to the said lot, and interest on the same. The said Pauline Smith answered this bill as amended, admitting that she had demanded possession of the said lot, and that she intended to oust the complainant, but denying all charges of fraud, and alleging that she bought the certificate of purchase to the said lot from the said Brown for herself, and not for her brother. The complainant demurred to this cross bill on the ground that it contained no equity. No witness was examined in the case, except the said Brown; and the cause was submitted, as shown by the note of testimony, on the deposition of the said John Brown, and upon an agreed statement of facts, which show the facts as stated above, and upon the pleadings. The chancellor decreed that the complainant was not entitled to the relief prayed for, and dismissed the bill. He also decreed that the cross bill had no equity, as it was shown that the respondent, Pauline Smith, was the owner of the legal title to the lot in controversy, and could get adequate relief at law. He therefore sustained the demurrer to the cross bill, and dismissed the same. The complainant in the original bill prosecutes this appeal, and assigns as error the decree of the chancellor dismissing his bill.

Thos. H. Watts, for appellant. John Gindrot Winter, for appellees.

McCLELLAN, J. Counsel for appellees argue that it is wholly improbable that the redemption by Pauline Smith from Brown could have been in the interest of Walker, when all that Walker had to gain by that tortious course was a release of the land from the payment of the insignificant sum secured by the Segars mortgage,—a sum scarcely greater than the consideration passing between Pauline and Brown. This argument is deprived of all weight by the facts that the Segars mortgage had been foreclosed, the period for statutory redemption had passed, and the purchaser at the sale under it had recovered the land in ejectment, and was in possession of it, before the purchase by Pauline Smith from Brown; so that the land was wholly lost to Walker, unless he could have it redeemed from the tax sale for his own benefit, and in such way as that his interest would not appear, and as, of consequence, the redemption would not inure to Gilmer, who held through the Segars mortgage. It was therefore obviously to Walker's interest to attempt to do what the bill charges in this connection. The land itself was about to be lost irretrievably to him. He could not avert the catastrophe by becoming himself the purchaser from Brown. Naturally, he wanted to conserve his interest, and save the land, if he could. Brown was anxious that he should do so. Pauline Smith declared that she wanted to purchase from Brown for Walker, her brother. The wishes, therefore, of each of these parties, converged towards the accomplishment of the plan to rescue the land for Walker and his family. Brown suggested the means of accomplishing this end. He "urged Walker to get some of his family to redeem it," as he (Brown) "did not want to keep it from Walker's wife and children." Following close upon this, Pauline Smith, a sister of Walker, appeared and redeemed the land, saying that "she wanted to take up the property for her brother." This rounded and completed the scheme. And we are unable, on these facts, to reach any other conclusion than that Pauline Smith purchased from Brown at Walker's instance, and wholly for the benefit of the latter, taking the transfer of the tax certificate, and afterwards the tax deed, to herself, in attempted effectuation of a purpose and intent entertained by Brown, Walker, and Pauline Smith to defeat Gilmer, or those to whose rights he succeeded under the Segars mortgage, of his or their rights in the premises; and we accordingly hold that the tax deed is fraudulent and void, as against the title of Gilmer, and that the complainant is entitled to the relief prayed in his bill. *Thorington v. City Council of Montgomery*, 94 Ala. 266, 10 South. 634. A decree will accordingly be entered here, canceling the tax deed to Pauline Smith as a cloud on Gilmer's title. Complainant will be decreed to pay to Pauline Smith whatever sum she properly paid Brown for the certificate of

purchase at the tax sale. Defendants will pay the costs in this court and the court below. Reversed and rendered.

(103 Ala. 280)

SCHAMRAGEL v. WHITEHURST.

(Supreme Court of Alabama. May 22, 1894.)

ATTACHMENT—CLAIM—ATTACHABLE PROPERTY.

1. When the claimant's bond and affidavit recite the levy, by a constable named, of an attachment in the suit of plaintiff against the debtor, plaintiff is not bound, on certiorari in the circuit court, to produce other evidence of these facts.

2. That property attached was part of property purchased by the debtor and another, and that it had been set off to him as his share, and removed by him to his own premises, is sufficient prima facie proof that it was subject to attachment against him, without proof that he had paid for it.

Appeal from circuit court, Franklin county; H. C. Speake, Judge.

Certiorari, on petition of J. F. Whitehurst against A. C. Schamragel, to Thaddeus M. Mills, a justice of the peace, in the case of petitioner's claim to property attached by Schamragel in his suit against W. P. Montgomery. Judgment for claimant. Plaintiff appeals. Reversed.

Almon & Bullock and John F. Jack, for appellant. Key & Hester, for appellee.

COLEMAN, J. The plaintiff Schamragel began a suit in assumpsit against W. P. Montgomery by attachment, which was levied upon a quantity of lumber, before a justice of the peace, returnable to his court. Appellee, Whitehurst, interposed a claim to the property, made affidavit, and gave bond, as required by the statute, to try the rights of property. The justice of the peace found the issue for the plaintiff in attachment, and condemned the property to the satisfaction of the judgment which had been rendered in favor of the plaintiff against Montgomery. The claimant obtained a statutory writ of certiorari, and the case was brought up to the circuit court for trial. The justice of the peace certified up to the circuit court the affidavit and the claim bond made by claimant and the judgment rendered in the claim, condemning the property to the payment of the judgment against the defendant debtor. On the trial in the circuit court, the plaintiff introduced in evidence the transcript from the justice's court and evidence tending to show that the property belonged to the defendant debtor, and rested. The claimant introduced no evidence. The court gave the general charge for the claimant. This is assigned as error.

When a case is brought up by appeal on the statutory writ of certiorari from a magistrate's court to the circuit court, the trial is de novo. The plaintiff is the actor, and the burden is on him to show that the property is subject to plaintiff's debt. Until this has been done, the claimant is not required to

introduce any evidence. *Treadway v. Treadway*, 56 Ala. 390; *Rhodes v. Smith*, 66 Ala. 174; 3 Brick. Dig. 776. The affidavit made by the claimant states that "the lumber had been levied on by attachment by the constable at the suit of Alexander Schamragel against W. P. Montgomery," etc.; and the claim bond recites that, "whereas a writ of attachment issued out of the court of Thaddeus M. Mills, J. P., returnable to the next term of the court on second Saturday in December, 1890, placed in the hands of the constable, * * * and by him levied upon the following property," etc. Neither the debt due from the defendant nor the judgment against him, ordinarily, can be inquired into on the issue to try the rights of property. On such a contest the issue is whether "the property claimed is the property of the defendant [in execution or] attachment, and liable to its satisfaction." Code, §§ 3005, 3012, 3366; *Boswell v. Carlisle*, 55 Ala. 565. That the property had been levied on by a constable under attachment process in the suit of the plaintiff against Montgomery was an admitted fact, shown by the affidavit and claim bond of claimant. It was therefore unnecessary for the plaintiff to introduce evidence of the facts admitted in the pleadings. These admissions did not preclude the claimant, if he could, from showing that the writ of attachment or levy was void upon its face. The law is well settled that if a writ of attachment is issued by a person not authorized to issue it, or is void upon its face, from any cause, the claimant may avail himself of such a defect. *Nordlinger v. Gordon*, 72 Ala. 239; *Jackson v. Bain*, 74 Ala. 328; *Tallaferrero v. Lane*, 23 Ala. 369. But when, in the affidavit and claim bond, as in the case at bar, a levy is conceded to have been made by an officer authorized to make the levy, under an attachment issued by an officer, this court judicially knows had jurisdiction to issue it, the plaintiff is not bound to introduce additional evidence of these facts. In the case of *Henderson v. Bank*, 11 Ala. 855, it was held that "the claimant is estopped by his bond from denying that a levy was made." The same rule was declared in *Mayer v. Clark*, 40 Ala. 259, and *Guy v. Lee*, 81 Ala. 163, 2 South. 273; and the principle recognized in *Campbell v. May*, 31 Ala. 567.

It is further contended by the appellee that the charge of the court was justified, because of the failure of the plaintiff to show that defendant Montgomery owned such an interest in the property as was subject to levy and sale. On this point the undisputed evidence is that claimant owned a sawmill; that he and Montgomery bought timber together; that Montgomery was to haul the timber to the mill, and that claimant agreed to saw it into lumber, and then it was divided equally between them; that each owned a kiln, and, as the lumber was divided, each removed his share to his own individual kiln; that,

the lumber levied upon had been set apart to Montgomery as his share, and was at his own kiln when levied upon by the attachment. Under this state of facts, we do not doubt it was subject to the attachment, and that without regard as to whether this timber had been paid for or not at the time of the levy. Reversed and remanded.

(108 Ala. 181)

STEINER et al. v. CLISBY.

(Supreme Court of Alabama. May 22, 1894.)

FRAUDULENT REPRESENTATIONS — ASSUMPSIT — JOINDER OF COUNTS—ASSIGNMENT OF CAUSE OF ACTION.

1. One who has been induced to make a purchase by fraudulent representations may waive the tort, and sue in assumpsit.

2. One who has been defrauded of money does not make a misjoinder by setting out in the complaint a count for money had and received, and counts alleging the fraudulent representations, as they are all in assumpsit.

3. Where defendant made fraudulent representations to plaintiffs, to induce them to buy as agents of L., they cannot recover for the deceit, though plaintiffs paid L. the purchase money, on his being dissatisfied, and insisting that plaintiffs were liable to him for exceeding their authority; they not having been negligent, or guilty of fraud, and having merely bought poor securities, instead of good securities, as directed by L., by reason of having been overreached and defrauded by defendant.

4. The mere assignment to plaintiffs by L. of a note and mortgage which they, as agents of L., were induced to buy of defendant by reason of his fraudulent representations, does not give plaintiffs a right to sue for the deceit.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by Steiner Bros. against Alfred A. Clisby for money had and received. Judgment for defendant. Plaintiffs appeal. Affirmed.

As originally commenced, the complaint consisted of two common counts; the first for money had and received for the use of the plaintiffs; and the second for the use of M. L. & C. Ernst, with an averment that the claim was the property of the plaintiffs, having been transferred to them before the commencement of the suit. The suit was commenced on the 7th day of January, 1892. On the 6th of March, 1893, the plaintiffs amended their complaint by adding an additional count numbered 3; and also by adding another count, numbered 4, which was afterwards, by amendment, stricken from the file. The cause of action, as set out in said third count, makes substantially the following case: On or about the 19th of February, 1889, the defendant, being the owner of a note made by L. Clisby for \$5,000, dated April 25, 1887, payable at one day after date, but extended for twelve months, to the defendant's order, and of a mortgage executed to him by the said L. Clisby on a certain lot of land in Birmingham, Ala., securing said note, copies of which note and mortgage are made exhibits to the count, offered said note and mortgage for sale to the plaintiffs as agents

of M. L. & C. Ernst, and, in order to induce them to purchase the same, falsely and fraudulently made certain representations to the plaintiffs touching the title to said lot of land and the execution and existence of another mortgage securing a larger amount than the value of the lot thereon, the effect of which representations was to induce the plaintiffs to believe, as they did believe, that the defendant's mortgage created a lien on said lot prior to that created by the other mortgage; and that such representations were made by defendant with knowledge that they were false, and with the deliberate purpose of defrauding said M. L. & C. Ernst; that plaintiffs, not knowing that said representations were false, but believing the same, and being thereby induced so to do, purchased said note and mortgage from defendant for \$5,000, "which amount was then and there paid to him by plaintiffs as agents as aforesaid, and received his indorsement on said note without recourse upon him, all of which was done for and on behalf of said M. L. & C. Ernst;" that at the time of the purchase of said note, the same was utterly worthless, and the said L. Clisby was insolvent; and that said other mortgage above referred to was in fact prior to the mortgage so sold; and that when said note fell due no part of the same was paid. The count then proceeds: "In consequence whereof said M. L. & C. Ernst became greatly dissatisfied, and insisted that plaintiffs, who, as above stated, had acted as their agents in making said transactions, should refund said \$5,000 to them and take said note and mortgage off their hands, and plaintiffs accordingly did, on to wit, the 4th day of September, 1889, repay to the said M. L. & C. Ernst said sum of \$5,000, with interest thereon from the date of the purchase of said notes, and the said note and mortgage were thereupon delivered and assigned by said M. L. & C. Ernst to plaintiffs; by means whereof, the whole of said sum was lost to plaintiffs. And plaintiffs say that, prior to the commencement of this suit, on, to wit, the 26th day of August, 1889, they brought suit against the said L. Clisby on said note, in this court, and such proceedings were had in said cause that, on to wit, the 7th day of October, 1889, they obtained judgment against the defendant therein for the sum of \$6,183.26, and costs, which is still unpaid; and, before the commencement of this suit, the plaintiffs offered to return said note and mortgage, and to transfer said judgment to the defendant in this cause, but he utterly refused to accept the same; and the plaintiffs now bring said note and mortgage into court, and also the record of said judgment, and offer to transfer said judgment to the defendant." On May 25, 1893, the plaintiffs further amended their complaint by adding a fifth count: This count is an exact copy of the third count up to, and including the words: "In consequence whereof," near

the end of said count, and at the beginning of the part thereof above quoted. In lieu of the averment commencing with said last above quoted words, and ending with the end of the count, said fifth count reads: "In consequence whereof, the said M. L. & C. Ernst insisted that plaintiffs were legally responsible to them for any injury which they might sustain in the purchase of said note and mortgage; and plaintiffs, in compromise and settlement of said claim and demand, refunded to them the five thousand dollars which they had given for said note and mortgage, with interest thereon from the time of said purchase, and assumed to themselves the rights and responsibilities of said M. L. & C. Ernst arising out of said transaction; and the said note and mortgage were thereupon assigned and delivered by the said M. L. & C. Ernst to plaintiffs; by means of all which the defendant became and is liable to the plaintiffs as aforesaid."

To the third and fifth counts the defendant demurred, setting forth 22 grounds of demurrer. These grounds of demurrer may be summarized as follows: (1) That the averments fail to show that defendant ever had and received any money to and for the use of the plaintiffs. (2) That it does not appear that the said M. L. & C. Ernst had, at or before the time when they delivered said note and mortgage to plaintiffs, elected to rescind said trade, or had tendered back said note and mortgage to defendant, or had, in any way, offered to put defendant in statu quo; but, on the contrary each of said counts shows that the said M. L. & C. Ernst, by delivering said note and mortgage to plaintiffs, treated and used said note and mortgage as their own, and put it beyond their power to place defendant in statu quo. (3) That it is shown in and by each of said counts, that, after the said M. L. & C. Ernst had discovered the alleged fraud and false and fraudulent representations, for a valuable consideration, they delivered said note and mortgage, so sold to them, to the plaintiffs, and thereby they elected to ratify and confirm said trade. (4) Because it appears that the plaintiffs were mere volunteers in paying to the said M. L. & C. Ernst the said sum of \$5,000, and, therefore, they have no cause of action against defendant. (5) That it appears that plaintiffs had knowledge or notice of the alleged fraud and representations before they paid to the said M. L. & C. Ernst said sum of money. (6) That no privity is shown between plaintiffs and defendant. (7) That it is not shown that the cause of action sued on belongs to plaintiffs. (8) That it is not shown that the said contract of sale was ever rescinded. (9) That said representations are alleged to have been made to the plaintiffs as agents for the said M. L. & C. Ernst, and not otherwise. (10) That it is not shown that the money sued for ex aequo et bono belongs to plaintiffs. (11) That if a rescission

is shown, such rescission is not shown to have been made within a reasonable time. The court sustained the demurrers to both of these counts. The plaintiffs were allowed to further amend by striking out the first, second, and fourth counts; and they moved to further amend by adding another count, numbered 6. This count, after alleging the ownership in defendant of the note and mortgage mentioned in the other counts, proceeds: "And plaintiffs aver that on the 19th day of February, 1889, the defendant offered to sell said note and mortgage to the plaintiffs, or to any one from whom they had or could obtain authority to purchase; plaintiffs thereupon wrote to M. L. & C. Ernst, who were at that time engaged in business in Uniontown, Alabama, informing them of said offer, describing said note as given for \$5,000, as purchase money of a two-story building on Second avenue in the city of Birmingham. Whereupon the said M. L. & C. Ernst replied, authorizing them to purchase said note if the parties making it were the right sort of people to have dealings with, and provided that the property was clear and unincumbered, and worth more than the amount of the note; this was the only authority which plaintiffs had to purchase said note and mortgage for said M. L. & C. Ernst. Thereupon, on inquiry made of the defendant as to the title of said property, in order to induce the plaintiffs to purchase the same," the defendant made certain false and fraudulent representations, which are substantially as set forth in the third and fifth counts. It is also averred in this count that said representations were made "with deliberate purpose of defrauding the plaintiffs and M. L. & C. Ernst." The count then proceeds: "And plaintiffs say that, not knowing said representations to be false, but believing and having confidence in the same, and being thereby induced to do so, they purchased said note and mortgage from the said A. A. Clisby for and on behalf of the said M. L. & C. Ernst at and for the sum of five thousand dollars, which amount was then and there paid to him by plaintiffs as agents as aforesaid." Then follows averment of insolvency of defendant, worthlessness of the note and mortgage and falsity of representations, substantially as in the other counts. The count then proceeds: "And plaintiffs say that the said M. L. & C. Ernst, not knowing of the falsity of said representations, or of the making of the same, or the worthlessness of said note and mortgage, or that the same was not a first or prior lien on said property, accepted the same from the plaintiffs. When said note fell due, no part of the same was paid, and soon thereafter the plaintiffs and the said M. L. & C. Ernst were informed for the first time of the fraud which had been committed upon plaintiffs and them as above set forth, and thereupon repudiated said transaction, insisting that plaintiffs had exceeded their

authority; and that the plaintiffs were legally responsible to them for the loss sustained by them in said transaction. And plaintiffs, having been induced by said fraudulent representations to exceed their authority as agents aforesaid, and having thereby become responsible to the said M. L. & C. Ernst on account of said transaction, paid to them, in settlement of their said claim, the sum of five thousand dollars with interest thereon from the time of said sale. And thereupon, and in consideration thereof, said note and mortgage were assigned and delivered by said M. L. & C. Ernst to the plaintiffs, by means whereof, the defendant became and is liable to the plaintiffs as aforesaid." The defendant objected to the allowance of the additional count of the complaint as amended, upon the following grounds: (1) Said count is a departure from the case made by the other counts of complaint. (2) Said count is in tort, and constitutes a misjoinder of causes of action. (3) Said count seeks to recover as in assumpsit for an alleged deceit practiced by the defendant upon the plaintiffs. (4) It is not alleged or shown that the plaintiffs ever became or were liable to M. L. & C. Ernst by reason of their agency. (5) It is shown by said count that after the discovery of the facts constituting the alleged fraud the said M. L. & C. Ernst elected to treat the note and mortgage as their own, and sold and delivered the same to plaintiffs. (6) It is not alleged or shown by said count that the contract of sale of the note and mortgage has ever been rescinded by M. L. & C. Ernst, or that any offer has been made to do so. (7) That said count shows no cause of action in favor of the plaintiffs against the defendant. The court overruled the said motion of the plaintiffs, and refused to allow them to amend the complaint by adding a sixth count, and to this ruling the plaintiffs duly excepted. The plaintiffs having stricken out the first, second, and fourth counts of the complaint, and the demurrers to the third and fifth counts of the complaint having been sustained, declined to further amend their complaint, or to plead further, and judgment was thereupon rendered for the defendant. The present appeal is prosecuted by the plaintiffs, who assign as error the sustaining of the demurrers to the third and fifth counts, the refusal of the court to allow the amendment by the addition of the sixth count, and the rendition of judgment for the defendant.

White & Howze, for appellants. London & Tillman, for appellee.

HARALSON, J. 1. It is well understood, everywhere, that the action for money had and received is a liberal and equitable action, and on principles of natural justice and equity will be supported, when the defendant has received money, which in good

conscience he ought not to retain, and which *ex aequo et bono*, belongs to the plaintiff. The law implies a promise that he will pay it; and the only privity between the parties that need be shown in such an action, arises from this promise implied by law,—that the defendant, having in his hands money which belongs to the plaintiff, will pay it over to him. *Boyett v. Potter*, 80 Ala. 479, 2 South. 534; *Levinshon v. Edwards*, 79 Ala. 294; *Harper v. Claxton*, 62 Ala. 46; *Booker v. Jones*, 55 Ala. 275; *Bank v. Parrish*, 20 Ala. 434; *Thompson v. Merriman*, 15 Ala. 168; *Houston v. Frazier*, 8 Ala. 84; 1 Brick. Dig. p. 140, § 73; *Mason v. Waite*, 17 Mass. 562.

2. The question often arises, and does in this case, whether money obtained by fraud, and to recover which an action on the case would be an appropriate form of action, may be recovered in an action for money had and received. Mr. Greenleaf, from whose conclusion there seems to be but little, if any dissent in the authorities, states the doctrine to be, that, "The count for money had and received may also be supported by evidence, that the defendant obtained the plaintiff's money by fraud, or false color or pretense." And after giving illustration of the rule he adds: "So, if the money of the plaintiff has, in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort, and bring assumpsit on the common counts. But this rule must be taken with this qualification: that the defendant is not thereby to be deprived of any benefit, which he could have derived under the appropriate form of action in tort." 2 Greenl. Ev. § 120. Mr. Starkle states the principle to the same effect as follows: "So, the plaintiff may recover in any case where the defendant has by fraud or deceit received money belonging to the plaintiff; for he may waive the tort and rely upon the contract which the law implies for him." *Houston v. Frazier*, 8 Ala. 85; *Bank v. Parrish*, 20 Ala. 434; *Russell v. Little*, 28 Ala. 160. In *Burton v. Driggs*, 20 Wall. 125, in speaking of one who has been overreached and deprived of his money by fraud and false pretenses, the court held that the person thus defrauded, may recover his money in assumpsit, on a declaration containing special counts setting out the instrument as inducement, and averring the utter falsity of its recitations, and the fraud of the whole transaction—the declaration containing also, the common counts.

3. In the application of the foregoing principle, however, it is not enough to show that the defendant has money he cannot conscientiously retain, but the plaintiff must go further and show, that of right, he is entitled to it. It will be observed, that in all the authorities referred to, the party defrauded, the one whose money had been obtained and was withheld by the defendant, was the party to maintain the action. In the extract

from Greenleaf, it was "the money of the plaintiff," and in the one from Starkie, it was the "money belonging to the plaintiff," that was referred to as being recoverable by him, and so it was, in the cases cited—the obligation in each instance, being on the defendant to refund to the plaintiff his money, and not another's. If the false representation is made to A. to induce him to part with his money, and he does so, A. must sue; but, if made to him to induce B. to part with his, and B. is induced thereby to do so, he, and not A., is the party injured, who may maintain the action. In *Wells v. Cook*, 16 Ohio St. 67, it was held, that one who has been damaged by acting on false and fraudulent representations made to him as agent of another, but not intended to be acted on by him, has no action for deceit against the party making the representations. The court in that case say, "We are satisfied that one of the prescribed limits is this: that the false and fraudulent representations must have been intended to be acted on, in a manner affecting himself, by the party who seeks redress for the consequential injuries." In *Hungerford v. Moore*, 65 Ala. 235, it was said: "The theory of the suit is, that the defendant received the money, when, *ex aequo et bono*, it belonged to the plaintiffs. In such case, the burden is on the plaintiffs, to show that they are legally entitled to the money, and it is not enough to show that defendant has no right to it. If neither party is entitled to the money, neither can recover from the other." *Railroad Co. v. Feirath*, 67 Ala. 189.

4. An agent who undertakes to represent another in the performance of a service, is understood to contract for reasonable skill and ordinary diligence,—that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs,—and is, consequently, liable to his employer for the want of these. *Story, Ag. § 183; Mechem, Ag. § 494; 1 Am. & Eng. Enc. Law, 371.*

5. In applying what has been above said to this case, it would seem to follow, that if the plaintiffs have any right, growing out of the alleged transaction between them, acting as the agents of M. L. & C. Ernst, and the defendant, to give them cause of action in case against defendant, they might waive the tort and maintain assumpsit, as well. There is no objection, therefore, to the mere form of this action; the party aggrieved could maintain either assumpsit or case. Nor are the counts liable to demurrer for a misjoinder of counts. They are all in assumpsit and not in case.

6. In neither count we have before us is it pretended, that plaintiffs did more in the transaction, than to act as the agents of said Ernsts. In the third and fifth counts, the allegations as to agency are the same, that "on the 19th day of February, 1889, the plaintiffs were the agents of M. L. & C.

Ernst, and defendant offered said note and mortgage for sale to the plaintiffs, as agents as aforesaid, and in order to induce them [as agents] to purchase the same falsely, and fraudulently" made to them the representations that induced them to do so. In the sixth count which was offered by way of amendment and rejected, it is expressly stated, that the defendant made the proposition to sell said note and mortgage to the plaintiffs, or to any one from whom they had or could obtain authority to purchase them, and that plaintiffs, induced thereto, by defendant's false representations, "purchased said note and mortgage of defendant for and on behalf of the said M. L. & C. Ernst, at and for the sum of \$5,000, which amount was then and there paid to him by plaintiffs as agents as aforesaid." These allegations show with certainty that the plaintiffs were not representing themselves in that transaction, but the said Ernsts, as the agents of the latter, and defendant knew that fact, and made whatever representations he did to them, to induce them as agents to buy. What right, therefore, have plaintiffs to maintain this action? The third count puts this right upon the ground, that the Ernsts, when said note fell due and was not paid, "became greatly dissatisfied and insisted that plaintiffs, who had acted as their agents in making said transaction, should refund said \$5,000 to them and take said note and mortgage off of their hands; and plaintiff accordingly did, on to wit, the 4th day of September, 1889, repay to said M. L. & C. Ernst, with interest thereon from the date of the purchase of said note and mortgage, and they were thereupon delivered and assigned by said M. L. & C. Ernst to plaintiffs." In the fifth it is stated as follows: "In consequence whereof [the nonpayment of said note] the said M. L. & C. Ernst insisted that plaintiffs were legally responsible to them for any injury which they might sustain in the purchase of said note and mortgage, and plaintiffs, in compromise and settlement of said claim and demand, refunded to them the \$5,000 they had given for said note and mortgage, * * * and the said note and mortgage were thereupon assigned and delivered by the said M. L. & C. Ernst to plaintiffs." In the sixth it is stated in this manner: That said Ernst had authorized plaintiffs to purchase said note, if the parties making it were the right sort of people to have dealings with, and provided the property was clear and unincumbered and worth more than the amount of the note, and when they were informed of the fraud which had been committed upon them and plaintiffs, they repudiated said transaction, insisting that plaintiffs had exceeded their authority, and that plaintiffs were legally responsible to them for the loss sustained by them in said transaction; and plaintiffs having been induced by said fraudulent representations to exceed their authority as agents aforesaid, and having thereby

become responsible to said Ernsts on account of said transaction, paid to them in settlement of their said claim the said sum of \$5,000 and interest thereon, and thereupon said note and mortgage were assigned and delivered by the Ernsts to plaintiffs, by means whereof the defendant became and is liable to the plaintiffs.

7. The legal effect of these averments is, that the plaintiffs,—because of dissatisfaction on the part of their principal, and because they insisted that plaintiffs had exceeded their authority, as agents,—purchased the note and mortgage in question from them. Their liability to their principals is assumed, and averred as a legal conclusion. But, from the facts stated, it does not appear that the plaintiffs did transcend their authority. They were authorized, certainly, to make the investment for their principals. If they failed to act with ordinary, reasonable skill and diligence in their representation of their friends, it is not averred. To test the liability of the plaintiffs, to the parties they represented, on the allegations as we find them in this complaint, we have but to suppose that their principals had instituted suit against them, to recover this money, setting up the facts of this complaint, without more, and to ask, if they could recover? Clearly, on these averments alone, and in the absence of others showing fraud on their part, or negligence in the discharge of their duties as agents, the plaintiffs, in such a case, would have no standing. There is not only an absence of such essential averments of liability on the part of plaintiffs, but such a thing as fraud or collusion on their part is expressly negatived, and according to the allegations of this complaint, they were simply overreached and defrauded in a way that did not make them liable to their principals. Authorities *supra*.

8. If the plaintiffs were under no legal obligations to pay this demand of the Ernsts, and the defendant made no request for them to pay it, they could not make him their debtor, merely by paying it. 1 Brick. Dig. p. 143, § 120. But, if defendant owed the amount to the Ernsts, and it were true that plaintiffs were under legal obligations to pay it to them and did so, they became the equitable owners of the debt and entitled to enforce its payment to them. *Rather v. Young*, 56 Ala. 96, and authorities there cited. They have shown no such liability on their part, from anything averred in this complaint, and they occupy, in paying it, the position of volunteers.

9. The only other ground upon which the plaintiffs can rest their right to maintain this suit, is upon the averment that the note and mortgage were assigned to them by said Ernsts, in consideration of their having paid them the amount owing to them by defendant, or, in other words, that they became the purchasers of said note and mortgage, which were assigned to them. But, there is a vast

difference between said note and mortgage, and the cause of action on which this suit is founded. The two are separate and distinct,—the obligations implied in each being from different individuals. The plaintiffs, by virtue of their purchase and ownership of the former, may have the right to enforce them, and they did sue on and obtain a judgment on the note against L. Cillsby, its maker, but the ownership of the note and mortgage, and their right to enforce the same, gave them no ownership of and right to enforce the cause of action on which this suit is instituted. There is no averment in any of the counts, that plaintiffs purchased and became the owners of Ernsts' cause of action against defendant for the money he is said to have in hand belonging to them.

10. Enough has been said, without noticing other of the many grounds covered in the argument of counsel, to make it appear, that the plaintiffs have not presented in the complaint and in the amendment which was proposed and not allowed, a cause of action which they can maintain against the defendant. The city court did not err in sustaining the demurrers to the third and fifth counts, and in not allowing the sixth to be filed. Affirmed.

(133 Ala. 36)

BEAVERS v. STATE.

(Supreme Court of Alabama. May 22, 1894.)

MURDER—EVIDENCE—INSTRUCTIONS.

1. In a murder trial, where the defense was an alibi, the witness testified to the facts of the killing, the presence and flight of the man whom he saw run from near the scene of the murder, and his recognition of defendant as the man. He further testified that he saw defendant the next morning after the killing, and when he was in custody of the officers. *Held*, that witness might be asked whether he recognized the man then under arrest as the same man who had run off the evening before.

2. Where there was evidence of threats by defendant against deceased at different times during the 12 months before the killing, an instruction that the probative force of the threat would be increased if it was frequently repeated, and the same cause for ill will continued to exist, was proper.

3. Where the defense is an alibi, a charge that it is essential to the proof of an alibi that it should account for the whole of the time of the transactions in question, or at least so much of it as to render it impossible that the prisoner could have committed the imputed act, is erroneous; since it violates the rule that defendant is entitled to an acquittal if the whole evidence causes a reasonable doubt as to his guilt.

Appeal from circuit court, Tuscaloosa county; S. H. Spratt, Judge.

Rufus Beavers was convicted of murder, and appeals. Reversed.

Hargrove & Vande Graaff and Jones & Mayfield, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. Appellant was convicted of murder, and sentenced to imprisonment in the penitentiary for life. One Oscar Crowder,

a son of deceased, testified that he was with his father in a certain cornfield when the latter was shot by some one hidden in the woods or bushes near by. As soon as the gun fired, he raised up, and, seeing his father fall over, he turned around, and saw a man in the act of running. He stepped to the left to see if he could see him and tell who he was, and, stepping five or six steps, saw the man running. Until then the smoke and bushes prevented his seeing him. He looked at the man as he was running off. The identity of the defendant with the assassin was the matter in issue, his defense being an alleged alibi, in support of which he introduced the testimony of a number of witnesses. After the witness Crowder had testified to the facts of the killing, and the presence and flight of the man whom he saw run from near the scene of the murder, and his recognition of the defendant as the man, he further testified, on interrogation by the state, that he saw the defendant the next morning after the killing, when he was in custody of the officers; and witness was then asked by the prosecution: "Did you recognize the man then under arrest as the same man who had done the assassination and run off the evening before?" The defendant objected to this question, and reserved an exception to the overruling of his objection. The witness answered in the affirmative. There was no error in this ruling.

The state introduced evidence of threats made by the defendant against the deceased, at different times, extending over a period from about 12 months, to within about 2 weeks, before the killing. In the oral charge, the court said to the jury, in treating of the subject of threats: "So the probative force of the threat would be increased if it was frequently repeated during the whole time intervening between its first utterance and the doing of the criminal act, and the same cause for ill will and hate continued to exist. Then it would be imputed to a malignant spirit and a purpose that may have been vacillating, but at last became fixed and settled." The defendant excepted to this instruction, and now argues that it invaded the province of the jury. In the same connection the court had said that, "if threats were made, their weight is to be determined by the jury. If a long period intervenes during which there were opportunities of doing the threatened injury, and there was no attempt to do it, and no repetition of the threat, it would be but a slight circumstance in connecting the accused with the injury, and there would be more reason for regarding it as having been a mere careless utterance or idle bravado or ebullition of passion." And the court concluded what it had to say on this subject with the remark: "But, as before stated, if any threats are proven, their weight must be determined by the jury." It will be observed that the portion of the charge excepted to embraces two distinct

propositions, stated in as many complete sentences: (1) That the probative force of the threat would be increased if it was frequently repeated during the whole time intervening between its first utterance and the doing of the criminal act, and the same cause for ill will and hate continued to exist; (2) that it would then be imputed to a malignant spirit and a purpose that may have been vacillating, but, at last, became fixed and settled. To sustain the exception, it must be determined that both propositions were erroneous. It is not questioned that such threats were admissible in evidence to show motive, and to connect the defendant with the commission of the homicide. They are received, of course, because, in judgment or law, they tend to prove these material elements of the charge; in other words, because, in the view of the law, they possess material probative force. It is not perceived, therefore, why the court may not assume before the jury that, if such threats were made, they possess probative force, and to declare to the jury that which is obviously true,—that such force would be increased if the threat was frequently repeated during the whole time intervening between its first utterance and the doing of the criminal act, and the same cause for ill will and hate continued to exist, beyond the force which should be accorded to it if a long period intervened during which there were opportunities of doing the threatened act, and there was no attempt to do it, and no repetition of the threat. The court did not undertake, in the first proposition of the charge excepted to, to tell the jury just what degree of force or weight they would give the defendant's threats, but declared a principle merely, correct in itself, leaving it to the jury to determine their proper weight. It was no more, in effect, than if the jury had been instructed that, in determining the weight they should give the threats, they might consider the frequency of their repetition, the length of time they covered, their nearness to the homicide, the opportunities of carrying them into execution, and the continuance or not of the ill will and hate, if any, which prompted them. This determines the exception, in this connection, not well reserved; but we inquire if it was not an invasion of the province of the jury to instruct them, as in the second proposition of the charge, that the threats, under the conditions mentioned, would be imputed to a malignant spirit, and a purpose at last fixed and settled."

The court, in its oral charge, gave the following instruction, which was excepted to: "It is obviously essential to the proof of an alibi that it should cover and account for the whole of the time of the transactions in question, or at least so much of it as to render it impossible that the prisoner could have committed the imputed act." Under the evidence tending to prove an alibi, if true, it

may have been possible for the defendant to have committed the crime; but its character was such that it was most clearly for the jury to determine whether, if the evidence was true, he availed himself of the possibility it afforded. Similar instructions were declared erroneous, for reasons there given, which we need not repeat, in the following cases: *McAnally v. State*, 74 Ala. 9; *Albritton v. State*, 94 Ala. 76, 10 South. 426; *Pate v. State*, 94 Ala. 14, 10 South. 685.

Reversed and remanded.

(103 Ala. 353)

FT. PAYNE BANK v. ALABAMA SANITARIUM et al.

(Supreme Court of Alabama. May 18, 1894.)

FRAUDULENT CONVEYANCE BY CORPORATION—DIVISION OF PROCEEDS AMONG STOCKHOLDERS—CONSIDERATION—RIGHTS OF CREDITORS—ACTION TO SET ASIDE—DISMISSAL OF BILL.

1. Where a corporation conveys all its property to another corporation, and receives from the latter, therefor, mortgage bonds on the property for the price, the transfer is not without consideration and void.

2. Where the stockholders and officers of an insolvent corporation convey all its property to another corporation in consideration of mortgage bonds issued by the grantee on the property, and, without providing for the debts, divide the bonds, pro rata, among themselves, such transfer is a fraud on the creditors of the grantor, though such creditors knew of and acquiesced in the transfer at the time; and such creditors may set it aside, whether the grantee is a stranger to the grantor, or a new corporation formed by the shareholders of the latter.

3. In an action against such corporations, stockholders, etc., to set aside such transfer, where the bill is sufficient, and there is a prayer for general relief, and decrees pro confesso are entered against several stockholders of the grantor corporation, it is error to dismiss the bill, as to them, on final hearing, though the evidence is insufficient to support the bill, as to the answering respondents.

Appeal from chancery court, De Kalb county; S. K. McSpadden, Judge.

Bill by the Ft. Payne Bank against the Alabama Sanitarium and others. There was a judgment dismissing the bill, and complainant appeals. Reversed.

The bill in this case was filed by the Ft. Payne Bank, on September 28, 1892, against the Alabama Sanitarium, the Ft. Payne Educational Association, E. W. Godfrey, as trustee, C. O. Godfrey, and 18 other defendants. The bill was filed by the complainant as a nonsecured creditor of the Alabama Sanitarium, it being alleged in said bill that it was the owner of the note for \$6,872.95, which had been given by the Alabama Sanitarium to the Bank of Ft. Payne, and had been subsequently transferred to the complainant. The validity of the note sued on, and complainant's ownership of it, are fully established by the evidence in the cause. Its original consideration, as shown, was money loaned by the Bank of Ft. Payne to the Alabama Sanitarium, renewed, from time to time, until, on March 31, 1891, this note was

given for the debt and accrued interest. The Bank of Ft. Payne pledged this, and other obligations due to it, to the First National Bank of Chattanooga, Tenn., as collateral security for a loan by said bank to it, of about \$12,000, and these collaterals, on default of the payment of said loan by said borrowing bank, were sold by the Chattanooga bank, and C. O. Godfrey became the purchaser of them, and afterwards this and other notes so purchased by him were transferred to the complainant—the Ft. Payne Bank—a different corporation from the Bank of Ft. Payne. The evidence also shows that said C. O. Godfrey was, at the time he purchased said note, and the others at said sale, a director in the plaintiff corporation, and it tends to show he purchased said notes for the complainant.

Referring to such further facts as are necessary for an understanding of the case, it appears that the Alabama Sanitarium was chartered under the laws of this state, on the 20th of March, 1889, with C. O. Godfrey, A. S. Loventhal, and E. W. Godfrey as incorporators; that the capital stock was \$40,000, and was all subscribed by these three incorporators, and C. O. Godfrey was elected president, and E. W. Godfrey, secretary of the company; and, it is not made to appear, what other persons besides these three, except the president and cashier of the Bank of Ft. Payne, ever became stockholders in said company, or that there was ever any change in the incumbency of the offices.

The evidence shows, that the original note for the money borrowed, for which the one in suit was a renewal, was indorsed by C. O. Godfrey and A. S. Loventhal, but the one in suit does not bear their indorsement. It is not shown with certainty, how their names as indorsers on the notes disappeared. But the evidence does show, that there were negotiations between the lending bank and C. O. Godfrey, for their release, by his giving collateral security by way of a mortgage on town lots, and the transfer to the bank of notes of other parties which were secured by liens on land. Whether this negotiation was ever perfected or not, is not disclosed, further than that such security for said note was given and the names of said indorsers no longer appear on the note. The evidence also tends to show, in this connection, that the collaterals given by said Godfrey to secure said note, were, at the time, deemed ample for the purpose. It is an admitted fact, that on the 24th of June, 1890, the Ft. Payne Educational Association was incorporated, under the general incorporation laws of the state, with nine persons as incorporators, whose names are given, no one of whom was an incorporator or stockholder, so far as is shown, in the Alabama Sanitarium, except C. O. Godfrey. He was an incorporator and stockholder in the sanitarium and an incorporator of the educational association. It does not appear, that there were any stockholders in the association. It was shown,

that a meeting of the stockholders of the sanitarium was held at Ft. Payne, on the 16th day of August, 1890, at which meeting a resolution was passed to the effect, that whereas the educational association, a corporation duly organized under the laws of Alabama, had proposed to purchase the hotel, land and entire property of the sanitarium, and to issue bonds for the sum of \$30,000 on said property, due and payable in five years after date, bearing interest at the rate of 6 per cent. per annum, and offered in payment of said property, \$25,000 of said bonds, it was unanimously resolved that said proposition be, and it was accepted, and that said bonds should be accepted in full payment for all of said property; and the president and secretary were authorized and instructed to execute a warranty deed to said property to said educational association. The following resolution was also adopted at that meeting: "That the board of directors be instructed to issue a dividend of said bonds, when same be received, and they be authorized to wind up the affairs of the company." The minutes of this meeting fail to show, and it does not elsewhere appear in evidence, who the stockholders composing this meeting, and who the officers—president, secretary and directors—of the corporation, were. It is not disputed that the sanitarium, acting under this resolution, did, on the 23d of January, 1891, execute and deliver its deed of conveyance of said property—which was all it owned—to the educational association. On the 18th day of August, 1890, at a meeting of all the trustees of said association, it was resolved and voted, to issue a series of bonds from 1 to 300, both inclusive, for \$100 each, amounting in the aggregate to \$30,000, payable September 1, 1895, at the First National Bank of Ft. Payne, in the city of Ft. Payne, Ala., to bear interest at the rate of 6 per cent. per annum, payable semiannually, on the 1st days of March and September, each year, which bonds were to be devoted solely to the payment for the academy buildings—the sanitarium property—and the needs and purposes of the school. On the 27th of January, 1891, said educational association executed its deed of trust, in accordance with said resolution, to the First National Bank of Ft. Payne, as trustee, to secure the issue of the bonds of the corporation as provided in said resolutions, and delivered to the sanitarium \$25,000 of said bonds in full payment for said property, retaining \$5,000 of the issue. This deed was filed for record in the office of the probate court of De Kalb county, on the 30th January, 1891. The complainant bank was not organized and did not commence business, until July, 1892, nearly 2 years after the sanitarium, at a meeting of its stockholders, resolved to sell its property, wind up the corporation, and divide the proceeds of the sale among the stockholders, and about 19 months after the educational association purchased said property, and paid

for it in the issue of its bonds. The First National Bank of Ft. Payne, the original trustee in the deed, resigned, and E. W. Godfrey was duly appointed trustee in its place. Default having been made in the payment of the interest on the bonds, E. W. Godfrey, as trustee, proceeding under and according to the terms of the deed, advertised said property for sale, on the 4th day of October, 1892.

The prayer of the bill is, (1) for an injunction against the sale of said property by said Godfrey; (2) that a receiver be appointed, to take charge of the property; (3) that on final hearing of the cause, said deed of the sanitarium to the association be canceled and set aside as voluntary and fraudulent as to complainant and other creditors of the sanitarium, and that the property therein described be subjected to the payment of complainant's debt; (4) that the issue of said bonds be canceled and held fraudulent and void; and (5) for general relief. As grounds for relief thus prayed for the bill makes the following specific charges: (1) That the recited consideration of \$25,000, contained in the deed of the sanitarium to the association, was false and fictitious, that there was, in fact, no consideration paid, and the transfer of the property was wholly without consideration. (2) That the trustees of the association were the owners of stock in the sanitarium, and the transfer of the property was, in fact, to the same parties who owned stock in the sanitarium; and they knew the condition of the affairs of the sanitarium and knew of the indebtedness to the bank of Ft. Payne, and knew and were fully advised of all the facts in relation to the transfer. (3) That the bonds were issued by the association and were delivered to the owners of the stock in the sanitarium, and that all the defendants to the bill, except the sanitarium, and the association, were owners of the bonds of said association, and were owners of the stock of the sanitarium; and said bonds were issued and delivered to the present holders of the bonds, in lieu of stock in the sanitarium, this being the only consideration of said bonds. (4) That said issue of bonds was fraudulent, unlawful and unauthorized; that the transfer of all of the property of the sanitarium to the association was a fraud on complainant and the creditors of the sanitarium, and hindered, delayed and defrauded them; that the sanitarium and the association are insolvent, and if the sale of the property advertised by said Godfrey, as trustee, takes place, the proceeds arising from it will be distributed among the persons who own and hold the said bonds; that no assets will be left out of which complainant can collect its debt, and it will be left without recourse in its collection. On October 1, 1892, after the execution of the proper bond, a writ of injunction was issued, restraining the trustee from selling the property, which originally belonged to the Alabama Sanitarium, or in any manner interfering with the same.

On October 5, 1892, a receiver was appointed by the register in accordance with the prayer of the bill.

Of the parties defendant, ten were nonresidents, against nine of whom, after publication, the bill was taken as confessed. The bill was not taken as confessed against M. H. Pennell, one of the defendants, nor was he served with subpoena. All the defendants except those against whom decrees pro confesso were taken, and said M. H. Pennell, filed answers, in which many of the allegations of the bill, down to section 7,—in which the charges on which relief is sought began to be averred,—were admitted to be true; but, beginning with section 7, all of said charges are positively and specifically denied, except that C. O. Godfrey was a stockholder in the sanitarium and a trustee of the association. The answers of the two corporations deny the allegations that the trustees of the association were all owners of stock in the sanitarium, and aver that six out of the nine trustees whose names are given, never did own stock therein, and knew nothing of the affairs of the sanitarium, and of its indebtedness to the Bank of Ft. Payne, and never had any interest, directly or indirectly, in said corporation, either at the time of the transfer of said property to the association, or at any other time; that no one of the trustees of the association, had any personal interest of any character in the property of the association, or in any property that might be conveyed to it; that the association delivered the \$25,000 of its bonds, when issued, directly to the stockholders of the sanitarium, with the consent and by the direction of the officers of the sanitarium, and with the knowledge and consent of the Bank of Ft. Payne; that W. P. Rice and F. H. Toby were at that time president and cashier of said bank, and each of them were owners of stock in the sanitarium, and each received his proportion of the share of said bonds. It is further denied, that all the defendants named in the bill, except the sanitarium and the association, were owners of said bonds, and it is averred, that the defendants, E. W. Godfrey, C. O. Godfrey, H. B. Hill, A. Conaut, J. F. Brown, Sidney Sargent, G. M. Baker, J. W. Spalding, Ft. Payne Hardware Company and Rebecca Loventhal, were not owners of any of said bonds at the time of the filing of this bill, and had not been such owners for some time. Mrs. Loventhal denies the allegations of fraud on which the bill rests for relief, denies that she owns any of said bonds or has any interest in them, or that any of them were delivered to her for stock in the sanitarium. The other defendants who were served, deny the allegations of fraud as averred in its paragraphs from 7 to 13 inclusive. Neither one of the witnesses examined in behalf of complainant states any facts of value to the complainant on the controverted facts in the case. Hemphill, either as assistant cashier, or as cashier, was connected with

the Bank of Ft. Payne, from March, 1889, to April, 1892, and is the cashier of the plaintiff bank, organized in July, 1892. He does prove that F. H. Toby, the cashier of the Bank of Ft. Payne, the then owner of the note sued on, received some of the bonds of the association. F. H. Toby testified, that he was the cashier of the old bank, from and including the year 1889 to February, 1892; that he knew of the distribution of the bonds of the sanitarium among its stockholders; that he received some of them, and that Mr. Rice, who was president of the Bank of Ft. Payne at the time, was a stockholder and received some of the bonds; that he knew the association, after it was organized, proposed to issue its bonds and purchase the property of the sanitarium with the bonds. He also testified that he was informed the transfer of the property was made, and the bank took no steps to prevent it, and gave no notice to, and made no demand on the association, for the claim it held against the sanitarium. Who were the stockholders of the sanitarium, who were the trustees of the association, who were the parties who received the bonds of the sanitarium in distribution for their stock therein as alleged in the bill, and who were the present owners of the said bonds, was not shown or attempted to be shown by the complainant. It does appear, as stated above, that C. O. Godfrey was a stockholder and incorporator of the sanitarium, and was, also, a director in the Bank of Ft. Payne. For the defendants it was shown by the depositions of the trustees of the association, examined as witnesses in the case, that they were not, at the time of the conveyance of said property to the association, acquainted with the financial affairs of the sanitarium, and did not know and had no information of the complainant's debt or any other debts of said corporation; and three of them swear, that so far as they knew, neither of the other trustees ever had any such information. The witness Train swears that there was no fraud or attempt at concealment in the transfer, and it was not made with the view of avoiding any debt or liability of the sanitarium—as to the existence of which he was ignorant—but was made in good faith for valuable consideration, to secure further educational advantages to the youths of Ft. Payne. On appeal to the chancellor from the order of the register appointing the receiver, and on the respondent's motion to dissolve the injunction, for want of equity in the bill, and on the sworn denials in their answer, the chancellor, on October 14, 1892, annulled the appointment of the receiver, and ordered the property restored to the possession of the trustee and dissolved the injunction. Upon the final hearing of the cause, on pleadings and proof, the chancellor adjudged that the complainant was not entitled to the relief prayed for, and decreed that its bill be dismissed. The present appeal is prosecuted

by the complainant; and it assigns as error the interlocutory decree annulling the order appointing the receiver and dissolving the injunction, and the final decree of the chancellor dismissing the bill.

Davis & Haralson and Howard & Ewing, for appellant. George D. Parks, for appellees.

HARALSON, J. 1. On the foregoing statement of the pleading and evidence in this cause, it is insisted that the conveyance of the sanitarium to the association was without any consideration, voluntary and void. So far as this branch of the contention goes, it must be said, that a corporation has the same right to dispose of its property for cash or on credit, as any natural person has, and a promise to pay, in either case, constitutes a valuable consideration to uphold a deed. Bump, Fraud. Conv. 225. Unaffected by other questions in the case, the transaction between the sanitarium and the association, was no more than the ordinary sale by one person to another of his property on a credit, for which the purchaser executed his notes to the vendor, with a deed of trust or mortgage on the property sold, to secure the payment of the purchase money.

2. It is alleged, however, as we have seen, in the statement of the case, that the parties, whose names are given, who were the trustees of the association, were the owners of the stock in the sanitarium, and knew of the indebtedness of that corporation to the Bank of Ft. Payne; that the bonds were issued and delivered to the owners of said stock, and that the present owners of the bonds were the owners of said stock. These allegations, so specifically denied in the answers, have not been proved, nor attempted to be proved, by complainant, but have been, to a large extent, at least, disproved by defendants. A. S. Loventhal and E. W. Godfrey, individually, two of the three original incorporators of and stockholders in the sanitarium, and E. B. Cook, alleged to have been a stockholder, it is noticeable, have not been made parties. As for C. O. Godfrey, it appears he was a stockholder in the sanitarium, and a trustee in the association, and he is the only party in the case who is shown, definitely, to fall within the sweeping averments of the bill. But, the proof is not satisfactory to show, that he acted with any actual fraudulent design. It was manifestly greatly to the interest of the stockholders of the sanitarium to dispose of their property. It was idle and had failed for the purposes for which it was intended, and liable to great depreciation. Said Godfrey seemed to make ample provision, at the time, to secure the debt, which was the only one the corporation owed, by giving collaterals to the bank, and the course the bank authorities pursued, indicates they regarded said debt as protected. He and the stockholders of the sanitarium acted openly

in what they proposed to do in the sale of the property; they held a meeting of the stockholders and agreed to accept the proposition of the association for the purchase, ordered the sale to be made, and passed a resolution to distribute among the stockholders the bonds, to be given for the purchase, and wind up the corporation. The president of the bank that held this debt at the time, and its cashier, were both stockholders in the sanitarium; they each knew of what was being done, as it appears, and each received his share of the bonds. The cashier deposes, that the bank did not forbid the sale, but silently acquiesced, and gave no notice of its debt to, and made no demand on the association for it. The deeds were put upon record, disclosing the whole transaction, and in the lifetime of the bank, for 18 months or more, afterwards, these proceedings were not questioned. The trustees of the association, outside of C. O. Godfrey, appear to have had no interest to subvert, in committing a fraud, or other purpose, except to buy the property, by the issuance of the bonds of the purchasing corporation, for the purposes of establishing educational advantages for the children of Ft. Payne. And, as to said C. O. Godfrey, as before stated, it is not clear that he was actuated by any bad design. Without reference, however, to any good purposes, of the two corporations or their officers, if it were a fact, that the parties in the sanitarium as stockholders sold the property for those bonds, and divided them among themselves, leaving this debt of the plaintiff unprovided for, it would be a legal fraud on the complainant. No principle is better settled, and more equitable, than that the assets of a corporation are a trust fund for the payment of its debts, vested in the hands of trustees to be preserved by them to secure the creditors of the corporation. As the result of an examination of the authorities on the subject, we cannot do better than adopt what Mr. Morawetz has compiled. After stating that if a corporation should become insolvent after having distributed a portion of its capital among its shareholders, or otherwise transferred it without value, its creditors, whose equitable claims had attached before the distribution or transfer, would be entitled to follow the capital, and apply it in payment of their claims, he says: "The same rule applies if a corporation, without providing for its creditors, should transfer its property to another corporation, unless the latter is a purchaser for value; the corporation receiving the transfer would, in that case, be liable to the unpaid creditors, to the extent of the property received without value. It would be immaterial whether the corporation receiving the property was a stranger to the transferring company, or a new corporation formed by the shareholders of the transferring company to supersede the latter in business, or a corporation formed as the result of a consolidation. In either event, the un-

paid creditors would be entitled to set aside the transfer, so far as it was a fraud on their rights. If the corporation was controlled by the same persons as the company executing it, or if the real parties in interest in both companies were substantially the same, the burden of showing that the transfer was made in good faith, for value, would fall on those asserting its validity against unpaid creditors." Shareholders, says Mr. Cook, "are bound to take notice of the true character and condition of the capital stock, and they cannot escape liability on account of their ignorance. If a dividend has been paid out of the capital stock, the stockholders are conclusively presumed to have known it, and are liable to an action for a repayment. They cannot claim to hold the position of innocent bona fide holders." 2 Mor. Priv. Corp. §§ 790, 791; Ang. & A. Corp. §§ 599-604; 1 Cook, Stock & Stockh. & Corp. Law, § 548; Railroad Co. v. Branch, 59 Ala. 139; Smith v. Huckabee, 53 Ala. 191; Bank of St. Mary's v. St. John, Powers & Co., 25 Ala. 566; McDonell v. Agricultural Co., 38 Ark. 27; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136.

3. On the evidence before us, we do not feel authorized to hold, that this deed should be set aside, as being without consideration, fraudulent and void. There is too much averred and too little proved. To authorize relief in such a case, there should be closer agreement between the allegations and proof. The bill, however, should not have been dismissed. Besides the prayer for special relief, there was added the one for general relief, under which, if it were shown that any of the defendants, being stockholders of the sanitarium, received a dividend in the bonds of the association, they were liable to be held to account, ratably, to the extent of their holding, if necessary, for the debt of complainant. Decrees pro confesso were rendered against nine who were alleged to be in this category, and the bill should not have been dismissed as to them.

4. We have, at considerable length, and much particularity, reviewed the facts as they will be reported, and stated the principles of law governing this case, with the view, that on another trial, the bill may be so framed as to parties, and with fuller and more definite proofs, corresponding with the averments, the court below may make a final disposition of it. The decree dissolving the injunction is not disturbed; but should the complainant amend its bill, and desire another injunction against the sale by the trustee, and present a case authorizing it, it can make application therefor and it will be granted.

5. The case was not at issue, and the very unsatisfactory proofs taken by deposition, without an agreement to obviate it, will have to be retaken; but this error is not available on appeal to complainant, through whose

fault the error was committed. *Vaughan v. Smith*, 69 Ala. 92.

Reversed and remanded.

(46 La. Ann. 1371)

MARX v. HIS CREDITORS. (No. 1,287.)

(Supreme Court of Louisiana. June 15, 1894.)

INSOLVENCY—SETTING ASIDE RESPITE.

Under the act of 12th July, 1888, the creditor seeking to set aside the respite granted his debtor must prove his failure to make the payments required by the respite; and such proof is not dispensed with because the debtor ruled to show cause why the respite should not be set aside fails to show cause, or files a frivolous exception.

(Syllabus by the Court.)

Appeal from district court, parish of Union.

Appeal by Jacob Marx, insolvent, from an order setting aside a respite. Reversed.

Gunby & Sholars, for appellant. Everett & Thomas, for appellees.

MILLER, J. The plaintiff, Jacob Marx, obtained a respite from his creditors. Subsequently, some of the creditors instituted proceedings, by rule, to set aside the respite, on the ground that the debtor had not made the payments under the terms of the respite, and other grounds were assigned. To this rule the debtor excepted, and the exceptions were overruled. Thereupon, the court, without any proof of the allegations in the rule of the creditors, made the rule absolute, annulling the respite, and appointing a syndic to administer the debtor's property; the court conceiving the debtor called in by the rule to show cause, and having shown no cause against annulling the respite, that the judgment making the rule absolute was authorized without any proof of the creditors' demand. From that judgment the debtor appeals.

Act No. 134 of 1888 is the basis of the demand of the creditors. That act provides that the creditors of the respited debtor shall have the right to cause the respite to be set aside, and a syndic appointed, if the debtor fails to comply with the terms of the respite. The proceeding under the act is to be summary. We are asked, in this case, to hold that the act providing a summary proceeding dispenses the creditor from making any proof of the default of the respited debtor, on which default the right of the creditor to the relief sought by him depends. All will concede the general rule that the plaintiff, whether in the suit or in rule, must prove his demand. When the appeal comes to this court, the record must exhibit the testimony, or the statements of facts, or admissions on which the judgment rests. Code Pr. arts. 585, 586, 603. The judgment in this case rests on no basis, except the rule against the debtor to show cause why judgment should not be pronounced against him, and his failure to show cause. The creditors (plaintiffs in rule)

were not, in our view, dispensed from proving the allegations of their rule merely and only because the debtor did not exhibit cause. The burden was not on the debtor to show the creditors had no ground, but on the creditors to show the grounds existed on which they relied. The defendant in the suit, who fails to appear when cited, or files a frivolous exception, which is overruled, is not therefore presumed to admit plaintiff's demand. The plaintiff in the ordinary suit, notwithstanding the failure to answer or the frivolous exception, of the defendant, must still prove his demand. So it is with the plaintiff in rule; that is, although the defendant in the rule does not show cause,—or, at least, any adequate cause,—still the plaintiff in the rule must prove his demand.

It is urged on us that rules to erase mortgages and against garnishees are made absolute without proof. Such rules taken by administrators or syndics, in the course of their administration, before the court having jurisdiction of the succession or insolvency, are made absolute because the law directs such erasures as the incident of such administration. Judgments go against garnishees, because the legal consequence of the mere lapse of 10 days without answer. But proceedings to erase mortgages, or against garnishees, furnish no warrant for a judgment annulling a respite, without any proof of the facts on which, under the act of 1888, the right to annul depend. It deserves consideration, too, that respites concern all the creditors of the debtors. On the theory that respites may be set aside without any proof of the default of the debtors, the rights of all the creditors could be displaced or affected by the collusion of the debtors with any one of the creditors not to show cause when proceeded against to annul the respite. We think the consequence itself illustrates the fallacy of the argument in support of the judgment. The presumption is invoked that judgments are based on testimony. But any such is excluded by the showing in the record that no testimony was produced.

The manifest justice of the case, and the fact that the lower court conceived the act of 1888 authorized the judgment without proof, determines us to remand the case to enable the creditors to make the proof. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and the case be remanded to the lower court for proceedings in conformity to this opinion; the costs to be paid by the appellee.

(46 La. Ann. 1273)

STATE v. WHITE. (No. 1,298.)

(Supreme Court of Louisiana. June 15, 1894.)
JURY—BALLOTS IN JURY BOX—SUFFICIENCY—PRESUMPTIONS—CRIMINAL LAW—PRELIMINARY EXAMINATION OF DEFENDANT—ADMISSIBILITY.

1. The venire of jurors will not be set aside, and the indictment quashed, merely be-

cause one of the commissioners wrote the names of the jurors on a portion of the ballots in the jury box, or because there is a number, only, on the ballots, manifestly intended to designate the ward of the residence of the juror; it appearing the names were so written by one of the commissioners in the presence of his co-commissioners and clerk, and although the clerk is required by the act to write the names, and although the act requires the ballots should express the residence, as well as the name, of the juror, the irregularities indicated being within the provisions of the act maintaining the venire and indictment unless it is shown the irregularities caused great wrong to the accused. Act No. 44 of 1877.

2. It is presumable that ballots in the jury box bear names of jurors written by clerks of the district court who have passed out of office. Hence the testimony of the incumbent clerk, on the motion to quash the venire, that he did not recognize the handwriting on three of the ballots drawn from the box, does not authorize the conclusion that persons other than the clerk wrote the names on the ballots so drawn, but the inference is the names were written by the predecessors, or some of them, of the incumbent clerk, and of whose handwriting he had no knowledge. Act No. 44 of 1877.

3. No foundation for the introduction of the testimony on the preliminary examination of the accused is required other than that afforded by the certificate of the committing magistrate, save when it is claimed the witnesses are within reach of process, and should be produced. Then diligence to obtain their presence is an issue. Rev. St. § 1010.

(Syllabus by the Court.)

Appeal from district court, parish of Ascension.

Charles White was convicted of manslaughter, and appeals. Affirmed.

G. A. Goudreau and R. McCulloh, for appellant. J. P. Madison, Dist. Atty., for the State.

MILLER, J. The defendant appeals from sentence of 10 years' imprisonment for manslaughter. It is urged the court erred in overruling the motion to quash the indictment. The grounds of the motion were that the ballots or "slips of paper" drawn from the box were not written by the clerk, and did not contain the number of the ward or place of residence of the jurors. The testimony is that the names of three of the jurors on these ballots so drawn to form the petit jury were in handwriting not known to the clerk of the court, and from this the conclusion is deduced that the ballots were not written by the clerk. It is further urged, in the motion to quash; that a portion of the ballots were written by one of the commissioners, but in the presence of the clerk and the other commissioners. It further appears that the ballots have only the name of the juror, and a number, and this is the basis of the objection that the residence of the juror is not on the ballot, as the laws requires.

Under the law, 300 ballots bearing the names of jurors were required to be put in the jury box at the outset, i. e. when the present law went into operation, years since; and the box is required to be replenished from time to time, so that the standard of 300 names

shall at all times be maintained. It is a fair inference that the box contains ballots bearing names written by the clerks, or at least some of them, who have at different periods filled the office, the duty of writing the names being imposed on the clerk as one of the jury commissioners. Act No. 44 of 1877. The presumption that the ballots were placed in the box, and the names written on them by the clerk, is not at all displaced by the testimony of the present clerk of his want of knowledge of the handwriting on three of the ballots. The inference is authorized that the handwriting was that of one of his predecessors in office.

The number on the ballot could have been placed upon it for no other purpose than to indicate the ward of the juror's residence. Of course, it would have been better to write the word "ward," but still the significance of the number is that residence is intended, so as to meet the requisites of the law that the ballot shall bear the residence as well as name of the juror.

When we are asked to quash this indictment on the ground that other than the clerk wrote the names on the ballots, the answer is that there is no proof to sustain this ground. To call on this court to quash the indictment because the ballots bearing numbers manifestly referring to the jurors' residence do not contain the word "ward" is to insist, we think, on an exactitude as to details not ordinarily attainable or to be expected. The law directs the clerk shall write the names. In this case some were written by one of the commissioners, but in the presence of his co-commissioners and of the clerk. This was a deviation from the law. But the law has wisely provided that no venire of jurors shall be set aside, and indictments quashed, for any irregularity in drawing jurors, unless it appear that some great wrong or injury has resulted to the prisoner. No such wrong is suggested in the case, and we think this saving provision in the jury law is in itself a sufficient answer to the objection that some ballots were written by one of the commissioners, and other ballots did not express the juror's residence. The decisions cited by the prisoner's counsel from 29 La. Ann. 825 (*State v. Newhouse*), 43 La. Ann. 1131, 10 South. 203 (*State v. Taylor*), and 35 La. Ann. 350 (*State v. Conway*), maintain the nullity of venires drawn without the presence of the clerk, clothed, as he is, with important functions in the jury drawings. They also hold that the assumption by strangers of the functions of jury commissioners violates the venire. We cannot appreciate the application of those decisions to this case.

The last point urged against the verdict is, that the lower court erred in admitting in evidence the testimony, reduced to writing, of the witnesses on the preliminary examination. The objection is that no foundation was laid for the introduction of the testi-

mony. It is urged in the brief that the preliminary examinations were not attested by the magistrate. The bill of exceptions does not show that objection. The bill states: "The papers were not in proper shape." That objection is too vague. We must conclude that the preliminary examinations were properly certified, and the depositions reduced to writing by the committing magistrate. No foundation was requisite to be laid, other than that afforded by the papers themselves. Rev. St. § 1010. It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed.

(46 La. Ann. 1269)

STATE v. TYLER. (No. 1,299.)

(Supreme Court of Louisiana. June 16, 1894.)

LYING IN WAIT TO KILL—INDICTMENT—CRIMINAL LAW—EVIDENCE OF ABSENT WITNESSES.

1. The error assigned in the indictment, under section 790 of the Revised Statutes, for stabbing with intent to murder, while lying in wait, or in perpetrating, or attempting to perpetrate, a robbery, etc., that the essentials of the robbery are not set out, will not be sustained when rejecting as surplusage all words relating to robbery, and the perpetrating, or attempt to perpetrate, that crime, there is the complete offense charged of lying in wait and stabbing with intent to commit murder. Rev. St. § 790; *State v. Brown*, 21 La. Ann. 348; *State v. Humphries*, 35 La. Ann. 906; 1 Bish. Cr. Proc. 230.

2. The summoning of the witnesses who testified on the preliminary examination of the accused, and the returns of the sheriff "Not found," unless it is made to appear the witnesses are in fact within reach of the process of the court, are sufficient to authorize the introduction of their testimony, reduced to writing on the examination. Rev. St. § 1010.

(Syllabus by the Court.)

Appeal from district court, parish of Ascension.

Bill Tyler was convicted of lying in wait and stabbing with intent to kill, and appeals. Affirmed.

R. McCulloh, for appellant. J. P. Madison, Dist. Atty., for the State.

MILLER, J. This appeal is from the sentence of the lower court on defendant of imprisonment for life, as his correction for lying in wait and stabbing, with a dangerous weapon, with intent to commit murder, the persons named in the indictment. There was a motion to quash the indictment for irregularities in drawing the jury, the same as are alleged in the case of *State v. White* (decided at this term) 15 South. 623, and, for the reasons given in the decision in that case, our conclusion is there is no merit in that motion.

There is a bill of exceptions to the admissibility of the testimony on the preliminary examination; the objection being that there was not sufficient diligence to obtain the presence of the witnesses on that examination at the trial. Under the statute, the witnesses should be produced if their attend-

ance can be secured. Rev. St. § 1010. We find that the witnesses were summoned, and there is the return of the sheriff they could not be found. There is, besides, his testimony of fruitless inquiries made by him for the witnesses. In the course of the examination of the witnesses, one testified he had heard the absent witnesses state, when before the committing magistrate, that they were nonresidents. The defendant took a bill of exceptions to the testimony of the statements of the absent witnesses. Without the testimony of their statements, we think the state exhibited due diligence to obtain their presence, and a foundation was then laid for the introduction of their depositions on the preliminary examinations. It cannot be expected that the state should send its subpoenas into other parishes with no reasonable cause to suppose the absent witnesses could be found. Subpoenas were issued, and the witnesses were sought in the parish of Ascension, and the sheriff's efforts extended to the adjoining parish,—Assumption,—and all was done that could be reasonably demanded in the premises.

The assignment of errors is that the indictment under section 790 of the Revised Statutes is defective, because charging lying in wait, and attempting to perpetrate and perpetrating a robbery, and stabbing with intent to murder. The ingredients of robbery and the particulars of the crimes are not stated. But the disjunctive in the section makes the crime complete without the perpetration or attempt to perpetrate a robbery. So any supposed defect in respect to describing the robbery may be rejected as surplusage, and there remains the offense of lying in wait and stabbing Albert Lincoln and Michael Cooney with a dangerous weapon, "then and there feloniously, willfully, and of malice aforethought to kill and murder said Albert Lincoln and Michael Cooney." The conviction stands for the offense sufficiently charged. It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed.

44 La. Ann. 1276)

**STATE ex rel. REYNOLDS & HENRY
CONST. CO. v. MAYOR, ETC., OF
MONROE.** (No. 1,801.)

(Supreme Court of Louisiana. June 16, 1894.)

**MANDAMUS TO CITY—PROMULGATION OF ELECTION
RETURNS.**

The promulgation of the returns of election of the vote of taxpayers to determine whether a tax is to be imposed in aid of railroad enterprises is a ministerial duty, obedience to which will be compelled by mandamus. The officials charged with the duty, when called on to promulgate the result, can raise no question of fraudulent voting or other objection to the validity of the tax, nor have such officials any discretion or power to withhold or refuse that promulgation. Act No. 35 of 1886; High, Extra. Rem.; State v. Bordelon, 6 La. Ann. 68; Parker v. Robertson, 11 La. Ann. 672;

Bassett v. Barbin, 14 La. Ann. 249. Passim, see decision between these parties in 45 La. Ann. 1024, 13 South. 400.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

An application by the state, at the relation of the Reynolds & Henry Construction Company, for mandamus against the mayor and council of Monroe. From an order denying the application, relator appeals. Reversed.

C. J. Boatner, for appellant. T. O. Benton, for appellee.

MILLER, J. This is an application for a mandamus against defendants, the mayor and council of Monroe, to promulgate the result of an election held in Monroe on the 10th April, 1888, to determine whether a tax should be levied in aid of the construction of the Houston, Central Arkansas & Northern Railroad Company, the relator acquiring, by assignment from the railroad company, the right to such taxes. The defendants resist the application on various grounds: That no demand has been made for the promulgation, and no refusal to promulgate; that relators had not used due diligence to secure the returns, and their demand is stale; that more than five years have elapsed since the election, during which the relators have had it in their power to compel the commissioners of the election to make their return; that no returns have been made; that all data of the election, except as shown, have been lost; the fault of the relators is charged to have been the cause that the law was not complied with; that it is beyond relators' power to comply with the mandamus; that they never had possession of the returns. The answer further assails the election itself, and the returns claimed to have been filed with the clerk of the court, as false and fraudulent, the fraud in respect to the election being in the alleged fraudulent votes cast, and the answer asserts a discretionary power in the council in respect to promulgating the returns, of which discretion, it is charged, the issue of the writ would deprive defendants.

Act No. 35 of 1886 provides for elections to determine the question of taxing the property of cities, towns, and parishes in aid of railway enterprises. Const. art. 242. If such tax is approved by a majority of the taxpayers at the elections to be conducted in accordance with the general election law, the act makes it the duty of the municipal authority of the town, city, or parish to levy the tax. Act, §§ 1-4. This court, in its previous opinion between these parties, held that the preliminary step to claiming the imposition of the tax was to obtain the promulgation of the returns, and reserved the relators' rights to compel that promulgation. We gather from the brief and argument of defendants that the discretionary power asserted for them in respect to the election under consideration relates to fraudulent votes

claimed to have been cast, for reference is made in the brief to defendants' efforts in the lower court to show fraudulent and illegal voting; and it is claimed the discretion also exists in the council to determine whether there shall be any promulgation at all. This theory of a discretionary power runs through the entire defense in the court. We are at a loss to conceive whence it is derived. If it exists, the power to vote the tax, which the constitution and legislation vests in the property taxpayers, is controlled by the discretion of the municipal authorities, to be exerted after the votes of the taxpayers have been cast. The power claimed for the municipal authorities assumes they shall determine whether illegal votes have been cast, and for this cause, or because they deem the returns illegal, they shall have the discretion to make no promulgation of the result, and refuse to give effect to the election. In our view, no such power exists in the council and mayor. Their functions, in all respects, are ministerial. On the presentation of the petition, signed by one-third of the taxpayers, the election must be ordered, and the result proclaimed. If in favor of the tax, it must be levied and applied as directed by the act. From first to last the writ of mandamus is available to any such parties in interest to compel obedience of duties purely ministerial. High, Extr. Rem. verbum "Mandamus." "If frauds are committed in the election, of a character to vitiate the tax, or other causes exist to resist it, the remedy is not to be sought in any discretion of the council. Instances are not infrequent of taxes of this character being resisted; nor has there been the least difficulty in finding suitable remedies where there is ground for their application; but remedy and relief are met by the refusal of the municipal authorities to perform ministerial acts.

There is, in our view, no place in this discussion for questions of fraudulent voting or other defenses intimated against the tax itself. Such issues can have no determinations to bind anybody on the mere issue whether the result of an election shall be announced by those charged with the duty. Hence, while we have given due attention to all these defenses, we are clear they are foreign to the issue here, and need no other comment.

On the issue that the defendants cannot perform the duty, we must be controlled by the proof and the nature of the duty to be performed. It is, as we appreciate the testimony, proved that the returning officer handed the returns of the election to the secretary and treasurer of the common council at its meeting. Copy of the returns, doubtless, can be found in the proper custody. The previous litigation has been conducted on no such ground as inability to make the returns, and the present defense on that ground is hardly consistent with the other positions assumed by defendants.

, As to the lapse of time, no prescription has

accrued, nor are defendants in any position to urge delays imputable to them.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that the writ of mandamus issue as prayed for in the petition of relators, and that defendants pay costs.

(46 La. Ann.)

STATE ex rel. BREAZEALE, District Attorney, v. CANNON, Sheriff. (No. 11,495.)

(Supreme Court of Louisiana. May 23, 1894.)

SHERIFFS—REMOVAL FROM OFFICE—MISCONDUCT AS TAX COLLECTORS.

1. While the denunciation of the constitution is directed against sheriffs *eo nomine*, and, for certain causes enumerated, requires their removal from office, yet, being charged with the collection of taxes by virtue of their offices, they are removable on the ground that they have been guilty of misfeasance or nonfeasances in the discharge of duties the law imposes upon them as tax collectors.

2. Therefore, while article 196 of the constitution denounces, as causes for the removal of sheriffs, acts of nonfeasance, misfeasance, and other acts of official misconduct on the part of such officers, yet the tax statutes can be examined for the purpose of ascertaining the legislative interpretation of their acts as tax collectors, and the consequences that those statutes attach to any dereliction of duty thereunder; and those statutes having clearly defined the duties of sheriffs acting as collectors of taxes, and designated particularly and specially the pains and penalties which attach to the non-observance of them, and having declared that, for certain delinquencies, removal from office is the penalty, this court will accept same as the legislative interpretation of this particular description of nonfeasance, misfeasance, etc., as applicable to sheriffs while acting as tax collectors, by virtue of their official capacity as sheriffs.

3. In case the evidence fails to show corrupt conduct or willful wrongdoing on the part of a sheriff acting as collector of taxes, thereby bringing him within the plain and evident denunciation of tax statutes, he cannot be removed from office under the behest of the constitution.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles.

Petition, on the relation of Phanor Breazeale, district attorney, for the removal from office of Clifton Cannon, sheriff and ex officio tax collector of the parish of Avoyelles. From a judgment in favor of said Cannon, the state appeals. Affirmed.

Fenner, Henderson & Fenner, for relator. Clegg & Thorpe, for respondent.

WATKINS, J. Alleging the suit to have been brought at the written request and on the information of citizens and taxpayers of the parish of Avoyelles, whose several names are enumerated, the district attorney avers and represents that the defendant, as sheriff and ex officio tax collector, "has been, and still is, guilty of malfeasance, nonfeasance, favoritism, and extortion in his official capacity, * * * and has failed to perform the duties imposed upon him as

sheriff and as tax collector, by the laws of the state of Louisiana, as will be specifically charged and shown hereafter, and should be adjudged guilty and removed from office." The prayer of the petition is of like tenor, and demands the removal from office of said sheriff and ex officio tax collector. At the threshold we are met with several exceptions that are urged by the defendant's counsel, which require a passing notice.

1. The objection to the adequacy of the petition is that it does not set out, in terms, that the suit was instituted by the district attorney "on the written request and information of twenty-five citizens and taxpayers," in the language of the constitution; but the petition has followed the very language of the constitution, for it declares that "the petition of the state of Louisiana, ex relatione Phanor Breazeale, district attorney, * * * brings this suit on the written request and information" of the following named citizens and taxpayers, referring to the written request of the citizens, which is annexed to the petition. Referring to the citizens' written request, which accompanies the petition, it shows that they urge and request the district attorney "to file immediate suit" for the removal of the defendant from office, on the ground that he "has been guilty of malfeasance, nonfeasance, favoritism, and oppression in office," etc. It is evident that the averment of the petition is authorized by the request of petitioning citizens, and that they furnished the information. Their written request contained all the information that it was needful that they should have furnished the district attorney.

2. It is objected that no proof was adduced of the citizenship of the petitioning citizens, or, in other words, that they were residents of the parish of Avoyelles. Had there been any doubt of the citizenship of the petitioning taxpayers in the mind of the defendant's counsel, they should have seasonably excepted, and tested the matter in the court below. It is not a matter that is examinable, for the first time, on appeal. In our view, this objection does not involve a question of jurisdiction, *ratione materiae* nor *personae*.

3. It is further objected that there is exhibited on the record "a fatal mistake in the validity of the proceedings in the matter of impaneling of the jury," in that 12 of the 30 jurors who constituted the special venire that was drawn under section 4 of Act 135 of 1880 for the trial of this particular case were withdrawn and sworn to try another and different case, and were sent away, and they did not return any more; so that the venire, in truth and fact, consisted of 18 instead of 30 jurors, as the statute requires. The terms of the statute in question run thus: "In all cases where a special jury is ordered, the judge shall order the drawing of thirty qualified jurors, who shall be summoned by service of notice in the usual form. On the trial the jury shall be impaneled,

and the right to challenge shall be exercised, as in jury trials in ordinary civil cases; and talesmen may be summoned as in other cases." Act 135 of 1880, § 4. But, after the 12 of the aforesaid special venire were withdrawn, the 18 remaining constituted a sufficient nucleus on which talesmen could be, and doubtless were, drawn to complete the panel. The object of the law evidently was to speed the trial of preference cases, such as this; and, for the purpose of promoting the accomplishment of that object, the law has wisely incorporated the provision that such a jury shall be drawn, summoned, and impaneled as other juries are, the right to challenge being specially reserved, as well as the right to summon tales jurors. This objection is not well taken.

4. That offenses of tax collectors are not triable by the mode pointed out and designated in article 201 of the constitution for the removal of sheriffs. But there is no such office created by the law as tax collector *eo nomine*. The constitution provides that "the sheriffs, except in the parish of Orleans, shall be ex officio collectors of state and parish taxes." Article 118. And this suit is brought against the sheriff and ex officio tax collector. Therefore, while article 196 of the constitution denounces, as causes for the removal of sheriffs, acts of misfeasance, nonfeasance, and other acts of official misconduct on the part of such officers, yet the tax statutes can be examined for the purpose of ascertaining the legislative interpretation of their acts as tax collectors, and the consequences that those statutes attach to any dereliction of duty thereunder; and those statutes having clearly defined the duties of sheriffs acting as collectors of taxes, and designated, particularly and specially, the pains and penalties which attach to the nonobservance of them, and having declared that, for certain delinquencies, removal from office is the penalty, this court will accept same as the legislative interpretation of this particular description of nonfeasance, misfeasance, etc., as applicable to sheriffs while acting as tax collectors, by virtue of their official capacity as sheriffs. This objection is not good.

5. That an original judgment of conviction cannot be rendered by this court; or, in other words, that a suit for removal under articles 196 and 201 of the constitution is, in legal effect and intentment, an impeachment, and therefore quasi criminal in character, though cognizable by the civil tribunals and subject to an appeal to this court. The argument of counsel on this proposition is unique and worthy of reproduction, and it is as follows, viz: "The literal law is that the appellate court, in case of reversal, shall render such judgment as the lower court should have rendered (Code Pr. art. 905); that when a cause has been tried by jury, and the jury has given a general verdict, the lower court must give judgment pursu-

ant to the same, unless a new trial has been granted (Id. art. 541). Thus, in the instant case, in the face of a general verdict of acquittal, the district court was powerless to render a judgment of conviction; and the letter of the law does not give to the appellate court the right to render a judgment prohibited to the district court. To do so would be to correct the error of the law, not to correct the error of the court below. It will not serve to say that 'court,' in article 905, means judge and jury; for, in article 541, 'court' plainly designates judge alone,—the instrument of the judgment,—while 'jury' means a wholly distinct functional body, involving that which is the foundation and basis of the judgment. Under the system of jury trial as constituted by our law, there can be a verdict without judgment, but there cannot be judgment without verdict. The judgment non obstante veredicto of the common law is not here known." Pursuing this thought, counsel presents the following argument, viz: "The appellate jurisdiction on facts granted by the constitution can be exercised, without absolutely destroying the trial by jury, only by the appellate court refusing to affirm a judgment rendered upon a verdict with which it is unable to agree, and recommitting the case to the district court for further trial. But to review a judgment of acquittal based upon a verdict, and enter, instead, an original judgment of conviction, against verdict and without verdict, would be to abolish trial by jury, though guarantied by the constitution. This we cannot believe the court is inclined or prepared to do. We rather expect from your predecessors in an analogous case,—*Thompson v. Chapman*, 7 La. Ann. 258: 'We can only regard this part of the statute [of 1840] as a civil remedy by supposing it the intention of the legislature, though not expressed, that the imprisonment shall terminate on payment of the whole debt and costs; but, even in this point of view, it is a civil remedy, of such a highly penal character that we should never feel authorized to convict the debtor of fraud, and punish him with imprisonment, which might extend to three years, without the verdict of a jury; and, although we should remand the case for a new trial if any errors of law had occurred in the progress of the trial, we are unable to do so for differing with the jury as to the effect of the evidence alone. Such a course would trench too much upon the humane principle that no man should be tried twice for the same offense, having been acquitted, after a fair trial of the facts, by a jury of his country.' More especially do we expect such response to a demand for original judgment of conviction by the state's prosecutor, who admits that he submitted the case, with its voluminous evidence, complicated figures, and numerous documents, without a word of argument to the jury to assist their deliberations, and that,

after verdict, he permitted judgment to be entered thereon without seeking to correct errors in the verdict by moving for new trial. Such a course savors too much of a spirit to ignore a constitutional tribunal, and to lay traps and pitfalls for both court and jury. If there was error in the verdict, it might have been obviated by a fair discussion of the evidence before the jury, and this honorable court relieved of the more than doubtful and confessedly unpleasant duty of entering original judgment of conviction." Forsooth, when a cause has been tried by a jury, and such jury have given a general verdict, the district court "must give judgment pursuant to the same." Code Pr. art. 541. It does not follow that this court cannot render a judgment different from the one that was rendered in the district court, under the authority of Id. art. 905. This court does not deal with the verdict of the jury, except as a component part of the judgment which is thereon pronounced. When the cause is brought here on appeal, it is from the judgment the appellant seeks relief, and the appeal is prosecuted for the purpose of obtaining "recourse to a superior tribunal, in order to have the judgment of an inferior court corrected." Id. art. 564 et seq. And the Code of Practice further declares that, when this court "reverses the judgment of an inferior court, it shall pronounce on the case, the judgment which the lower court should have rendered," etc. Article 905. As it is only the judgment of the lower court that is appealed from, it is, necessarily, the judgment of the court that this tribunal is to reverse, and not the verdict of the jury. Surely, there is no reason to suppose that the term "inferior court," in that article, was intended to personate the jury or the judge. The term was evidently intended to refer to the court, whether it was personated by the judge and jury, or by the judge alone. That this court has jurisdiction of the facts as well as of the law of the case is too well attested by the uniform and consistent course of our jurisprudence to need any argument in support of it, and it is securely founded upon the provision of the constitution which confers upon this court jurisdiction of "all cases" within the limits designated (article 81); and what is the extent and meaning of this appellate jurisdiction is defined and explained by the further declaration that "the general assembly shall provide for appeals from the district courts to the supreme court upon questions of law alone" (article 91); thus clearly conveying the idea that this court has jurisdiction on questions of law and fact in all cases, and that its jurisdiction will not be restricted to questions of law, except "the parties aggrieved by the judgment desire only a review of the law" (article 91). The case stated in *Thompson v. Chapman* is exceptional, arising, as it did, under the provisions of the act of 1840, with relation to imprisonment for debt. That law was somewhat analogous in

its provisions to those of our insolvent law (Rev. St. § 1802 et seq.); and while the insolvent law declares that, if the insolvent debtor be convicted of fraud by the jury selected to try the charges preferred against him, "he shall be sentenced to imprisonment for a term not exceeding three years" (Id. § 1807), yet this court has always held this to be a civil remedy, and appealable to this court as other civil cases are; and it will be observed that the court, in that case, put its declination to "convict the debtor of fraud" without the previous verdict of a jury on the ground that his conviction would result in his imprisonment, and not on the want of jurisdiction to render such a decree. We had occasion to examine and consider the case of *Thompson v. Chapman* in a recent case, and intimated that we would not adhere to the doctrines therein announced, unqualifiedly. *Burdeau v. His Creditors*, 44 La. Ann. 11, 10 South. 395. Whether we affirm, reverse, or remand the cause must depend on the view we entertain and appreciation we have of the evidence that was administered on the issues joined in the case.

There were other exceptions taken during the progress of the trial which were not insisted upon in brief or argument, and therefore they need not be examined.

A. On the merits, the demands of the relator are represented by numerous charges and specifications, which will be taken up and examined in detail and seriatim; but a fair conception can best be had of the issues involved by reference to the printed arguments of counsel, and we have made the following extracts from their respective briefs, viz. (from the relator's brief): "It is the natural and necessary dictate of the commonest business sense and experience that the state should make careful rules and regulations for the administration of such a trust, intended to secure faithful performance, proper accounting, careful record of transactions, and prompt exposure of delinquencies. Such rules are not to be treated as perfunctory, nor is their disregard to be excused by failure to prove special injury in a particular case. It is enough that the failure to observe such regulations affords opportunity for wrongdoing. It is enough that the duty is plain and clear, and that its strict observance is intended as a guard against maladministration. Take, for example, the rule provided in sections 76 and 79 of Act 85 of 1888, requiring the tax collector to make monthly settlements with the police jury, under the express penalty of removal from office. What is the purpose of this requirement? Obviously, to prevent the accumulation of funds in the hands of the collector, to diminish the time during which he holds them, and thus to lessen the chances of their malversation, and to secure speedier detection of any malversation. If a collector fails to make these settlements for six months, can he excuse himself and escape the penalty

expressly imposed by law by saying that when he did account, he accounted for all he had received? Clearly not. If so, he would be at liberty to repeat his nonfeasance, and in future cases the funds might not be accounted for. If so, every other tax collector in the state would feel authorized to commit similar delinquencies without fear of penalty, and the legislative rule would be practically nullified. Like considerations apply to the various other legislative mandates which this defendant is charged and proved to have violated. They are all of like character, intended for similar purposes, and to operate as checks on official administration. They are such regulations as every financial corporation or business concern imposes on their servants charged with the receipt and disbursement of moneys, and no servant guilty of neglecting to observe them could retain his place. Their nonobservance, where the rules are clear and mandatory, suggests a sinister intent, or such loose ideas of official duty and responsibility as unfit the officer for such a post. Such nonobservance cannot be tolerated without danger to the fisc, and without nullifying and destroying the safeguards which the legislature has so carefully provided to secure the faithful and prompt accounting for public moneys." The following are extracts from the brief of the respondent, viz.: "On a careful review of the record, two things, we think, at the outset, will arrest the attention of the court. The first is that the state does not confer any claim; and, secondly, that the parish has sustained no appreciable injury. In neither case does it appear that the defendant is chargeable with a single dollar due to either state or parish. After a searching scrutiny into his accounts, plaintiffs have failed to trace a single dollar into his hands for which he has failed to account. If there be any shortage, we have been unable to find it." "It is not to be wondered at, then, that plaintiffs preferred no money demand. They had before them the report of a committee of their own police jury of September 27, 1892, showing that the accounts of the defendant were all correct. This report, as will be seen by reference to it, covers the entire period of the defendant's incumbency of the office, extending over a period of more than four years. They had, besides, the report of the state examiner, sent up here by the governor of the state, at the instigation of the police jury, which only went still further to establish the correctness of the previous report of the committee appointed by the police jury. See Chretien's report." "But all this does not seem to have satisfied the plaintiffs. Something more must be done. So they proceeded to catechise this taxpayer and that taxpayer, this license payer and that license payer, until the whole list was pretty well exhausted; and they deemed they had made out a case against the defendant. Nor did they desist even then. The books of the col-

lector were unsparingly gone through with, and an item here and an item there culled, and the entire product of their joint labors is now before the court in the petition in this suit." It will thus appear that the case of the relator is that the defendant, as sheriff and ex officio tax collector, has been guilty of a technical disregard of the rules and regulations specified in the tax statutes with reference to the collection of taxes, and that the respondent's "failure to observe such regulations" afforded opportunity for wrongdoing, not that the respondent was guilty of any criminal act, or had failed, ultimately, to account for all the public moneys he had collected and received; for the fact is not denied that he had made all of his monthly, quarterly, and even final settlements prior to the filing this suit. The prayer of the petition is to like effect. Keeping in mind the foregoing résumé of principles on which this case is founded, the following is a synoptical statement of the charges and specifications on which the relator demands a judgment of this court, decreeing the removal of the respondent from the office of sheriff and ex officio tax collector, to which he was elected by the suffrages of the people at the general election on the 19th of April, 1892.

B. Following the language of the petition, the relator's averment is as follows, viz.: "It is shown that the laws of the state require that the tax collector shall, within the first week of each month, make a true, correct, and faithful settlement with the parish treasurer of all taxes, interest, and licenses collected by him for and during the preceding month. Such statement and settlement must be sworn to, and be unequivocal, true, and faithful."

On this declaration of the law governing the monthly settlement of the tax collector, the specifications of the respondent's violation thereof are as follows (the first five, being of the same character, may be taken together): "First. It is shown that said Cannon has failed to make such settlements with the parish treasurer. * * * Second. It is shown that from April 19, 1892, to September 10, 1892, he made no settlement with the parish treasurer as required by law. * * * Third. It is shown that during the months of April, May, June, July, and August, 1892, he collected fully two thousand dollars of taxes, licenses, and interests due the parish of Avoyelles, and utterly failed to make any settlement with the parish treasurer, as required by law, until about September 24, 1892, when he was forced to make a settlement, which was not correct and faithful. Fourth. It is shown that [he] on September 24, 1892, paid into the parish treasury \$7,933.62 for taxes of 1891 collected by him; that this amount of parish taxes was collected by him many months prior to [that date], and he failed to pay said sums as collected, [and] at the time of collection, as required by section 76 of Act 85 of 1888. Fifth. It is charged that [he] did,

on the 24th of September, 1892, pay into the parish treasury \$2,025 for parish licenses collected from various persons during the year 1892, [which] was so collected by him many months prior to September 24, 1892, [he] failing to pay said sums into the treasury at the time they were collected, as required by law." Hence we have the proposition for consideration that because the defendant tax collector did not make the monthly settlements which the law requires, with the parish treasurer, of taxes and licenses by him collected, and at the time they were collected, he is brought within the denunciation of the tax statute then in force, and may be removed from office on that account. Consulting the provisions of the act of the legislature that is relied upon to ascertain the legislative interpretation that is placed upon this particular kind of alleged nonfeasance in office, we find the following to be the provisions of section 76 of Act 85 of 1888, to wit: That tax collectors shall make "settlements for all parish taxes and licenses * * * during the first week of each month with the parish treasurer; that all tax collectors shall make their final settlement with the auditor of public accounts, and police jury, within ten days after the twentieth of July of each year; and every collector failing to comply with this section shall be proceeded against as provided by law," etc. This section requires of tax collectors to make monthly settlements with the parish treasurer of taxes and licenses collected, and final, annual settlements with the police jury on the last of July of each year; and it further declares that, on "failing to comply with this section, [collectors] shall be proceeded against as provided by law." This paragraph is omitted from the quotation in relator's brief, and the next section (77) is added, for the purpose, evidently, of supplying a penalty not existing in section 76. Section 77 of the act is as follows, viz.: "That said tax collector shall settle with the police jury, and in default of such settlement, shall be removed from office in the manner provided by law." As section 76 only requires tax collectors to make their annual settlements with the police juries, the denunciation of section 77 has no application to the five charges and specifications we are considering, as they, exclusively, relate to the defendant's alleged failure to make monthly settlements with the parish treasurer; and a still further distinction must be taken between the two sections, in relation even to the contemplated annual settlements to be made with the police juries, and it is this: that while section 76 requires tax collectors to make their annual settlements "within ten days after the twentieth of July," and declares that the consequences of his failure to do so is that he "shall" be proceeded against as provided by law, section 77 declares that "the tax collector shall settle with the police jury, and in default of such settlement, [he] shall be removed from office in the manner provided by law." In

other words, the failure to make his annual settlement within the time prescribed does not result in his removal from office, but it is his failure to make any settlement at all that results in a removal from office. But, in respect to his failure to make the monthly settlements, removal from office is not the result or consequence, the statute not declaring such failure to have that effect. The interpretation of these two sections of this statute is not left to inference or conjecture, for the next succeeding section (78) provides "that if any tax collector fails or neglects to make a settlement provided by law, he shall forfeit the commission so allowed him, and interest at the rate of five per cent. per month of the sum withheld;" and it further provides that "any tax collector who, having made his monthly or quarterly settlement as provided in this act, or any other act, shall fail immediately to pay the amount so ascertained to be due, into the state or parish treasury, and obtain the treasurer's receipts therefore, shall, in addition to the forfeiture of commission and interest aforesaid, be subject to the penalties provided for embezzlement, and to removal from office." Act 85 of 1888, § 78. This section of the statute sets this matter at rest. It formally declares that the failure or neglect to make a settlement entails, as a consequence, the forfeiture of commissions, and the payment of 5 per cent. per month interest; and it, with equal certainty, declares that the retention of money in his hands, and his failure to pay same over to either the state or parish treasurer, as the case may be, subjects him to the penalty of embezzlement and removal from office. Hence it is manifest that this court cannot go outside of a special tax statute, and find a cause of removal of the defendant not found therein. This question was examined, and these statutes and their penalties were compared, in the recent case of *State v. Reid*, 45 La. Ann. 180, 12 South. 189, and, on careful consideration, we gave them a similar interpretation to that now expressed. These five charges and specifications are not tenable.

The charges from 6 to 12 are not discussed in the relator's brief, and consequently require no examination at our hands.

The thirteenth, fourteenth, and fifteenth, being similar in character, may be taken together, and they are as follows, viz.: "Thirteenth. It is shown that during October, 1892, he demanded and received from T. A. Lemoine the sum of \$240 for state and parish license due by Lemoine, as retail merchant and liquor dealer, for the year 1892, and that he failed up to April 6, 1893, or later, to deliver to said Lemoine the legal state and parish licenses, as required by law (section 19 of Act 150 of 1890), although repeatedly asked to do so by said Lemoine. Fourteenth. It is shown that [he] failed up to the 6th of April, 1893, to account for or pay to the state or parish said \$240 so collected from said Lemoine, as will appear

from his cashbook of parish treasurer's receipts, all of which is directly in contravention of mandatory laws of the state. Fifteenth. It is shown that Lemoine owed a large sum as interest on the amount of his state and parish license, the same having become delinquent on March 1, 1892, and [the respondent's] failure to collect said interest is favoritism; and, if he did collect it, he failed to pay it into the treasury." The substance of these three charges is that the respondent collected of Lemoine \$240, on account of licenses, in October, 1892, and failed to deliver the licenses until April 6, 1893; that he failed to account for or pay over said sum of money thus collected until the 6th of April, 1893; and that notwithstanding said licenses became delinquent, and the said Lemoine owed interest after the 1st of March, 1892, the respondent failed to collect said interest, and, if he did collect said interest, he failed to pay it into the treasury. The facts are as follows, viz.: There is no entry in the license register of 1892, furnished by the state auditor, showing a license issued to Lemoine, but such an entry does appear on the supplemental statement that the respondent returned to the auditor on the 27th of April, 1893. Copies of the two state licenses of Lemoine—one a retail liquor license, and the other a retail merchant's license—bear date December 21, 1892, and aggregate \$220 in amount. Lemoine states that he paid his licenses in September, 1892, in capital and interest, \$240, but did not receive his licenses at the time of payment. The respondent explains that Lemoine gave him a draft for the amount of his licenses, but that he did not then give him his licenses, because he never issued licenses on mere drafts; and that, after the draft was paid, he failed to see him; and that he did not mail them to him, as he feared they might be lost. He states that his receipts from the state and parish treasurers show the exact amount of interest he collected, and accounted for. His settlement with the parish treasurer shows that all the parish licenses of 1892 were accounted for by the defendant, either in money or licenses returned. Taking the date of Lemoine's payment as September, 1892, and computing 2 per cent. interest per month on \$220 from the 1st of March, 1892, and we have \$26.40 as the exact amount of penalty due; that is to say, \$6.40 less than he should have paid. But this is a somewhat hypothetical statement, as no precise date is fixed from which to make an exact calculation of the interest actually due. We find on the respondent's cashbook an entry on the list of licenses paid, \$220, paid by Lemoine, and \$2.20 interest; but that was evidently the license of 1893, that was paid in on the 3d of April, 1893, only one month after they had become delinquent; and consequently \$2.20 was the exact amount of penalty due the state. The testimony of Lemoine is to that effect also.

On this statement of fact, the gravamen of these charges disappears altogether. That the collection of these licenses was delayed is evidence of neglect on the part of the defendant is true, but the state and parish have been compensated for the delay in the manner designated by law. That the remedy pointed out in the statute, whereby Lemoine could have been coerced into making a more speedy settlement than he made, was not applied, was more the fault of the tax collector's attorney than of the tax collector himself; for the statute provides that "if any business shall be conducted without a license, in case herein provided, the officer whose duty it is to issue licenses, shall, through the attorney herein provided for, on motion in the proper court, * * * take a rule," etc. Act 150 of 1890, § 18. That is the license law of the state, and it regulates the manner of collecting licenses; but it does not deal with the method of settlement. The general revenue law, above quoted from, must be examined and consulted for that purpose. The license law further declares that "the tax collector violating any of the provisions of this act * * * shall be deemed guilty of a misdemeanor in office, and shall, on conviction before a competent authority, be summarily dismissed therefrom." Act 150 of 1890, § 23. The evident import of that provision is that the tax collector must be first convicted, before a competent court, of such a misdemeanor in office as is in that statute contemplated, before he can be "summarily dismissed from office." That conviction is manifestly a *sine qua non* to removal proceedings. There is no foundation for these charges and specifications.

The sixteenth charge is as follows, viz.: "Sixteenth. It is shown that [he] permitted many persons to pay their state and parish licenses in installments, which is contrary to law, and constitutes favoritism." In support of this charge, the only specification furnished in relator's brief is that of T. S. Denson. The evidence shows that he was a retail merchant and liquor dealer, and that his licenses were the same as those of Lemoine, \$220,—and that he paid the amount in three different installments. All the payments were made within the period of one month; but he admits that he did not get the license at the time. The respondent's explanation is that, in some instances, he permitted parties to make payments in installments, not issuing licenses, however, until the whole amount was paid; and he states that he was authorized to do so by the police jury, and that, if he had not collected in this way, the money would have been lost to the state and parish. Counsel for the relator cites section 19 of Act 150 of 1890 as supporting their contention. In our opinion, there is nothing in this section to warrant that contention. It is as follows, viz.: "That the only legal evidence that a license has been paid shall be the appropriate form of

license issued by the auditor of public accounts; and no receipts issued by a tax collector in place of the license itself shall be valid; and this clause shall be construed to prevent the tax collector from issuing any receipt in lieu of the appropriate form, to any person, association of persons, or business corporations; provided, that nothing herein contained shall be so construed as to exclude oral evidence of lost or destroyed licenses." In this case the proof does show that the respondent did issue receipts to the parties making these payments by installments, but they were not intended or used as substitutes for licenses, but merely as memoranda of amounts paid, between the parties, on which bona fide licenses were thereafter regularly delivered. There is nothing in this charge.

The seventeenth charge is as follows, viz.: "Seventeenth. It is shown that on December 26 and 30, 1892, or about said dates, [he] collected from the Texas and Pacific Railroad Company and the Southern Pacific Railroad Company some \$1,500, for state and parish taxes; that he failed to pay to the parish treasurer the amounts so collected until about March 23, 1893, although he pretended to make on January 18, 1893, February 10, 1893, and March 10, 1893, true and faithful settlements of all taxes and licenses collected by him during the respective months of December, 1892, and January and February, 1893." The substance of this charge is that the respondent collected the sums specified, and thereafter failed and neglected to carry same into his accounts and settlements thereafter made; not that he had carried said money into his settlements and accounts, and thereafter failed to pay same over to the parish treasurer. The respondent's cashbook does show that he had collected of the Texas & Pacific Railroad Company about \$1,000 on December 26, 1892, and the proof shows that, in a settlement subsequently made, this sum was not included. But the respondent affirms that when the omission was discovered, while he and the parish treasurer were engaged in checking up his stub book, it was immediately entered in the cashbook at date of payment, a supplemental statement filed, and the money paid over at once, with interest added. But, even conceding the fault of the respondent to be established, the penalty of the law is not removal from office. The revenue law is clear, explicit, and free from ambiguity; for it declares "that if any tax collector fails or neglects to make a settlement provided by law, he shall forfeit the commissions so allowed to him and interest at the rate of five per cent. per month, of the sum withheld, to be computed from the time the same should have been paid, until actual payment," etc. Act 85 of 1888, § 78. That is the penalty of the law against the respondent in case his fault be deemed es-

tablished. The following paragraph attaches a different and more severe penalty to the failure to pay over money which has been ascertained to be due on settlement. It says that "any tax collector who, having made his monthly, or quarterly settlement, as provided for in this act, or in any other act, shall fail immediately to pay the amount so ascertained to be due, into the state or parish treasury and obtain the treasurer's receipts therefor shall, in addition to the forfeiture of commissions and interest as aforesaid, be subject to the penalties provided for embezzlement and to removal from office." *Id.* It is against the tax collector's failure to pay over the amount of money found to be due by him on a settlement of accounts at which the denunciation of the statute is directed, and not against his failure to account for moneys collected.

The eighteenth charge is as follows: "Eighteenth. It is shown that on October 6, 1892, [he] paid into the treasury of the parish * * * about \$700 of jurors' and witnesses' certificates in payment of parish taxes collected by him, and failed to take the oath prescribed by law; that such certificates were received bona fide by him in payment of parish taxes. It is charged that such witnesses' and jurors' certificates were not received by him from any person in bona fide payment of parish taxes." This charge is predicated upon the provisions of the Revised Statutes, (section 2646), which declares that "no claim against any parish shall be received by any parish treasurer from any collector of taxes, unless the said collector shall make oath or affirmation * * * that he has paid the full amount expressed on the face of such claim, and that he has not directly nor indirectly speculated in the public money." The proof on this point is meager, and to the effect that, during the respondent's incumbency of office, he had, from time to time, collected parish taxes in parish scripts or warrants, of different kinds, and paid same into the parish treasury, on making his settlements as tax collector; that, on making settlements with the parish treasurer and police jury, he was not required to make, and did not make, the oath indicated by the statute, that he had received same at their face value, and had not speculated in the public moneys; but the respondent affirms that such was a fact. It appears that such parish paper as was thus received by the respondent, and paid over to the parish treasurer, has, since the settlements were made, been destroyed by order of the police jury, and consequently same is not in esse. This evidence meets the requirements of the law, and the relator's charge "that such witnesses' and jurors' certificates were not received by [the respondent] from any person in bona fide payment of parish taxes." The section of the statutes referred to and relied upon is found

under the title of "Parish Treasurer," and it deals exclusively with the powers and duties of parish treasurers, and does not deal with or define the duties of tax collectors, and does not, of course, denounce any penalty against tax collectors for the non-observance of its requirements, but in this case the order of things has been reversed, and the parish treasurer, whose duty it was to see the precept of this law enforced, is put on the stand, as witness for the relator, to prove the fault of the tax collector, whereas it was primarily his own fault.

The nineteenth charge is as follows, viz.: "Nineteenth. It is shown that he has failed absolutely to keep his cashbook, furnished to him by the state auditor, as prescribed and required by Act No. 84 of 1892, in the manner required by law, viz.: He has failed to make therein the entries of the payment of taxes and other moneys paid him by the taxpayers at the time of such payments. That on December 28 and 30, 1892, or about that time, the T. & P. R. R. Co. and the S. P. R. R. Co. paid the amount of taxes due by each, amounting to several hundred dollars, and they were not entered in the cashbook at the time." The sense of this charge is that the respondent has failed to keep his cashbook in the manner prescribed by law, and not that he did not keep a cashbook at all; in other words, that "he failed to make therein the entries of the payment of taxes and other moneys paid him by the taxpayers at the time of such payments," citing the instance of the two railroad companies. The statute relied upon by the relator requires that the auditor shall furnish the tax collector with a blank cashbook, paged, ruled, and divided into columns, in such form that the tax collector may enter therein the names of the persons making payments of taxes, dates of payments, amounts paid, on what account paid, etc. That law provides that "the state taxes paid shall be first entered, and afterwards a like entry of parish taxes shall be made. The tax collector shall make such entry or entries at the time the taxpayer makes the payment of taxes." The law then prescribes and defines the duties of the parish treasurer with regard to transcribing the entries of the tax collector from his duplicate cashbook, and the kind of a certificate he shall append thereto. The final clause of the statute contains the penalty that is affixed to any violation of its provisions on the part of the tax collector, and it is in these words, viz.: "In case of the failure of the tax collector to keep said book, as above prescribed, he shall be, on complaint, dismissed from office, and shall be liable to fine and imprisonment, at the discretion of the court." Act 84 of 1892. What is the true intent and meaning of the phrase, "In case of the failure of the tax collector to keep said book, as above prescribed"? Does it not mean just what it says,—"keep said book, as above prescribed"? That is to say,

the tax collector is required to keep the cash-book in the manner indicated above; that is, according to the designations of the act from 1 to 8. While it is true that the law requires the tax collector to make entries of the taxes paid "at the time the taxpayer makes the payment," yet it was not the intention of the legislature to attach to any mere accidental omission of an amount of taxes paid, on the very date the payment was made, the severe penalties of the act. It could not have been the intention of the legislature to declare that the omission to make an entry, however small, should subject the tax collector to dismissal from office, as well as to fine and imprisonment. If such were indeed the case, it would be scarcely possible for any tax collector to escape the dire consequences of the law. Traveling, as the tax collectors of the country parishes do, from post to pillar, throughout their jurisdictions, in search of delinquent taxpayers, and gathering taxes, in diminutive amounts, from persons living at distances remote from their offices, how would it be possible for them to avoid some mistakes? We take the law to mean that the tax collector is required to keep his cash-book in the manner directed by the law; that he must observe the subdivisions and arrangement indicated in the printed headings of the book, so that it will tally with the duplicate cashbook kept by the parish treasurer, and furnish a ready source of information to any one having the pleasure to examine its contents for information in regard to taxes and licenses. While the argument of the relator apparently favors a close and rigid construction of the act, yet it virtually concedes the justice and correctness of our opinion in making the following statement, viz.: "We do contend that, if the evidence shows *flagrant violations of this provision*, the defendant should be removed from office." (Our italics.) But we fail to find in the record any evidence of the respondent's "flagrant violations of this provision." The instances given in the petition are certainly not of that character, if we are to be guided by the evidence in the record. The cash-books are before us in the original, and they appear to have been fairly well kept. They are kept in the exact manner that is indicated in the statute. True it is that they exhibit some irregularities, but they are satisfactorily explained and accounted for. Our conclusion on this branch of the subject is that this charge and the specifications under it only present inaccuracies and accidental omissions, that are not wrong in themselves or criminal in character, and that they cannot prevail.

The charges and specifications that are embraced in Nos. 20, 21, 22, 23, 24, and 25, being interrelated, may be considered together. They are as follows, viz.: "Twentyeth. It is shown that during the month of October, 1892, [he] collected as delinquent taxes due the parish for the year 1891, from

various taxpayers, the sum of \$293.82, with interest on the same amounting to about \$60, making a total of taxes and interest collected of \$353.82; [and] he never paid this sum into the parish treasury until March 10, 1893, and then only paying into the treasury the sum of \$261.10, as will be shown by the treasurer's books and receipts. Twenty-first. It is shown that in November, 1892, he collected for the parish, delinquent taxes of 1891, \$20.80, with about \$6 interest thereon, and only paid it into the treasury in May, 1893. Twenty-second. He also collected in December, 1892, delinquent parish taxes and interest of 1891, amounting to \$154.25, and only paid it into the parish treasury in May, 1893. Twenty-third. It is shown that his cashbook of 1892 does not include any of the delinquent taxes of 1891, collected by him in October, November, and December, 1892, and were not entered therein at the time they were collected, as required by law. Twenty-fourth. But it is now shown that the delinquent taxes of 1891, as collected by him in October, November, and December, 1892, were entered in the back part of his cashbook of 1893, furnished him by the state auditor of public accounts; and that such entries were never seen by the parish treasurer until about September 7, 1893; and hence they were never copied by the parish treasurer into his duplicate cashbook, as required by law, and said entries were therefore never compared with the collector's cashbook by the parish treasurer. Twenty-fifth. It is shown that such entries of delinquent taxes of 1891, collected by [him] in October, November, and December, 1892, and entered in the back part of his cashbook of 1893, were wrongful and false entries therein, for the reason that [the collector] did not get said cashbook of 1893 from the state auditor until after January 25, 1893, * * * and such entries appearing in said cashbook of delinquent taxes of 1891, collected in October, November, and December, 1892, could not have been entered therein until after January 25, 1893, all of which is contrary to law." The sum and substance of the six foregoing charges and specifications are—First, that during the month of October, 1892, he collected, delinquent taxes of 1891, aggregating, in capital and interest, \$353.82, and only accounted for \$261.10, and then only on the 10th of March, 1893; second, that delinquent taxes of 1891 he collected in November and December, 1892, he did not account for until May, 1893; third, that his cashbook of 1892 does not include the several amounts of 1891, delinquent taxes that he collected during the months of October, November, and December of 1892, but that same were wrongfully and falsely entered by the respondent in the back part of the cash-book of 1893. The remainder of the quoted averments of the petition is more in the nature of argument and explanation than of

specification. These charges are almost identical with those already considered, being clothed with slightly different phraseology, and arranged in different combination. See charges 13, 14, 15, 17, 19. We make the subjoined extract from the relator's brief, in which these charges are summarized, viz.: "The charges embraced in specifications Nos. 20, 21, 22, 23, 24, and 25, being related to each other, may be considered together. They are, in substance, that defendant collected delinquent taxes of 1891, exceeding \$500, which he never paid into the treasury until many months afterwards; that he never entered these collections on his cashbook of 1892; that he long afterwards entered them in the back of his cashbook for 1893; that the parish treasurer's attention was never called to these entries, entered in this unusual time and place; that they were therefore not included in the duplicate copy which the treasurer was required to make; that when the amount thereof was paid over in July, 1893, the treasurer did not know from what source they were derived; and that he never knew of or saw these entries until after this suit was filed, when they were discovered and shown to him by the district attorney." It will be observed that no mention is made in this summary of the twentieth charge, to the effect that the respondent had collected in October, 1892, \$353.82, of delinquent taxes of 1891, and had accounted for \$261.10 only; and none is made of the twenty-fifth charge, to the effect that the collections of delinquent taxes made in October, November, and December of 1892 were wrongfully and falsely entered in the back part of the respondent's cashbook of 1893. The presumption is that these two charges—the only two serious ones of the series of six—were not sustained by evidence, and were consequently abandoned. But the proof is to the effect that the respondent paid in \$315.20 on March 10, 1893, and in April, 1893, tendered in full all the delinquent taxes collected from October to April, 1893, but same were declined by the parish treasurer, pursuant to the instructions of the district attorney. But his receipt from the parish treasurer shows a full settlement made in July, 1893. It also appears that all of these collections are properly entered in the respondent's cashbook of 1893. The respondent explains that it was his custom to make entries of delinquent taxes collected in the back part of his cashbook in which he kept the entries of current taxes, leaving a sufficient space between them; and that this was done in order to prevent confusion in his accounts. He explains that his stub book of receipts issued is an ample check on the entries made in the cashbook, and that access to it can always be had for the purpose of the detection of errors or omissions therein. These various cumulated charges are not well grounded, and cannot prevail.

The twenty-sixth charge is as follows, viz.: "Twenty-sixth. It is shown that on June 12,

1893, or near that date, [he] obtained from the parish treasurer the sum of \$183.45, in payment of two accounts against the parish which had been approved by the Hon. A. V. Cocco, judge of the 10th Dist., which approval was made in error of fact by the judge, and on the representations of the respondent that said accounts were correct and due by the parish. It is now shown that said accounts * * * were wrong and extortionate, and contained items that the parish did not owe and was not legally chargeable for. It is shown that [he] returned to the parish about \$50 of the sum so obtained, thereby admitting the illegality and extortionate character of said charge and accounts." The facts on this subject are that one of the two accounts of the respondent covers the cost of the transportation of the deputy sheriff and a lunatic in his charge to the asylum, and their expenses, in May, 1893; and the other covers the cost of like transportation of the sheriff and a deputy from Marksville to New Orleans, to recover a capital prisoner, who was a refugee from justice, then in the hands of the police authorities, and the transportation of the sheriff, his deputy, and the prisoner from New Orleans to Marksville, and also their expenses to and from New Orleans. The only items objected to were those for transportation of the prisoner from station to the jail, deputy's transportation, and expenses in New Orleans. These two accounts were duly presented to and approved by the judge, and the parish treasurer ordered to pay them. The judge makes the following statement, viz.: "My attention was first called to these bills by the finance committee of the police jury, * * * concerning what they regarded as overcharges in those bills that had been presented by the sheriff for my approval. Upon inspecting these bills carefully and critically, I thought the items as claimed by the finance committee, were overcharges; and I took the original accounts, and called on the sheriff in his office, and invited his attention to them. We went over the accounts together, and checked off what I regarded as overcharges and erroneous charges; not legal, as I construed it. I don't say that those costs were not incurred, as I believe he was entitled [to them] under the law. We checked off the different items that appear as overcharges, and deducted them from the bill; and, upon Mr. Cannon's assurance that he would pay [the same] to the treasurer, I returned them to the finance committee, and reported to them, and they appeared to be satisfied, and my connection ceased right there." He states that the respondent did not consider the charges complained of to be erroneous, and that he only consented to reduce them on the ground that he desired to avoid litigation. To say the most that could be said about the items that were objected to, they were clearly and distinctly covered by the fee bill; but, if they were not, it does not seem at all un-

reasonable that the sheriff should have paid to the chief of police of New Orleans the actual expenses of the prisoner while in his custody. It does not seem to have been an unreasonable precaution for the respondent to have exercised in carrying with him a deputy to assist him in safely conveying back to Marksville an escaped capital prisoner,—a refugee from justice; and, as he had taken a deputy as an assistant, it is not unreasonable that he should have made against the parish a claim for the reimbursement of his expenses. If, in fact, the foregoing were incorrect charges, the incorrectness of them was apparent from a simple inspection of the face of the account that was submitted to and approved by the district judge, and paid by the parish treasurer. This is what we understand the judge to mean when he says: "I don't say these costs were not incurred, as I believe he was entitled to them under the law." It seems that no one doubts or denies the sheriff's expenditure of the money called for by the accounts. The only claim that is made is that he should have sustained the loss himself, and demanded no reimbursement from the parish. It does not require any argument to demonstrate the entire absence of any attempt at extortion on the part of the respondent in this transaction.

The twenty-seventh charge is as follows, viz.: "Twenty-seventh. It is shown that the police jury * * * passed an ordinance for the years 1891 and 1892 requiring the incorporated towns of the parish * * * to pay three mills on the dollar of taxes on all taxable property in their respective limits, to defray pro tanto the criminal expenses of the parish, exempting said towns from the payment of other taxes;" and, notwithstanding said tax has been extended on the parish assessment rolls, the respondent has failed and refused to collect it, thus ignoring the ordinances, and causing the parish grave injury, loss, and damage. The testimony of a single witness on behalf of the relator—a member of the parish finance committee—is relied upon to support this charge; and he simply states that, on the occasion of an annual settlement being made with the respondent, his committee demanded of the respondent to know why he had not collected the criminal tax which the police jury had assessed against the different municipalities, and that his answer was, "because everybody said it was illegal," to which the witness replied "that he had done what the court must do, his business being to collect until enjoined." But, in the course of this witness' cross-interrogation, the following occurred, immediately afterwards, viz.: "Q. Was that all he said? A. He said he would, if we said so, go to collecting it. * * * Q. Now, as a matter of fact, don't you know that the sheriff immediately proceeded to collect these taxes, and continued to do so until enjoined? A. I have stated I have heard he did. As a matter of fact, I don't

know anything about it." The respondent says that he consulted very nearly all the lawyers about this tax during 1891 and 1892; and they gave it as their opinion that it could not be collected; that the tax was illegal. But the finance committee was of a contrary opinion, and, in obedience to their request, the respondent commenced at once to collect the tax, and continued thereafter to collect this tax, and to pay the money over, until he was enjoined. That injunction is still pending. On this showing the charge made of nonfeasance in the performance of the duties of tax collector is utterly groundless. This is not the case of failure of a tax collector to seize, and offer for sale, property that has been regularly assessed, and which is plainly liable for an uncontested tax; and consequently the act charged does not bring the respondent within the penalty of section 60 of Act 85 of 1888, which is denounced against a tax collector for failure "to seize, advertise, and sell delinquent property." The taxes in question are not delinquent.

The final charge against the respondent is that contained in a supplemental petition, which was filed during the progress of the trial; but, as no service thereof was made, the respondent objected to any evidence being received under it, and the evidence that was introduced thereunder was received over his exception. While we are decidedly of the opinion that the ruling of the judge a quo was incorrect, and that the amendment, containing a matter of substance, should have been regularly served and defaulted, yet, as a change of ruling would serve to protract, unnecessarily, an unpleasant litigation, we prefer to pretermitt any positive ruling on the question, and pass upon the issue tendered. The charge, in substance, is that the respondent made sale of certain real estate under fi. fa., and retained out of the proceeds of sale \$39.62, to cover the taxes due on the property; and it is alleged that the retention of that sum was wrongful and extortionate, because said taxes had been paid under a tax sale previously made, and for which the respondent had given a receipt. The facts are that at the time of the execution sale, at which the plaintiff in execution became the purchaser, his attorney gave to the respondent a draft for the amount of the taxes of 1892; but, soon after the execution sale, it was discovered that the title of the defendant in execution had been theretofore divested by a tax sale. Consequently, the purchaser at sheriff's sale called upon the purchaser at tax sale, and demanded the right to redeem, when the fact was ascertained that the latter had paid the taxes of 1892 to the sheriff's deputy a little while before. When the sheriff was informed of this fact, he simply returned the draft that had been given him for taxes. That was simply a very ordinary mistake, one that very frequently occurs; and to the circumstance no wrong or improper motive could possibly attach.

After a thorough and painstaking examination of each and every one of the charges preferred against the respondent, and the specifications thereto appended, as well as the proof under them, it is our deliberate conviction that he is not guilty of any violation of law or any wrongful act or corrupt conduct in the discharge of the duties of his office that entails the penalty of removal from office. In the court below there was a verdict of the jury in favor of the respondent, acquitting him of all the charges that were preferred, and we concur in their finding. Judgment affirmed.

(46 La. Ann. 1234)

WISNEE v. ROHNERT. (No. 1,284.)

(Supreme Court of Louisiana. June 15, 1894.)

PLEADING—PETITION—DISMISSAL OF APPEAL.

1. In case a petition contains two distinct demands, one of which discloses a cause of action, and the other does not, the latter may, on exception, be disregarded, and the cause permitted to go to judgment on the remaining issue, in the district court.

2. If, in such case, the exception be improperly overruled by the judge a quo, and the ruling reversed in this court, and the remaining issue ascertained to be one not within the jurisdiction of this court *ratione materiae*, in consequence of said ruling, the appeal should be dismissed *ex propria motu*.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

Action by Edward Wisner against Morse Rohnert. Judgment for plaintiff, and defendant appeals. Dismissed.

Boatner & Lamkin, for appellant. H. P. Wells, for appellee.

WATKINS, J. The averment of the plaintiff's petition is: That in February, 1892, he executed a deed to the Delhi Land & Improvement Company, Limited, under certain conditions, to one 40-acre tract of land, and one acre of land, in the vicinity of Delhi, in the parish of Richland, and that, at the same time and place, said land and improvement company executed a deed in his favor to certain pieces and parcels of land in the same vicinity,—the two transactions being intended as an exchange pro tanto. That said deeds were placed in the keeping and custody of Morse Rohnert, the defendant, "with the understanding and express agreement that said deeds should not be recorded, nor filed for record, until after the specific performance of a certain [other] agreement between the said land improvement company and petitioner, which agreement was, in substance, that [petitioner] should pay, or cause to be paid, one-sixth of the indebtedness of said company, as soon as the other stockholders should pay their proportionate parts of said indebtedness. That, contemporaneously with the agreement, and

the delivery to the defendant of the aforesaid deed of the plaintiff, the former executed his obligation, in which he bound himself not to deliver said deed, nor permit the same to be recorded, until after the delivery by him to your petitioner of the deed made by said land company in his favor." That on or about the 27th of January, 1893, the defendant, in violation of his agreement, did cause or permit the said deed of petitioner to the land company to be recorded, "greatly to the injury and detriment of your petitioner;" and plaintiff avers "that the permitting of the recording of said deed to said land company, or allowing same to pass from his custody, was in bad faith, and that said violation of trust on the part of said Rohnert was expected and intended by said Rohnert to accrue to his personal benefit." That said violation of trust and agreement was and is productive of great injury to petitioner, and to the extent of the sum of \$5,000, to wit: "Petitioner is damaged in the sum of not less than \$1,000 by the alienation from him of his property described in said deed, made by him to said land company, without consideration, petitioner having received no consideration therefor. Petitioner is further damaged in the sum of \$4,000 by the reason that the said land company has pretended to dispose of all of the lands conveyed in both of the above-described deeds, and that not without great cost, and loss of valuable time, and the interference of business, can said agreement or contract with said Delhi Land & Improvement Co. be enforced." Wherefore, plaintiff's prayer is "for judgment in and for the amounts above specified [to] be rendered against the defendant."

From a casual inspection of the quoted averments, it is evident that there is not, nor could there be, any contingency in which the district court, or this court, could now, or at any time, have rendered a judgment for more than \$1,000, in favor of the plaintiff, and hence this court has no jurisdiction *ratione materiae*; for the plain declaration of plaintiff's petition is that "he is damaged in the sum of not less than \$1,000 by the alienation from him of his property described in his deed to the land company,"—that is to say, the 41 acres that is covered by the deed; being an estimative value of \$24 per acre,—an exceedingly improbable valuation. And its further declaration is that he is "further damaged in the sum of \$4,000 by the reason that the said land company has pretended to dispose of all the lands conveyed in both of the above-described deeds." Granting this last declaration to be absolutely true in every particular, yet it is not alleged that the defendant was, in any manner, responsible for the damage that resulted. The land improvement company was not made a party to this suit. The defendant is not alleged to be an officer, director, or stockholder of the company; nor is there alleged to be any privity of contract be-

tween them, in respect of these transactions, from which imputation of liability could be inferred. In the court below, there was first a judgment rendered in favor of the defendant, but, on rule for a new trial, that judgment was set aside, and a new trial granted. On the second trial, there was judgment in favor of the plaintiff for the sum of \$405, from which the defendant alone appealed. In this court, the plaintiff failed to answer the appeal and demand an increase of the judgment. This state of facts clearly characterizes the demands of the plaintiff—if that was needed—and furnishes confirmation of the view we entertain of the pleadings. In the lower court, the defendant filed an exception of no cause of action, which was undoubtedly directed at that part of the petition which refers to the damages that are alleged to have been suffered at the hands of the land improvement company. We are of opinion it should have been sustained, to that extent, and the suit restricted to plaintiff's remaining demand, as the judgment evidently was. Had this course been pursued, the demand against the land improvement company would have passed out of the case, and clearly exhibited the lack of jurisdiction in this court *ratione materiae*. But, as this was not done by the judge a quo, it becomes our duty to give effect to the plea of no cause of action in respect to the plaintiff's demand against the land company. And, finding that no cause of action is stated in this respect, the remaining demand for \$1,000 is not within our jurisdiction, and the appeal must be dismissed *ex propria motu*. It is therefore ordered, adjudged, and decreed that the appeal in this cause be dismissed at appellant's cost.

(46 La. Ann. 1230)

BROWN et al. v. HAYNES. (No. 1,294.)

(Supreme Court of Louisiana. June 15, 1894.)

APPEAL—REMAND FOR FURTHER EVIDENCE.

When a motion is made in this court to dismiss an appeal, on the ground that the appellant has acquiesced in the judgment, and consented to the execution, the cause will be remanded for the purpose of permitting the administration of proof on that question.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

Bill by C. A. Brown and others against G. B. Haynes, administrator. Judgment for plaintiffs, and defendant appeals. Remanded.

Stubbs & Russell, Drew & Stewart, and J. A. Dorman, for appellant. Gunby & Sholars, for appellees.

WATKINS, J. Plaintiffs, averring themselves, in their partnership capacity, owners of a certain sawmill, complete, including engine, boiler, and fixtures, and 20,000 feet of

lumber, and that the defendant, as administrator of the succession of J. O. Rouschick, has advertised said property for sale, as that of the succession, prayed for and obtained an injunction staying sale proceedings until the right of property could be judicially tested and determined. In an amended petition, plaintiffs laid claim to a lot of saw logs, in addition to the aforesaid property. In answer to the original petition, the administrator pleads, first, a general denial; and, second, that the sawmill plant and fixtures had been sold by the plaintiffs to the deceased, who was in possession; and that the plaintiffs thereafter operated same as employes of the deceased, and for his account; and hence he prays the dissolution of plaintiffs' injunction, at his cost. His answer to the amended petition is a general denial. On the trial, there was judgment in favor of the plaintiffs, recognizing their ownership of the entire plant and property claimed, and perpetuating the injunction; and from the judgment the administrator has appealed.

In this court, the plaintiffs and appellees have filed a motion to dismiss the appeal, on the ground that the judgment appealed from has been acquiesced in. They aver that "they are in the peaceable, undisturbed possession of the property, the subject of the controversy herein, and have been in possession thereof since the rendition of the judgment herein appealed from; that they took possession of said property with the full knowledge and consent of the defendant, G. B. Haynes, administrator; and that said defendant has fully acquiesced in said judgment, and consented to the execution of the same." Wherefore, they pray that the appeal be dismissed. The truth of the statement made in the motion is affirmed on the oath of one of the appellees. Of course, the appeal should be dismissed if, as the appellees' motion declares, the appellant has acquiesced in the judgment rendered, and consented to its execution, since same was rendered. If, indeed, the plaintiffs have been allowed to take open, peaceable, and undisturbed possession of the property in dispute, as owners, with the full knowledge of the defendant administrator, that is the end of the case, and there is nothing further left for us to decide. But, manifestly, these are questions en pais, which require the administration of proof in the court of original jurisdiction, nothing appearing on the face of the transcript in respect to transactions occurring since the judgment was rendered in the court a quo. For this purpose, the cause must halt where it is, until such proof is administered; and the cause must be remanded for that purpose. It is therefore ordered, adjudged, and decreed that the cause be remanded, in its present situation, to the court a quo, with instructions to the judge of the lower court to hear proof in regard to the defendant's acquiescence in the judgment, so that further proceedings can be had

in the cause according to law; and it is further ordered that further proceedings herein be stayed until the further order of this court.

(71 Miss. 762)

SAFFOLD et al. v. HORNE et al.

(Supreme Court of Mississippi. April 30, 1894.)

EQUITY—DISMISSAL OF CROSS BILL—ANSWER AS EVIDENCE—COMPETENCY OF RESPONDENT.

1. Complainant's answer to a cross bill which has been dismissed cannot be read in evidence in his favor.

2. The effect of an answer responsive to a bill does not depend upon respondent's competency as a witness.

Appeal from chancery court, Harrison county; W. T. Houston, Chancellor.

Action by John W. Horne and others against William Saffold and others. From a decree for complainants, defendants appeal. Reversed.

Nugent & McWillie, for appellants. J. M. Shelton and E. J. Bowers, for appellees.

CAMPBELL, C. J. It was erroneous to receive as evidence the answers of Horne and Humphries to the cross bill which had been dismissed. Although the chancellor denied the motion to take them off the file, they could not be read as evidence for the complainants, for they fell with the cross bill to which they were answers. That Horne and Humphries are not competent as witnesses against the estate of a deceased person has no influence on the question. The rule as to the effect of an answer responsive to a bill is not affected by the incompetency of the respondent as a witness, as has been often decided. But when the cross bill fell, by the action of the court on the application of the parties who exhibited it, the answers went with it. An answer responsive to a bill avails the respondent in the hearing of the case in which it is part, but it is not evidence, for the party who makes it, in any other issue. It performs its office as a response to the bill it answers. Away from that, it has no function, and can serve no purpose of its author as evidence for him. It serves him only against the bill it answers. All that is found in the books as to the effect of an answer has reference to its effect or influence as to the bill answered, and not to other and different issues. After the dismissal of the ill-advised cross bill in this case, the cause stood on bill and answer, and no evidence was admissible, except such as would have been if a cross bill had not been thought of. The idea seems to have obtained that a defendant to a bill for relief, called on to answer under oath, is entitled ever afterwards to use as evidence in his behalf his answer thus made. Such an idea is without any support whatever in principle or authority, as may be discovered by any one who will diligently examine the subject. Reversed and remanded.

(71 Miss. 656, 658)

JACOBS v. NEW YORK LIFE INS. CO.

(Supreme Court of Mississippi. Feb. 19, 1894.)

FINAL JUDGMENT—ORDER SUSTAINING DEMURRER—LIFE INSURANCE—DEATH PENDING APPLICATION.

1. An order sustaining a demurrer to a declaration, though not expressly dismissing the action, is a final judgment, and appealable, when leave to amend is not obtained during the term.

2. An insurance company is not liable where the application provides that there shall be no liability until it is approved and accepted, and the applicant dies pending its consideration.

Appeal from circuit court, Copiah county; J. B. Chrisman, Judge.

Action by Regina M. Jacobs against the New York Life Insurance Company. A demurrer to the declaration was sustained, and plaintiff appealed. Defendant moved to dismiss the appeal, on the ground that the order appealed from was not a final judgment. Motion denied. Judgment affirmed.

Mayes & Harris, for appellant. J. S. Sexton, for appellee.

On Motion to Dismiss Appeal for Want of Jurisdiction in Court.

CAMPBELL, C. J. The motion will be denied. The order, as entered on the minutes of the circuit court, sustaining the demurrer to the declaration, although not expressing that the action was thereby dismissed, was, in substance and effect, a judgment that the plaintiff take nothing, and that defendant go hence without day. 5 Am. & Eng. Enc. Law, 562. It is not the duty of the court to offer the plaintiff leave to amend when a demurrer is sustained to the declaration. If desired, it must be asked for, and, if leave to amend is not obtained during the term, the judgment is final, and the case disposed of, so that costs may be taxed, and an appeal may be prosecuted from the judgment as final. Motion denied.

On the Merits.

There is no escape from the plain stipulation of the contract "that, if said application is not approved and accepted, said company shall incur no liability thereunder," and the fact that said application was not approved and accepted, but the applicant died while the company was considering the application. It had incurred no liability, and cannot be held bound as if it had. We have examined the cases cited for the appellant, but they fall far short of maintaining the liability of the company. The denial of all liability by the company, on the facts of this case, does not need the support of adjudications, and we have not examined any, preferring to rest with perfect confidence on the unmistakable meaning of the written agreement, which no number of books or extent of ingenious argument could change so as to create liability, except on the terms it expresses. Affirmed.

(71 Miss. 753)

ADAMS, State Revenue Agent, v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi. March 18, 1894.)

LIMITATION OF ACTIONS—LEVEE DISTRICT.

1. The Yazoo-Mississippi delta levee district is a subdivision of the state, within Const. 1890, § 104, providing that statutes of limitation in civil causes shall not run against the state or any subdivision thereof.

2. Const. 1890, § 104, providing that statutes of limitation shall not run against the state, or any subdivision thereof, became operative upon the adoption of the constitution, and was not suspended by section 274, continuing in force, temporarily, statutes repugnant to the new constitution, because there was no statute repugnant to such section.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

"To be officially reported."

Action by Wirt Adams, state revenue agent, against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Calhoon & Green, for appellant. Mayes & Harris, for appellee.

CAMPBELL, C. J. The Yazoo-Mississippi delta levee district, created by statute, and recognized by article 11 of the state constitution as a division of the state, is a subdivision thereof, within the terms of section 104 of the constitution of 1890, which declares "statutes of limitation in civil causes shall not run against the state, or any subdivision, or municipal corporation thereof." And said section became operative immediately, by its own force, on the adoption of the constitution, not being suspended in its operation by section 274 of that instrument, because not embraced, there being no statute law of this state repugnant to this provision of the constitution. The statute of limitations applicable to such a demand as that here sued for is the six-years statute. The three-years statute (section 2670, Code of 1880) relates to actions founded on contract, express or implied. In saying that the six-years statute is applicable to the demand sued for, we mean that it applies to the taxes due, as imposed by the law, and not to the penalty of double the sum for default as to payment, which may be governed by section 2672 of the Code of 1880, to which we refer, in order to exclude the conclusion that it is decided now. The demurrer to the pleas should have been sustained, and the judgment is reversed, the demurrer sustained, and leave given to the defendant to answer over. Reversed and remanded.

(103 Ala. 29)

BRADLEY v. STATE.

(Supreme Court of Alabama. May 23, 1894.)

CRIMINAL LAW—ROBBERY—ADMISSIBILITY OF EVIDENCE.

On indictment for robbery, testimony that the prosecuting witness had in his possession,

shortly before the alleged robbery, money of the value and description of that charged to have been taken, is admissible.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Jim Bradley was convicted of robbery, and appeals. Affirmed.

The appellant was indicted, tried, and convicted for robbery, and sentenced to the penitentiary for five years. The testimony for the state tended to show that the defendant, with two others, had robbed one Allen Givens of \$7.85, of the following denominations: One five-dollar bill, two one-dollar silver pieces, and the rest in small change. The said Givens testified, as a witness for the state, that a short time before he was robbed he was in the place of business of one O'Rear, and while there he took out his money, and showed it to the witness O'Rear, and that it was of this money, which he had shown the said O'Rear, that he was robbed. The state introduced the said O'Rear as a witness, who testified that, on the evening of the alleged robbery, Allen Givens, who was in his place of business, took his pocket-book out of his pocket, and counted out, in the presence of the said O'Rear, one five-dollar bill, two silver dollars, and some small change. The defendant objected to this testimony, and moved to exclude the same. The court overruled the objection, and the defendant duly accepted. This ruling presents the only question reserved.

Wm. L. Martin, Atty. Gen., for the State.

BRICKELL, C. J. The general rule in regard to the relevancy of testimony is that facts and circumstances which are incapable of affording any reasonable presumption or inference in reference to a material fact or inquiry involved in the issue are irrelevant and inadmissible. But facts and circumstances which have a tendency to shed light upon a material inquiry, which are pertinent and not foreign to the issue, though, if disconnected from other evidence, are of themselves incapable of affording a reasonable presumption or inference, are admissible. The testimony of the witness O'Rear that an hour or two before the occurrence of the alleged robbery the prosecutor had in his possession money of the description and value charged to have been taken from his person was properly admitted. It was, as to the material fact that the prosecutor had such money at the time of the alleged robbery, confirmatory of his testimony, and for this reason was admissible. 1 Tayl. Evi. §§ 335, 336. The possession of personal property is prima facie evidence of ownership, and the evidence was admissible for the further purpose of proving the material fact of ownership, as alleged in the indictment. The admission of this evidence is the only question raised on the record, and the judgment of the city court is affirmed. Affirmed.

(103 Ala. 481)

BUTLER et al. v. HANNAH.

(Supreme Court of Alabama. May 23, 1894.)

REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE—FINDING OF FACT—WHEN REVIEWABLE.

1. In an action to redeem lands sold under execution, testimony of plaintiff's husband that he made a tender in gold coin, which is denied by defendant, who testified that he refused to sign an acknowledgment of a tender, because none was in fact made, is insufficient to show a tender, where a third person, who was present at the transaction, was not examined by either party, and his absence is not explained.

2. Where the evidence is wholly by depositions, findings of fact by the trial court may be reviewed on appeal.

Appeal from chancery court, Madison county; Thomas Cobles, Chancellor.

Bill by Laura B. Hannah against James E. Butler and others to redeem lands sold under execution. From a decree for plaintiff, defendants appeal. Reversed.

William Richardson, for appellants. Lawrence Cooper, for appellee.

COLEMAN, J. Laura B. Hannah, as the owner and holder of a judgment against Andrew J. Hannah, filed the present bill to redeem certain lands which had been sold under execution issued upon a judgment recovered by a different creditor against the said Andrew J. Hannah, and which lands were purchased by James E. Butler. The bill was filed within two years, and we hold the averments are sufficient to entitle complainant to relief if sustained by the proof. The statute provides the terms upon which one judgment creditor may redeem lands from a purchaser at execution sale or from another judgment creditor. In construing the statute, this court has uniformly held that the redemptioner must tender to the purchaser or his vendee the purchase money and 10 per cent. per annum thereon, and all lawful charges; and unless this is done before the filing of a bill to redeem, or some sufficient reason for not making the tender is shown, the redemptioner is not entitled to relief. *Beebe v. Buxton* (Ala.) 12 South. 587; *Lehman, Durr & Co. v. Moore*, 93 Ala. 186, 9 South. 590. The bill avers distinctly that the tender was made to James E. Butler, and the answer denies with equal emphasis that any money whatever was tendered. Andrew J. Hannah, the husband of the complainant, was the only witness examined to prove the tender. He swears positively to a tender to James E. Butler, in gold coin, of the proper amount, and 10 per cent. per annum. His evidence sustains the averments of the bill. James E. Butler testified positively that no such tender was made; that "neither A. J. Hannah nor Laura B. Hannah, nor any one acting for them," tendered him any money before the bill was filed. He says A. J. Hannah came to him with a paper, and wanted him to sign an acknowledgment that a legal tender had been made, "which witness refused to do, as he had made no tender

of any cash." The evidence is irreconcilable, and there is nothing that would justify a reasonable conclusion that the complainant had made good the averment of a tender. It would appear from the testimony of both these witnesses that a third person was present as a witness to the transaction between them, and, strange to say, this person was not examined by either party, nor any reason given why he was not examined. The case is not the same as when a court has a witness examined orally in its presence, and can consider the manner, tone, and appearance of the witness during his examination, in weighing the evidence. In the case at bar, both witnesses were examined by deposition. This court has all the means of weighing the testimony possessed by the chancery court, and, after weighing the evidence, we are not satisfied that a legal tender was made. It may be, as argued by the appellee, that the purchaser denied the right of complainant to redeem, and would have refused a tender if made. We do not know this. He remained at his place of business, was accessible, and, it seems, did not avoid giving to complainant the opportunity to make a tender. He testified that he refused to acknowledge a tender, because no cash was in fact tendered. There are other questions argued, but our conclusion upon the question of a tender renders it unnecessary to consider them. Reversed and remanded.

BRICKELL, C. J., not sitting.

(103 Ala. 50)

LOWERY v. STATE.

(Supreme Court of Alabama. May 23, 1894.)

ESTABLISHMENT OF COURT—CONSTITUTIONALITY—HOMICIDE—DUTY TO RETREAT—QUESTION FOR JURY.

1. Acts 1890-91, p. 592, establishing an additional circuit court in the county of Blount, does not create a new court, but merely divides the territorial jurisdiction of the court already established, and is constitutional.

2. Where a general request includes several charges, and is refused, if any one is bad, a general exception to such refusal is unavailable.

3. Whether a distance of 12 or 15 feet from deceased, who had a gun, was such perilous proximity as would have increased defendant's danger, had he attempted to retreat, is a question for the jury.

Appeal from circuit court, Blount county; John B. Tally, Judge.

John H. Lowery was convicted of manslaughter, and appeals. Affirmed.

The appellant was tried under the following indictment: "The grand jury for the western division of said county charges that, before the finding of this indictment, John H. Lowery, unlawfully, and with malice aforethought, killed William Justice, by shooting him with a gun or pistol." This indictment was preferred by the grand jury organized for the circuit court of the western division of Blount county, as authorized by an act of the general assembly approved February 12,

1891 (Acts 1890-91, p. 592). Upon the trial of the cause, as is shown by the bill of exceptions, the evidence introduced tended to show that at the time the fatal shot was fired the deceased, who was standing 12 or 15 feet from the defendant, had a gun drawn upon the defendant, and had snapped one barrel at him. After the introduction of all the evidence, the bill of exceptions recites that "the defendant asked the court in writing to give the following charges to the jury, which the court refused to do, and to the refusal the defendant duly excepted." The first charge which was thus asked by the defendant was as follows: "If the deceased and the defendant were at the time of the difficulty within a few feet—12 or 15 feet—apart, then that in law would be a perilous proximity, which in law could only increase the danger of one who attempts to fly from an assault with a gun." The defendant moved for a new trial, assigning several grounds therefor. The court overruled this motion, and the defendant duly excepted. The defendant then moved the court in arrest of judgment, upon the grounds—First, that the indictment against the defendant was not found by a grand jury authorized by law; second, that the court had no jurisdiction to try said cause; and, third, because the act creating this court is unconstitutional. This motion was overruled, and the defendant duly excepted.

Robt. T. Robinett, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The appellant was indicted and tried for the offense of murder, and convicted of manslaughter in the second degree, and fined \$50, and sentenced to imprisonment in the county jail for one month. The indictment and trial were in that division of the circuit court of Blount county created and defined by the act of the general assembly entitled "An act to establish an additional circuit court in the county of Blount and to provide a place for holding the same." Acts 1890-91, p. 592. It is insisted this act is unconstitutional, and the argument made in the brief is that the legislature has power, under the constitution, to create inferior courts only, and that this is not an inferior court, because the act contains no provision by which its proceedings may be reviewed by a higher tribunal. When the act is examined it is seen that it does not create a new court at all. Its purpose and effect are to divide the territorial jurisdiction of the circuit court, already established by the constitution, into two divisions, and to establish two places of holding that court in Blount county,—one in each division,—and to confer upon each division exclusive jurisdiction of all causes, civil and criminal, arising in its territory. Combined, they constitute the circuit court of Blount county, as established by the constitution, and form part of the ninth

judicial circuit of Alabama. We have been referred to no provision of the constitution, and are aware of none, which imposes any limitation upon the power of the legislature to thus divide the territorial jurisdiction of the circuit court of a county, and appoint a place in each division for holding the court. No objection to the act has been pointed out to us, except that above stated; and, the court being a division of the circuit court, the general statute of appeals applies to its judgments, as well as to those of any other circuit court in the state. It was unnecessary that the act make a special provision for revision by the appellate court.

The appellant, in one general request, asked the court to give eight written charges, and reserved a general exception to the refusal of the court to give them. In such case, if any one of the charges is bad, we cannot put the trial court in error, although one or more of the others may have been good. Looking at the first of these charges, we find it manifestly bad. It was for the jury, not the court, to determine whether the distance of 12 or 15 feet, which separated the combatants, was such perilous proximity as would have increased defendant's danger if he had attempted to avoid the combat by retreat. We therefore do not consider the other charges. We cannot revise the action of the trial court on motion for a new trial in a criminal case. Affirmed.

(103 Ala. 207)

MOBILE COUNTY v. POWERS.

(Supreme Court of Alabama. May 17, 1894.)

COUNTIES—FEES OF CLERK OF COURT—FROM WHAT FUND PAYABLE.

Sections 1, 2, p. 9, Acts 1890-91, consolidate the fine and forfeiture and general funds of the county of Mobile, and provide that all claims which, under existing law, were charges upon the fine and forfeiture fund, whether then existing or subsequently accruing, should be paid from the consolidated fund. Sections 3, 4, and 5 provide that all existing claims against the fine and forfeiture fund shall be paid only when there is a surplus arising from fines and forfeitures, after payment therefrom of subsequently accruing claims. Plaintiff's claim for fees as clerk of a city court accrued after the passage of this act, and, but for it, would have been payable out of the fine and forfeiture fund only. *Held*, that his claim was payable out of the consolidated fund, without reference to the moneys arising from fines and forfeitures.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Action by John F. Powers against the county of Mobile to recover fees. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff, in his complaint, claims the amount sued for as due him for services rendered at the November criminal term of the city court of Mobile, for 1892, and avers that the plaintiff was, at that time, the duly-appointed and qualified clerk of said court, and performed such services at the instance of

the solicitor in cases where indictments had been found, and for which services the plaintiff was entitled to the compensation charged by him, under section 4869 of the Code; that the defendants, in each of the cases in which such services were rendered, were acquitted, or the cases *nol pros'd*, or the indictments quashed; that after the expiration of the term, and on the 13th of February, 1893, he made up and presented an itemized account of the several services so rendered by him against the county of Mobile; that he duly verified and presented said claim, and requested registration in its proper order, and then, within 12 months from the date of its accrual, presented it to the county commissioners of said county; and that it was by them disallowed before the commencement of the plaintiff's suit. Several demurrers were filed to this complaint, and overruled, and the county then pleaded, first, the general issue, and, second, that the act under which the claim was made is unconstitutional, because it impairs the obligation of contracts. The cause was tried upon the following agreed statement of facts: "John F. Powers is now, and has been for many years, the duly-appointed and qualified clerk of the city court of Mobile, and was such, and so acted, during the November term, 1892, of said court, and then and there, in the performance of such duties as such clerk, the said John F. Powers did, at the instance of the solicitor of Mobile county, render certain services in a number of criminal cases pending in said court during said term, wherein criminal indictments were presented by the state of Alabama against several persons, and for such services the plaintiff was, under the provisions of section 4869 of the Criminal Code of Alabama, entitled to receive certain fees, aggregating the sum of four hundred and eighty-five dollars; and it is further admitted that the defendants in each of said causes were acquitted, or the cases were *nol pros'd*, or the indictments were quashed; and it is further admitted that after the expiration of said term, and on, to wit, the 13th day of February, 1893, the said plaintiff made up and presented, in due form, an itemized account of the several services rendered by him as aforesaid, during said term, against the county of Mobile, which said account was duly sworn to, as required by law, and was in due time presented by the plaintiff for registration in its proper order; and said account was, within twelve months after the same accrued, duly presented to the county commissioners of Mobile county, and was by said county commissioners duly passed upon and disallowed as a claim against the county of Mobile, before the commencement of this suit, holding that said claim was payable only out of the fine and forfeiture fund of said county, when there should be a sufficient amount in said fund to pay the same, after the payment of state witnesses or other claims that might be en-

titled to a preference. It is further agreed that on December 3, 1890, the date of the approval of the act entitled, 'An act to dispose of the fine and forfeiture fund in Mobile county, and to provide for the payment of all claims which are by law a charge against said fund,' there was a certain amount of money in the fine and forfeiture fund in Mobile county, and there were also at said date claims belonging to former sheriffs of Mobile county, and also claims belonging to the clerk of the city court of Mobile, all properly verified and registered with the treasurer of Mobile county, all of which claims were by law payable out of said fine and forfeiture fund, and none of said claims have been paid. The said claims referred to as claims registered against, and payable out of, said fine and forfeiture fund, at the time of the passage of said act, were for services rendered by such sheriffs and clerk in criminal cases tried in the city court of Mobile wherein the defendants were acquitted, or the cases *nol pros'd*, or the indictments quashed, prior to Dec. 3d, 1890."

Wm. S. Anderson, for appellant. Gregory L. & H. T. Smith, for appellee.

HEAD, J. The controversy brings us to construe the act, "To dispose of the fine and forfeiture fund in Mobile county, and to provide for the payment of all claims, which are by law a charge against said fund." Acts 1890-91, p. 9. The precise question presented is whether a claim which accrued after the passage of this act, in favor of the clerk of the city court of Mobile, which, without the act, would have been a proper claim against the fine and forfeiture fund, is now, by virtue of the act, payable out of the general treasury, without regard to whether there are funds in the treasury to cover it, arising from fines and forfeitures. If the act stopped with sections 1 and 2, no question could arise about it. They, in plain terms, abolish all distinction between the fine and forfeiture and general funds of the county, consolidate the two, and provide for the payment, out of the consolidated fund, of all claims, whether then existing or subsequently accruing, which, under existing law, were charges upon the fine and forfeiture fund. The controversy grows out of sections 3, 4, and 5 of the act. When we use the term "existing claims" in this opinion, we will be understood to mean claims outstanding against the fine and forfeiture fund at the time of the passage of the act; and by "subsequently accruing claims" we will mean claims accruing subsequently thereto, which, under the former law, would have been charges upon the fine and forfeiture fund. Sections 3, 4, and 5, when carefully read, are seen to relate alone to the existing claims; and the sole purpose of their insertion was to postpone the payment of such existing claims, in a way therein made known, oper-

ating, in effect, as a qualification or proviso to the general provision of section 2, that all claims existing and subsequently accruing shall be paid out of the general treasury. To this end, the following provisional scheme and plan were adopted, viz.: That the existing claims shall be paid only when there shall be a surplus in the treasury of the moneys arising from fines and forfeitures, after payment, out of such moneys, of the subsequently accruing claims; and when there shall be such a surplus or surpluses, arising from time to time, then the existing claims shall be paid therefrom, according to specified priorities, until all shall have been paid. To facilitate this plan, it is provided (notwithstanding, by virtue of the consolidation of the two funds under the first section, there is but one fund in the treasury) that the treasurer shall keep a separate account, showing all moneys received into the treasury arising from fines and forfeitures, and all moneys paid out on the subsequently accruing claims, so as to be able at any time to ascertain when there is such surplus in the treasury, until all the existing claims shall have been paid. The salary of the judge of the city court, formerly a charge on the fine and forfeiture fund, shall not be considered in ascertaining the surpluses. All existing claims shall be registered within three months after the passage of the act, or they lose their priority of payment. This is a plain statement of the provisions of the act, and their meaning appears to us clear. Their effect is that all claims, whenever contracted, are payable out of the general consolidated fund,—for there is but one fund; there is no separation of the moneys in the treasury,—but, as to the existing claims, they shall be paid, not generally, like others, but on a contingency, which is that there is in the treasury an excess of moneys, coming in from fines and forfeitures, over the amounts paid out on subsequently accruing claims, and then only to the extent of such excess, the excess to be ascertained by the separate account the treasurer is required to keep. Whenever a sufficiency of these excesses shall have arisen in the treasury to cover all the existing claims, then sections 3, 4, and 5 of the act will have spent their force, and sections 1 and 2 will stand as the unqualified, enduring law for the government of the treasury. Now, it seems from all this, too clear for doubt, that there was no intention to place any qualification or limitation whatever upon the payment, from the general consolidated treasury, of any claims, as directed by section 2 of the act, except the existing claims against the fine and forfeiture fund. Argument to the contrary is predicable alone on that expression in section 3 that the existing claims shall be paid only when there shall be a surplus in the county treasury, arising from said fund (fines and forfeitures), *"after the payment, out of the moneys coming from said fund,"* of the subsequently ac-

curring claims,—the contention being that subsequently accruing claims can only be paid when there are moneys in the treasury arising from fines and forfeitures sufficient to cover them. Construing the expression above quoted and emphasized in connection with section 2, and seeing how carefully, and with what minuteness of detail, the limitation upon the payment of existing claims is defined, and seeing the expression used in the framework of that limitation, we do not hesitate to declare that it does not mean literally that subsequently accruing claims shall be paid out of the fine and forfeiture moneys actually in the treasury. It means simply that whenever it is shown, by the separate account the treasurer is required to keep, that more funds have come in from fines and forfeitures than the amount which has been paid out on subsequently accruing claims, then the amount so paid out shall be referable to the funds so received, as a means of ascertaining a surplus, to the extent of which the existing claims may be paid. The postponement of payment of the existing claims was the central thought of the legislative mind, and the terms used were but the formulation of a plan to carry that thought into effect. There was manifestly no purpose to otherwise limit section 2. We hold that, plaintiff's being a subsequently accruing claim, he was entitled to have it allowed and paid out of the general treasury, without regard to the existence therein of moneys arising from fines and forfeitures. Affirmed.

(101 Ala. 632)

NEWSOM v. HOLESAPPLE. (No. 155.)

GUY et ux. v. NEWSOM. (No. 156.)

(Supreme Court of Alabama. May 18, 1894.)

CONSTRUCTION OF WILL.—DEFEASIBLE ESTATE.

Testator gave to his grandson certain property on the condition that if the grandson died, leaving no issue, the property devised should go to plaintiff. *Held*, that the grandson took a conditional fee, defeasible on his dying without issue, and that, on his death without issue, plaintiff became entitled to the property.

Appeal from circuit court, Colbert county; H. C. Speake, Judge.

Ejectment by John E. Newsom against James E. Holesapple. Judgment for defendant, and plaintiff appeals. Reversed.

Ejectment by John E. Newsom against I. P. Guy and another. Judgment for plaintiff, and defendants appeal. Reversed.

These two cases were statutory actions of ejectment, brought by John E. Newsom on January 9, 1892, against James E. Holesapple and I. P. Guy and wife, respectively, for the recovery of certain lands specifically described in each of the complaints. In the case against Holesapple, No. 155, the lands sued for were thus described in the complaint: "The northwest quarter of the northeast quarter of section one (1) in township four (4), and range fourteen (14) (except two acres upon which defendant's dwelling house

is located, and which two acres is not claimed by plaintiff or sued for in this action)." In the case against Guy, the complaint described the lands sued for as follows: "All of fractional section thirty-one (31) in township three (3) range thirteen (13) west. All of fractional section six (6) in township four (4) range thirteen (13) west. The southeast quarter ($\frac{1}{4}$) of section one (1) in township four (4) range fourteen (14) west and the northeast quarter of section one (1) in township four (4) range fourteen west except forty acres in the northwest corner of the last-described tract of land above." In each of the cases the defendants pleaded the general issue and adverse possession. All of the other facts necessary to a full understanding of the decision in these cases, are sufficiently stated in the opinion. In the case against Holesapple, No. 155, the court, at the request of the defendant, gave the general affirmative charge in his behalf, and refused a like charge for the plaintiff, and to each of these rulings the plaintiff duly excepted. In this case there was judgment for the defendant, and plaintiff appeals, and assigns as error the court's ruling upon the charges asked. In the case against Guy and wife, No. 156, the court, at the request of the plaintiff, gave to the jury the following written charge: "If the jury believe all the evidence in this case they should return a verdict for the plaintiff for the land described, as all of fractional section thirty-one, township three, range thirteen; all of fractional section six, township four, range thirteen, except the one-half thereof." The defendants duly excepted to the giving of this charge, and also excepted to the court's refusal to give the general affirmative charge in their behalf. In this case there was judgment for the plaintiff, and defendants appeal, and assign as error the rulings of the court in giving the charge asked by the plaintiff, and the refusal to give the charge asked by the defendants.

J. B. Moon and Roulhac & Nathan, for plaintiff. J. T. Kirk and R. O. Brickell, for defendants.

HARALSON, J. Whitmel Rutland died in Franklin county, in the year 1857, leaving a large landed and personal estate, which he undertook to dispose of by his last will. The will was dated 2d January, 1855, with a codicil added, of date February 19, 1855, and both were duly proved and admitted to probate in said county, on the 9th day of February, 1857. By the first clause in the will of the testator, he gave to his daughter, Penelope M. Newsom, one-half of his land which he had bought from one A. Barton, "to be divided by a line running North and South, parallel with the section lines, it being the west half of said land;" together with a number of slaves and other personal property. He added in reference to this devise,

"It is my desire that my daughter, Penelope M. Newsom, shall continue in and have free use of my dwelling house, so long as she remains a widow." By the codicil to his will, he gave to his said daughter, Penelope, "One-half section of land, that is the west half of the Section I live on, that was given to her in consideration of two thousand dollars paid by her husband, E. H. Newsom, on the purchase of said lands." We have quoted the language of the codicil. These lands appear to have been given to the said Penelope absolutely, unaffected by any conditions imposed on the devise of them to her. The testator makes a number of specific bequests of personal property and money, and then he makes devises and bequests of the remainder of his land and personal property. The will has no numbered items, but is written throughout, without apparent reference to order or systematic arrangement. For the sake of convenience in construing the instrument, we number certain parts of it, as items 12, 13 and 14, as has been done by counsel. According to that numbering, item 12 reads: (12) "I give and bequeath to my grandson, Whitmel Rutland Newsom, upon conditions hereinafter expressed, the two quarter sections of land I bought of O. T. Barton and wife, being the northwest quarter of Section one, and the northwest quarter of Section No. two, in Township four and Range fourteen, West, West of Huntsville, and the east half of my lands according to quantity, to be divided between him and his mother by a line running North and South, parallel with the Section lines, so that all the buildings may be on that part allotted to my grand-son, Whitmel Rutland Newsom, reserving however the lifetime (right) of his mother, (should she never marry) the said Penelope M. Newsom, in and to the dwelling house and out houses for the benefit of the family so long as she may live." The land last referred to in this item, the east half of which the testator gave his said grandson, is evidently the land referred to in item 1, the west half of which he gave to his said daughter, Penelope M., and designated as land bought by him from A. Barton. (13) The thirteenth item is as follows: "I also give and bequeath unto my grand-son, Whitmel Rutland Newsom, the following described lands,—the north-east quarter of fractional Section six in fractional Township four, Range thirteen, also the north-east quarter of Section one, Township four, Range fourteen, West, also the south-east quarter of Section No. six and the south-east quarter of section No. one in township four, range fourteen, also." (14) "I give unto my grand-son Whitmel Rutland Newsom upon the same conditions all the remainder of my estate, not already given away including negroes stocks of every kind crops of every description that may be growing or housed, provisions of all kinds, including notes, money, accounts and claims which I may have at my death, including also the

increase either by birth or purchase after the payment of all my debts and specified legacies. My will and desire is that all the property given conditionally to my grandson, Whitmel Rutland Newsom shall be kept together and worked on the land, and that my brother Turner Rutland, now living, with me, may be and remain on the farm and be supported by his nephew Whitmel R. Newsom so long as said Turner Rutland shall live. Now my will and desire is that should my grandson Whitmel Rutland Newsom die, leaving no legitimate issue at his death, then and in that case all the property of every kind and description herein devised conditionally to him shall go to and belong to my grandson John Newsom, and in case my grandson John Newsom should die, leaving no legitimate issue living, shall go to and belong to my grand-daughter Francis Pamela Newsom and her heirs forever."

The defendant in case 155, claims possession of the land under a title duly executed by said Whitmel Rutland Newsom, on the 20th of March, 1871, by which he conveyed to Sallie V. Holesapple, wife of defendant, the absolute title to the land sued for. The conveyance was to the said Sallie V. "and her heirs and assigns forever." Item 13 of said will which has been copied, embraces the lands sued for. The contention of the plaintiff is, that in and by the said will of said Rutland, the said Whitmel Rutland Newsom, took only a life estate in all the lands devised to him by said testator, in said three items of the will, with remainder to the plaintiff, and the said Whitmel R. having departed this life, in October, 1891, unmarried and without issue, as was shown, that plaintiff, under said will became entitled to the possession of all of said lands, including that sued for in this action; whereas, the defendant insists that an absolute fee-simple estate was conferred on said Whitmel Rutland Newsom to the lands mentioned in said item 13. The same contention is made between the parties in case No. 156. In case 155 the court gave the general charge for the defendant, and refused a like charge for the plaintiff. In case 156, it gave the general charge for the recovery of certain lands sued for, mentioned in the charge, and refused the general charge for the defendant, holding that item 13 conveyed an absolute and the others a life estate merely, to said Whitmel R. We are invited by this appeal to construe said will and to pass upon the rulings of the court in both cases, submitted together on the same evidence.

This will has been before this court in another case for construction, but not upon the point now raised. The question there presented and discussed has no bearing upon this case. It was said by the court, however, that said will was drawn without regard to proper punctuation, capitalization or a proper separation of the clauses. Newsom v. Thornton, 82 Ala. 404, 8 South. 281. In

arriving at the intention of a testator in a will so bunglingly drawn as this one was, we may look at the whole instrument and the circumstances which surrounded him at the time. *Wolfe v. Loeb* (Ala.) 13 South. 744. It is evident, after making what he thought was a competent provision for his widowed daughter, Penelope Newsom, that the chief object of his bounty was his grandson, Whitmel, to whom he gave the larger part of his estate, with certain conditions which he desired to impose upon the gift. It is with these conditions we have to deal, in construing his will. It has been seen he gave by the first item of the will, the west half of sections of land, to be divided by a line running north and south, parallel with the section lines, to his said daughter Penelope. He identifies these sections by referring to them as the lands he purchased from A. Barton. He also stipulates, in that item, that his said daughter should have the use of the dwelling house, so long as she remains a widow. The dwelling house could not have been on the land he gave her, or else this last provision was useless. It satisfactorily appears in evidence, it was on section 31, township 3, range 13. By his codicil he also gave to his said daughter, in consideration of \$2,000 paid by her husband, E. H. Newsom, on the purchase of said land, the west half of the section he lived on, which was shown to be section 31, township 3, range 13. Referring now, to items 12, 13 and 14, it will be seen, that he opens the devises and bequests to his grandson, Whitmel, in this language: "I give and bequeath, unto my grandson, Whitmel Rutland Newsom, upon conditions hereinafter expressed," certain designated real estate, including the east half of his land, and as he expresses it, "according to quantity to be divided between him and his mother, [who was the said Penelope M. Newsom] by a line running North and South, parallel with the section lines, so that all the buildings may be on that part allotted to my grandson, Whitmel Rutland Newsom, reserving however the life time (right) of his mother, (should she never marry) the said Penelope M. Newsom, in and to the dwelling house and out houses for the benefit of her family so long as she may live." When we take what is here said, in connection with the provisions for his said daughter, Penelope, in the first item, it is manifest, as before stated, that the east half of the section here given to his said grandson, is the same section, the west half of which he gave by the first item, to said Penelope. But, what is meant by the words,—"upon conditions hereinafter expressed?" Most certainly, as to the devises of these lands, to everything that follows, which imposed any burden or condition on the property the testator was bestowing on his grandson, whether light or heavy, which made his tenure of it short of an absolute title, to dispose of as he pleased. This pro-

vision in favor of said Penelope for the use of the dwelling and other houses on the curtilage, for herself and family so long as she lived, was evidently one of the conditions to which the testator referred, in making his devise to his grandson. In the next item, 13, out of which this litigation grows, the testator, immediately after item 12, with a comma between, as shown by the record, adds, "I also give and bequeath to my grandson, Whitmel Rutland Newsom, the following lands," describing them. The word "also," as here employed, means, "likewise," "in like manner." At the end of said item 13, the testator continued: "Also, I give to my grandson Whitmel Rutland Newsom, upon the same conditions, all the remainder of my estate, not already given away, including negroes," etc. He adds another condition, to those already stipulated, and which applies to all the property he gave to his said grandson, viz., "My will and desire is that all the property given conditionally to my grandson Whitmel Rutland Newsom, shall be kept together and worked on the land, and that my brother, Turner Rutland now living with me may be and remain on the farm and may be supported by his nephew Whitland R. Newsom so long as said Turner Rutland may live." But, the intention of the testator, in the way of imposing conditions on the devises on the estate he bestowed on his grandson, did not stop here, and he adds, "That should my grandson Whitmel Rutland Newsom die leaving no legitimate issue living at his death, then and in that case all the property herein devised conditionally to him, shall go to and belong to my grandson John Newsom," etc. We see no reason for supposing that the testator did not intend to impose these conditions on the lands described in item 13. What purpose did he have in not so doing? They did not constitute, so far as appears, a separate farm. They do not even lie together, in a body, or adjoining. Besides, a part of the same land included in this item, viz. the N. E. $\frac{1}{4}$ of fractional section 6, township 4, range 13,—which it is said was devised absolutely, is embraced in the lands devised in item 12, (being the E. $\frac{1}{2}$ of lands bought of A. Barton,) which are admitted to have been devised subject to a condition. This duplication of the devise, unnecessary to have been made, is in keeping with the general unskillfulness apparent throughout the instrument. After all this, it is manifest he did not intend any of the lands devised to be free of the conditions he imposed on the others.

Our conclusion is, that Whitmel Rutland Newsom took no estate under his grandfather's will, except upon condition, and that having died without issue, he took a conditional fee only in all the real estate devised to him under said will, defeasible on his dying without issue; and on his death, without children, John Newsom became entitled to it,

subject to the conditions therein imposed on it, as to him. Code 1852, § 1302; *Mason v. Pate*, 34 Ala. 379; *Goldsby v. Goldsby*, 38 Ala. 404.

The transcript of the will was properly admitted in evidence. It was made out for and used in another case, but that did not render it less admissible in these causes. The will was duly probated, and it, and the proof of probate, properly certified, were admissible in place of the original. Code, § 1934.

Both cases—Nos. 155 and 156—were here submitted to be tried together. The charge in favor of the defendant, Holesapple, in No. 155 was erroneous. The general charge requested by plaintiff should have been given.

In No. 156, the plaintiff, Newsom, requested the general charge for the recovery of certain designated lands sued for, which was given, and the general charge requested by defendants, Guy and wife, was refused. There was an inadvertent error in this charge of the court to the jury, given at the instance of the plaintiff, in excepting from the land the court charged them the plaintiff was entitled to recover, the E. $\frac{1}{2}$ of section 6, township 4, range 13, instead of the W. $\frac{1}{2}$ of said section. The charge should also have excepted the W. $\frac{1}{2}$ of section 31, township 3, range 13. These lands, as we have seen, were given by the will, to Mrs. Penelope M. Newsom. This error in the charge was followed in the verdict and judgment entry, and the cause will have to be reversed on that account. Otherwise than as stated, the charge of the court for the plaintiff was free from error. The judgment in each case is reversed and remanded.

(103 Ala. 154)

Ex parte FECHHEIMER et al.

(Supreme Court of Alabama. May 22, 1894.)

INJUNCTION—INJUNCTION BOND—MOTION TO DISCHARGE—REMEDY BY MANDAMUS.

1. Code, § 3613, authorizing appeals from all interlocutory orders sustaining or dissolving injunctions, does not authorize an appeal from an order made on motion to discharge an injunction; the remedy is by mandamus.

2. Where judgment has been rendered against a claimant in attachment, the claim bond forfeited, and execution issued against claimant and his sureties, a surety seeking to enjoin such execution must give the bond required by Code, § 3522, conditioned to pay the judgment enjoined, and such damages and costs as may be adjudged against him.

Application by Martin Fechheimer and others for a writ of mandamus to compel the chancellor to discharge an injunction. Writ denied.

On October 17, 1892, Eugene F. Enslan filed his bill in the chancery court of Jefferson county, in which he averred that on December 26, December 27, December 28, and December 29, 1892, Trounstone Bros. & Co., Fechheimer, Fiebel & Co., Wienman, Hirsch-

man & Co., and Hodges Bros., in the order named, upon the respective dates stated, sued out writs of attachment against M. Nathan & Co.; that these writs were executed by the sheriff of Jefferson county by levying upon a stock of merchandise contained in the storehouse in Bessemer, occupied by the said M. Nathan & Co., and proper returns of the levy of these several attachments were made by the sheriff; that one A. Klosky claimed a portion of the goods levied upon by the sheriff under these several writs of attachment, and executed a claim bond therefor with the complainant, E. F. Enslen, and one B. S. Loventhal, as sureties thereon; that the four causes, which had been previously docketed in the city court of Birmingham, were transferred to the circuit court of Jefferson county, holding at Bessemer, Ala.; and that in said last-named court, upon issue being made as to the claim of the said Klosky to some of the property levied upon under the attachments, the claim suit was tried, and judgment was rendered in favor of each of said plaintiffs in the several causes against the claimant, and the property claimed by said Klosky condemned to the satisfaction of the plaintiff's judgment against said Nathan & Co., which had been previously obtained. It was further averred in said bill that each of the causes were tried in one proceeding, and that the transfer of the causes from the city court of Birmingham to the circuit court, sitting at Bessemer, was not in accordance with the provisions of an act of the general assembly approved February 21, 1893, providing for such transfers, and that, therefore, the order of transfer was without authority of law and void; that the submission by the plaintiffs in the said several causes, and the claimant, to the jurisdiction of the circuit court at Bessemer was an alteration of the terms and conditions of the claim bond, on which the plaintiff was the surety, and operated to discharge the complainant from liability on said bond; that the trial of the said four causes in one proceeding, and the agreement entered into in reference thereto, were a further violation of the complainant's rights, and operated to discharge him from liability. It was also averred in said bill that, the said claim bond being returned forfeited by the sheriff, in August, 1892, four executions were issued by the clerk of the circuit court in favor of the four several plaintiffs, against the said A. Klosky, claimant, and his sureties on the claim bond; and that each of said executions was issued without authority of law, for the reasons stated above; and that the sheriff was without authority to indorse the said bonds "Forfeited," so as to claim any right against the orator. In conclusion, the complainant averred that, said executions being in the hands of the sheriff of Jefferson county, he was proceeding to enforce the same, and, unless restrained by an injunction, would levy upon, sell, and sacrifice

the complainant's property to satisfy said executions. The prayer of this bill was for an injunction restraining the defendants Fechheimer, Fishel & Co., each member of said firm, their attorneys and agents, from further proceeding against the complainant, upon said executions, and from further interfering with his property, by reason of said executions, and that the complainant be decreed as released from all liability on said bond. In accordance with the direction to the register, a writ of injunction was issued upon the complainant executing the injunction bond. The condition of said bond, which was executed by the complainant, was as follows: "Now, therefore, the condition of the above obligation is such that if the above-bounden Eugene F. Enslen, his executors, administrators, or any of them, shall and do well and truly pay, or cause to be paid, said execution enjoined, with interest, all damages and costs which may be decreed against him, if the said injunction is dissolved, then the above obligation to be void; otherwise to remain in full force and virtue." Upon the issuance of the injunction, the respondents to said bill, Fechheimer, Fishel & Co., moved the court to discharge the injunction, upon the following grounds: "(1) The register has not taken bond with proper condition as required by law. (2) The injunction was improvidently issued, in that the complainant was not required to give, and did not give, an injunction bond conditioned as required by law. (3) Because the bond given is conditioned to pay, or cause to be paid, the execution enjoined, with interest, and all damages and costs which may be decreed against him—that is, the complainant—in case said injunction is dissolved, whereas the bond should have been conditioned to pay all damages and costs which any person may sustain by the suing out of the injunction, if the same is dissolved. (4) Because the injunction did not issue to enjoin proceedings after judgment, nor to enjoin a judgment, and hence bond should not have been conditioned according to section 3522 of the Code, as amended by the act of the legislature (Acts 1888-89, p. 116), but should have been conditioned in accordance with section 3524 of the Code, as amended by said act of the legislature." On the submission of this motion, the chancellor decreed that it was not well taken, and overruled the same. Thereupon the respondents moved the court to require the complainant to give an injunction bond with proper condition, and, in default thereof, to discharge the injunction previously issued by the register, upon grounds which were substantially the same as those stated above, with the following addition thereto, which is, "(5) because if it should have been given under section 3522, as amended, it is not so conditioned; that is to say, it is conditioned to pay the execution, and not any judgment enjoined." Upon the submission of this motion, the same

was overruled by the chancellor. The said respondents, by petition, apply to this court for a writ of mandamus, directed to the Honorable Thomas Cobbs, Ch., sitting in said cause, commanding him to grant the motion, made in said cause by the present petitioners, to discharge the said injunction, or to make an order discharging the said injunction, unless the said Enslen shall execute a bond, with condition "to pay all damages and costs which any person may sustain by the suing out of said injunction, if the same is dissolved," or "to pay the judgment enjoined, with costs, and all such damages and costs as may be decreed against" the said Enslen, and, in default of the execution of such bond, to order the chancellor to dissolve the injunction.

Caboniss & Weakley, for petitioners.

McCLELLAN, J. Section 3613 of the Code provides for an appeal to the supreme court from all interlocutory orders, in term time or vacation, sustaining or dissolving injunctions. An order discharging an injunction is quite a different thing from an order dissolving an injunction, and it has been decided that the section referred to above does not authorize an appeal from an order discharging an injunction. *Ex parte Sayre* (Ala.) 11 South. 378. Had the legislative purpose in the enactment of that section been to authorize an appeal from an order overruling and denying a motion to discharge an injunction, it is not conceivable that the law-makers would not also have therein authorized an appeal from an order granting such motion and discharging an injunction. That this was not done convinces us that there was no purpose to authorize an appeal from any order made on a motion to discharge an injunction, and that the whole operation of section 3613 is upon orders on motions to dissolve injunctions. In the case at bar there was a motion to discharge the injunction, on the ground that the bond given for the issuance thereof was not the bond in respect of its condition which the statute required on the case made by the bill, unless complainant executed a sufficient bond. The chancellor overruled the motion, and refused to discharge the writ. No interlocutory appeal from this action of the chancellor being allowed by section 3613, or any other statutory provision, and it not being a matter for remedy on appeal from a final decree in the cause, our opinion is that mandamus is the appropriate remedy for the correction of the chancellor's action, if it be erroneous. We do not think, however, that the chancellor erred in refusing to discharge the injunction here. The purpose of this bill was and is "to stay proceedings of the judgment in a personal action," within the clear intention of section 3522 of the Code. It is quite true that no judgment had been rendered against the complainant *eo nomine*, but a judgment

had been rendered against the claimant, whose surety complainant was, in the trial of his claim to the property attached, and which had been delivered to him on the bond signed by the claimant, complainant, and another. This judgment was for the property thus claimed and taken by the claimant, or its alternate value. The property was not returned within the statutory period, and, when that had elapsed, the sheriff returned the claim bond as forfeited. This forfeiture, together with the fact that judgment had been entered against the complainant, authorized the issuance of execution against the sureties. The judgment against the principal in the bond was in legal effect converted by operation of law, through the return of forfeiture, into a judgment against the sureties, for all the purposes of section 3522, and the bond necessary for them to give to stay proceedings thereunder against them is that prescribed by that section, which was given in this case. Mandamus denied.

(46 La. Ann.)

LACHMAN et al. v. BLOCK et al. (No. 11, 365.)¹

(Supreme Court of Louisiana. April 9, 1894.)

CONTRACT OF SURETYSHIP — GUARANTY — ACCEPTANCE — CONCEALMENT OF FACTS BY GUARANTY — EFFECT.

1. Suretyship is defined to be an accessory promise, by which a person binds himself for another already bound, and a guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person; the former being treated of in the Code, and the latter being governed by the precepts of the law merchant.

2. A contract of suretyship or guaranty, like other contracts, requires the concurrence of intention in two minds, one of whom promises something to another who accepts. Consequently a mere offer to guaranty is not binding until acceptance by the person to whom it is made, and, until acceptance, it is revocable.

3. An acceptance of a proffered suretyship or guaranty may be given at any time before the person making it changes his mind and withdraws his proposition; but acceptance may be either express or implied, or it may, under certain circumstances, be manifested by silence or inaction.

4. If, however, a proposition of guaranty or suretyship be made in terms that are absolute, evidencing a design to give the other party the right of concluding the engagement by his assent, the proposer will be irrevocably bound by such assent, either express or implied, and his signification of dissent thereafter will be of no avail.

5. A distinction is taken—one that is observed in all the authorities—between a guaranty that is absolute and unconditional in its terms and a mere offer of guaranty, depending on acceptance, and not binding until it is accepted, expressly or impliedly.

6. Of the acceptance of an absolute guaranty, notice is not requisite, but, of a mere offer of guaranty, the guarantee's acceptance must be notified to the guarantor, such notification being of the essence of the agreement.

7. If the agreement under present consideration be treated as a California, rather than a

¹ Rehearing pending.

Louisiana, contract, the law is approximately the same, as by the California Code notice of the acceptance of a letter of credit is not required, unless the terms of the letter of credit require it.

8. Judicial admissions, made in the interest of a person not a party to the suit in which same are made, operate between the parties in interest like stipulations pour autrui in contracts, and they cannot be recalled by the party making them, after they have been accepted and acted upon by the party in whose favor they are made.

9. The rule is that voluntary disclosure need only be made by a proposed guaranty to the offering guarantor of such facts as tend to show that the contract between himself and the debtor may be different from that the guarantor might naturally expect; but, in order to enable the guarantor to avoid the contract by means of an equitable discharge, predicated upon fraudulent concealment of material facts, such material facts must constitute parts of the transaction, and necessarily operate as an inducement to the guarantor to bind himself; and these facts must immediately affect his liability, and bear directly on the particular transaction to which the suretyship attaches.

10. Unless interrogated, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the suretyship, though such facts would probably have a decided influence on the surety in entering into the contract; and the current and weight of authority supports the proposition that, unless inquiry be made by the guarantor, it is not obligatory upon the guarantor to volunteer a disclosure of the debtor's previous embezzlement, and his failure to make such a disclosure will not constitute a fraudulent concealment that will operate the surety's discharge.

11. Under the law of this state a surety may oppose to the creditor all the exceptions belonging to the principal debtor which are inherent to the debt, but he cannot oppose exceptions which are personal to the debtor.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans.

Action by Lachman & Jacobi against Henry Block & Bro. and Calmi Lazard. Judgment for defendant Lazard, and plaintiffs appeal. Reversed.

Bernard Titcher and Percy Roberts, for appellants. Farrer, Leake & Lemle, Lazarus, Moore & Luce, and Farrer, Jonas & Kruttschnitt, for appellees.

WATKINS, J. As against Henry Block & Bro., this suit is brought upon a matter of indebtedness, aggregating about \$10,000 in amount, accompanied by an attachment; but, as against Lazard, it is founded on an instrument of the following tenor, viz.: "New Orleans, June 4th, 1891. Messrs. Lachman & Jacobi, San Francisco, Cal.—Gentlemen: I hereby agree to become surety for Henry Block & Bro. for the sum of \$10,000, jointly and severally with Henry Block & Bro. This agreement to bind me in the sum of \$10,000 until the 15th day of October, 1891. Very respectfully, [Signed] C. Lazard." This instrument presents the only matter in controversy in this case, the defendants Block & Bro. having been confessedly insolvent at

the time suit was filed, and at this time urging no defense; and their property and assets having been attached by various creditors previous to institution of this suit, and notably by C. Lazard & Co., of which firm the defendant C. Lazard is a member. Various defenses were urged in the court below on the part of Lazard, the purport of which is as follows, viz.: (1) That there was no acceptance of the guaranty on the part of the plaintiff; (2) that the guaranty was procured by fraud on the part of Block & Bro. and concealment on part of plaintiffs; (3) that the debt sued on is not the one that was guarantied; (4) that the items of indebtedness sued on matured after the 15th of October, 1891, and do not come within the limit fixed in the contract of guaranty; (5) that, in any event, he can only be held liable for items of indebtedness Henry Block & Co. contracted after June 4, 1891,—date of agreement. On these issues the case was tried, and judgment rendered in favor of the defendant, and the plaintiffs have appealed.

It is manifest that the first two defenses are the most serious, and on them the district judge rested his opinion exclusively, employing this language, viz.: "The correspondence, the circumstances, the testimony, leave no doubt, in my mind, that the letter of guaranty on which Lazard is sued was obtained by fraud, collusion, and misrepresentation, devised jointly by Lachman & Jacobi and the Block Brothers." These defenses must be first analyzed.

1. In limine, an exception of no cause of action was propounded, and, by the judge, referred to the merits. As this is a suit upon an unconditional obligation of the defendant, who has not disavowed his signature, a cause of action has been plainly stated. The exception must be overruled.

2. The matter of controversy between counsel, and that for the court to decide, is whether it was obligatory upon the plaintiffs to give the guarantor or surety notice of their acceptance of the guaranty or suretyship as a condition precedent to its validity. The law of guaranty is not treated of, *eo nomine*, in the Civil Code, but it furnishes and formulates rules for the interpretation of the contract of suretyship in its stead, the contract of guaranty being governed and controlled by the precepts of the law merchant. In order to arrive at an accurate conclusion with regard to the question of notice, it will be necessary to summarize and compare the essential ingredients of the contracts of suretyship and guaranty. The Code defines suretyship to be an accessory promise, by which a person binds himself, for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not. Rev. Civ. Code, art. 3035. It must be restrained within the limits intended by the contract. *Id.* art. 3039. The surety is entitled to have the creditor discuss the prop-

erty of the principal debtor, except he has become "bound in solido, jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors in solido." Id. arts. 3045, 3050. A guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person. De Coly. Guar. p. 1. That author states the essential requisites of the contract to be (1) the mutual assent of the parties; (2) that the parties be capable of contracting; (3) that it be supported by a valuable consideration. With regard to the mutual assent of the parties, he says: "Every contract includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. Until, therefore, an acceptance be given (which must be an absolute and unconditional acceptance of the previous offer), the promisor is not liable. In accordance with this doctrine, it has been decided that a mere offer to guaranty is not binding until acceptance by the person to whom the offer is made. Till then it is revocable by the party making it." Id. pp. 2, 3. Tested by these principles, the agreement under consideration must be regarded rather in the light of a contract of suretyship than of guaranty, though the two engagements possess many similar features. It unequivocally states that the defendant Lazard agrees "to become surety for Henry Block & Bro.," to become surety for Henry Block & Bro. "for the specified sum of \$10,000." It declares that his undertaking is "jointly and severally with Henry Block & Bro." It is concluded with the statement that "this agreement [is] to bind [him] in the sum of \$10,000 until the 15th day of October, 1891." We find from the foregoing recitals—First, that it is a contract of suretyship in terms as it is in substance; second, that the amount for which the suretyship is undertaken is fixed and certain; third, that the contract is joint and several, and is operative as a solidary engagement, which is to be construed according to the principles that have been established by the Code for the interpretation of solidary obligations; fourth, that it is of limited duration. As a contract of suretyship, notice of its acceptance on the part of the creditor seems not to be contemplated by the Code, no such requirement being specified in those articles treating of that subject.

On the question "of the consent necessary to give validity to a contract" the precepts of our Code are quite similar to those we have quoted from De Colyar's treatise on the Law of Guaranties. It provides that "the contract, consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed. If he who proposes,

should before that consent is given, change his intention upon the subject, the concurrence of the two wills is wanting, and there is no contract." Rev. Civ. Code, art. 1800. But it likewise declares that the proposer "is bound by his proposition, and the signification of his dissent will be of no avail, if the proposition be made in terms, which evidence a design to give the other party the right of concluding the contract by his assent," etc. Id. art. 1802. (Our italics.) It further declares that "the acceptance needs not be made by the same act, or in point of time, immediately after the proposition; if made at any time before the person who offers, or promises, has changed his mind, or may reasonably be presumed to have done so, it is sufficient." Id. art. 1804. It further declares that "the proposition as well as the assent to a contract may be express or implied." Such assent "is implied, when it is manifested by actions, even by silence, or by inaction, in cases in which they can, from circumstances, be supposed to mean, or by legal presumption, are directed to be considered as evidence of an assent." Id. art. 1811. It likewise declares that "silence and inaction are, also, under some circumstances, the means of showing an assent that constitutes an obligation." Id. art. 1817. And the rules on the subject are concluded with the declaration that "when the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, it must be left to the discretion of the judge, whether assent is to be implied from them or not." Id. art. 1818. These are the rules of law applicable to all contracts, including the contract of suretyship. Applying them to the agreement or proposition of the defendant, and it seems to be clear that the plaintiffs were not bound to accept same before it became complete, because it was made in terms which evidence a design on the part of Lazard to give them the right to conclude it by their simple assent; and the facts disclosed by the record satisfy us that the plaintiffs acted on the defendants' agreement "to become surety for Henry Block & Bro." by extending them a line of credit. They would not otherwise have extended to them. And that this line of credit began immediately after the receipt of the defendants' agreement is evidenced by the items of the account sued on, and which are undenied. And, if acceptance be deemed essential, the circumstances clearly indicate plaintiffs' assent,—such an assent as puts it beyond the power of the defendant Lazard to voluntarily withdraw from his engagement. Certain it is that no formal notification of the creditor's acceptance is required by our law as a condition precedent to the completion of a contract of suretyship. De Colyar draws a distinction between a proposition of guar-

anty which is absolute and unconditional in its items—like the contract before us—and one containing a mere “offer of guaranty,” which “is not binding until acceptance by the person to whom the offer is made,” and which remains revocable until such acceptance occurs. But of this mere offer of guaranty the author states that “it is not, as a rule, necessary that the acceptance should be express; it may be implied.” And in illustration of that rule he furnishes the following example, viz.: “Thus, when an offer of guaranty is in these terms: ‘I agree to be security to you for T. C., for whatever you may trust him with while in your employ, and in case of default to make the same good,’—as soon as the person to whom it is given employs T. C. (but not before), the guaranty attaches, and becomes binding on the party who gave it, without any formal acceptance.” De Coly. Guar. p. 3. But the doctrine is much more strongly stated by an English judge in the following words, viz.: “If a person offers a guaranty, and, more still, if he signs a guaranty by which he makes himself liable, and that be sent to the other party, *such other party, if he means not to accept the guaranty, is bound expressly to dissent within a reasonable time; and if he keeps the guaranty an unreasonable time he is deemed to accept just the same as if he had assented to it by words, and if he has ever accepted it either by word or by act he cannot afterwards retract.*” Id. p. 8. (Our italics.) Pope v. Andrews, 9 Car. & P. 564. According to this treatise on the law of guaranty, as it is understood in England, and as it is interpreted in the English jurisprudence, even an offer of guaranty becomes binding on the guarantor, without other acceptance by the guarantee than acting under it; and it is esteemed the duty of the person to whom such offer is delivered to expressly dissent therefrom if it be his intention not to accept, and within a reasonable time, otherwise his acceptance of the offer will be implied. Referring to the defendant's brief, we find his argument addressed to the offer of guaranty exclusively. Thus: “We contend that the letter of Lazard to Lachman & Jacobl was nothing more nor less than an offer to guaranty; and in this we are supported by the jurisprudence of this state, and, so far as we have been able to find, by the jurisprudence of the United States supreme court and the supreme court of every other state in the Union.” Though far from conceding that the agreement under consideration is a mere offer of guaranty,—the terms of the instrument being absolute and unconditional,—it is apparent from casual observation that the authorities quoted by the defendants' counsel deal with that question exclusively. Many of them are based on letters of credit, compliance with which is purely optional on the part of the party addressed. Russell v. Clarke, 7 Cranch,

91; Edmonston v. Drake, 5 Pet. 624; Douglass v. Reynolds, 7 Pet. 125; Lee v. Dick, 10 Pet. 482; Adams v. Jones, 12 Pet. 207. All of these cases proceed upon the principle that is announced in Kellogg v. Stockton, 29 Pa. St. 460. “In all cases,” say the court, “when a plaintiff seeks to make one liable for the debt of another, the case must be plainly made out. Every ambiguity in the evidence is in favor of the defendant. It is essential, in such case, that the plaintiff should accept and give credit on the faith of the proposition; and it is equally necessary that the guarantor should be notified that his proffer has been accepted, otherwise there is no contract. A mere offer, not accepted, is not a contract; and a mere mental acceptance of a proposition, not communicated to the party to be charged, is not an acceptance at all, in the eyes of the law.” Vide Coe v. Buehler (Pa. Sup.) 5 Atl. 20. The decisions of the Arkansas court are to the same effect. Lane v. Levillian, 4 Ark. 84; McCollum v. Cushing, 22 Ark. 540. The decisions of the Alabama court are of like tenor. Lawson v. Townes, 2 Ala. 373; Walker v. Forbes, 25 Ala. 139. The rule was similarly stated in Mussey v. Rayner, 22 Pick. 223; also in Rankin v. Childs, 9 Mo. 674, and Hill v. Calvin, 4 How. (Miss.) 231. This rule was by the Illinois court extended to an offer to guaranty the payment of merchandise, thus: “An offer to guaranty the payment of goods to be sold to a third person does not become a complete contract, so as to bind the guarantor, until the guarantee has given notice to the guarantor of his acceptance of the guaranty, and has extended credit to the proposed purchaser.” Ruffner v. Love, 33 Ill. App. 601; Taussig v. Reid, 30 N. E. 1082. In Bank v. Sloo, 16 La. 539, our predecessors seemed to have followed the rule as laid down in Cremer v. Higginson, 1 Mason, 323, Fed. Cas. No. 3383, and Douglass v. Reynolds, 7 Pet. 113, and which are in keeping with other cases cited supra, and affirmed a judgment discharging the proffered guarantors because they had been given no notice of the acceptance of their guaranty of a letter of credit, nor of advances made under it, “nor until the circumstances of the debtors were materially changed by the dishonor of the bill.” In his treatise on the Law of Suretyship and Guaranty Mr. Brandt broadly states the doctrine of the common law on this subject to be in keeping with the principles announced in the American decisions above quoted. “A question often arising upon commercial guaranties is whether, in order to charge the guarantor, it is necessary that he be notified of the acceptance of the guaranty by the person acting upon it. When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another, at the option

of the party to whom the application for credit is made, the great weight of authority is that the guarantor must, within a reasonable time, be notified of the acceptance of the guaranty." 1 Brandt, Sur. (2d Ed.) § 186. But this author quotes approvingly from a decision of the Massachusetts court, in which the same distinction is taken between an offer of guaranty and an absolute guaranty that is made by De Colyar. "The distinction," say the court, "is between an offer to guaranty a debt about to be created, the amount of which the party making the offer does not know, and it is uncertain whether the offer will be accepted, so that he may be ultimately liable, and the case of an absolute guaranty, the terms of which are definite as to its extent and amount. In the latter case no notice is necessary to the guarantor, whereas in the former case the contract is not completed until the offer is accepted." Allen v. Pike, 3 Cush. 238; 1 Brandt, Sur. § 188. The action in Davis v. Wells, 104 U. S. 159, was brought on an unconditional contract of guaranty to the extent of \$10,000, and the answer of the guarantor was that there was no notice of the guarantees' acceptance of the guaranty, and of their intention to act under it; but the court held that the rule requiring notice by the guarantee of his acceptance of a guaranty, and his intention to act under it, applies only where the instrument is, in legal effect, an offer or proposal of guaranty, and not when it is an absolute guaranty; the court maintaining the principle that the contract of guaranty is the obligation of a surety. The same distinction was recognized and applied in the various cases therein cited by the court. Menard v. Scudder, 7 La. Ann. 385, presents the case of a prospective or continuing guaranty, and the court maintained and enforced the contract, holding that the guarantor had been constructively notified, and was, consequently, bound.

Referring to the instrument sued on, we find it couched in carefully selected terms, clearly indicative of the defendant's intention to bind himself absolutely. Its statement is that he agrees to become surety for Henry Block & Bro. The amount is fixed at \$10,000. It is styled "an agreement to bind" the promisor "in the sum of \$10,000." The duration of this agreement is limited to the 15th of October, 1891. But the words selected for the purpose of clearly conveying the absolute character of the engagement are, "I hereby agree to become surety for Henry Block & Bro., jointly and severally," etc. The execution of this instrument evidences care and skill. It is not the work of a mere layman. It is, in terms, as well as in import, most absolute and unconditional; and, in the sense of all the authorities, English as well as American, formal notice of its acceptance by the plaintiffs as guarantees was unneces-

sary, and the vinculum of the contract became complete by its delivery to them, and by their acting on it, by extending to the debtors credit on the faith of it. But, if the defendant's covenant be treated as a California, rather than as a Louisiana, contract,—the plaintiffs residing in San Francisco, and the defendant Lazard in New Orleans,—the situation of the latter is not improved, because the state of California has a Civil Code, an article of which treats of letters of credit, and declares that "the writer of a letter of credit is liable for credit given upon it, without notice to him, unless its terms express or imply the necessity of giving a notice." Section 2865. On this state of the authorities and the law we feel bound to hold that the plaintiffs were dispensed from giving to the defendant Lazard notice of their acceptance of his contract of guaranty or suretyship.

3. The defendant's answer sets out his right to be discharged in the form of a threefold proposition, thus: (1) That it was plaintiffs' duty to put him in possession of all the facts likely to materially affect his responsibility, but they did not do so, and, on the contrary, concealed the facts in relation thereto which would have prevented his signing the letter of guaranty, had he been made aware of their existence. (2) That the debtors, Henry Block & Bro., obtained said letter of guaranty through fraud and misrepresentation; and the course of dealing between them and the plaintiffs were such as to fairly lead the latter to believe that the former had employed fraud in obtaining the letter of guaranty, and to put them upon inquiry as to the circumstances under which it was obtained. (3) That, the letter of guaranty having been obtained through fraudulent misrepresentation and concealment of facts, it was thereby abrogated and annulled, and he became discharged ipso facto. It is to be observed that the allegations are general in terms, and contain no particular designation of the "material facts" which the plaintiffs suppressed, or reference to what particular fraudulent device or misrepresentation the defendants Block & Bro. resorted to, which influenced Lazard to execute the contract of guaranty. But the facts seem to be as follows, viz.: Prior to June 4, 1891,—date of the agreement of guaranty,—the firm of Henry Block & Bro., of New Orleans, had been extensively dealing in the wines sold by Lachman & Jacobl, of San Francisco, through L. Block, the father of Henry Block, as plaintiffs' agent. In the course of these transactions, Henry Block, individually, had made collections from customers of his father to the amount of about \$8,000, and appropriated same to his own account, making no return to the plaintiffs. This deficit occasioned some correspondence between Henry Block and the individual members of the Jacobl firm,—three only of the latter's letters preceding the

contract of guaranty, the same bearing dates May 25 and 26, 1891; all others succeeding it. Those letters appertain exclusively to Henry Block's shortage, and demand immediate settlement, two of them containing casual mention of the guaranty only; as, for instance: "The guaranty written of we want in such shape that it will cover all you owe us now [on merchandise] and all you owe us hereafter, up to \$10,000." Nothing whatever is said in the letters of Henry Block, replying, on June 2d and 3d, but in his letter of the 4th he says: "Your telegram of 3d to hand, and contents noted, and I wire you, 'Lazard guaranty mailed to-day,' which I inclose herewith. If I or our firm owe you this on that date, same will be paid by C. Lazard & Co." This was the same day on which the letter of guaranty was written to the plaintiffs, and mailed to them by Henry Block. With respect to the execution of the letter of guaranty it appears that Henry Block called on the firm of C. Lazard & Co., and requested them to sign the guaranty. It was not signed by the firm of C. Lazard & Co., because of objections on the part of the junior member; but it was signed by C. Lazard individually, notwithstanding said protest. C. Lazard is the father-in-law of Henry Block, and the business establishment of C. Lazard & Co. is only a few squares distant from that of Henry Block & Bro., the members of the two firms enjoying intimate social relations, and all of them acquainted with Lachman & Jacobl. The reliance of the defendant Lazard in procuring release from his contract is: First, upon the failure of the plaintiffs to make full and complete disclosures, to all the parties concerned, of Henry Block's shortage and defalcation; and, second, upon the facts which are disclosed in the testimony of the two Lazards, to the effect that Henry Block had procured the signature of C. Lazard on the representation that he needed it to enable him to purchase 500 barrels of wine that was a little specked, on which he expected to realize a profit of a few thousand dollars. The first is charged in the answer to have been a fraudulent concealment on the part of plaintiffs, which operates defendant's equitable discharge; and the second was a misrepresentation on the part of Block & Bro., through which the letter of guaranty was obtained; and that the course of dealing between plaintiffs and the Blocks had been such as to lead them to believe it had been thus obtained. Both of these propositions are strenuously denied by plaintiffs' counsel, and they insist that they did not participate in the negotiations leading up to the execution of the agreement, and no inquiries were made of them as to the reason or necessity for the guaranty, and that they are, consequently, not in any way responsible for defendant's want of information. They further insist that these negotiations were undertaken and

consummated by Henry Block alone, and for his individual advantage, and that he alone was guilty of appropriating their money, and not Henry Block & Bro., for whom the defendant Lazard became guarantor; hence the impropriety and want of necessity for any disclosures being made, the guaranty being for the firm, and not Henry Block alone.

In addition the plaintiffs urge as an estoppel against C. Lazard the judicial declarations made in the suit of C. Lazard & Co. v. Henry Block & Bro.,—a suit recently filed, and still pending,—in which he sued for and claimed judgment on this guaranty as a liability of the defendants; and, as a further estoppel, the promise of C. Lazard to pay the amount of this guaranty subsequent to the institution of this suit. From the record it appears that on the 5th of October, 1891,—10 days prior to the termination of the contract of guaranty,—the firm of C. Lazard & Co. obtained an attachment against Henry Block & Bro. upon a claim of \$41,598.43, and caused all of their assets to be seized, C. Lazard making the affidavit. The claim on which this suit was brought exceeded the value of the assets of the defendant by nearly \$30,000; this attachment being first in point of time and in rank of lien. Two days subsequent to the attachment the plaintiffs, through their attorneys, made demand on C. Lazard for the payment of the account of Henry Block & Bro., and he admitted his liability, and requested time within which to pay it. It subsequently transpired that the \$10,000 guaranty constituted a part of the \$41,598.43 on which C. Lazard & Co. brought suit against Henry Block & Bro.; and that, after the aforesaid demand had been made, and the promise to pay had been given by C. Lazard, the attorneys for the plaintiffs in attachment appeared in court, and voluntarily remitted the sum of \$10,000, on the hypothesis that same had been included "through error of fact;" their motion not indicating what was the fact which was relied upon as error. But the two Lazards, as witnesses, state that the error was that when C. Lazard's interview occurred he understood that Henry Block & Bro. had received the wine he expected to buy, and, if they had received the wine, he was indebted for it,—or, in other words, that Henry Block & Bro. had received the 500 barrels of specked wine which Henry Block had stipulated to buy, and on the faith of which undertaking C. Lazard had executed the guaranty; and that such was his impression when he sued out the writ of attachment, though such was error in point of fact, Henry Block & Bro. not having received the wine. This testimony—and other testimony of like character—was objected to by plaintiffs' counsel on the ground that it tended to contradict, change, and vary the terms of the written contract

of guaranty; but the objection was overruled, and the testimony admitted for the purpose of throwing light on the alleged fraudulent misrepresentation and concealment of facts material to the issue, but only in the event of plaintiffs being connected therewith. There seems to be no objection to this ruling, but the record furnishes no evidence in any way connecting the plaintiffs with the statement of the Lazards, and, consequently, any such misrepresentation or concealment as this testimony intimates cannot be considered under the restriction placed upon it by the judge *a quo*. But, if this evidence be considered for the purpose of explaining the defendant's admission of liability to the plaintiffs, and, in a measure, counteracting the plaintiffs' plea of estoppel, it recalls upon him; for the account sued on shows that the plaintiffs sold Henry Block & Bro. over 700 barrels of wine between the 16th of June and the 28th of September, 1891,—within the limit of the guaranty,—and it is for the purchase price of the goods thus sold and delivered that this suit is brought. This leads to the supposition that it was the expectation of C. Lazard and Henry Block that the specked or indifferent wine the latter contemplated buying could be sold at the market price of good wine. Surely, if such a fraud on the public was contemplated, plaintiffs are not censurable for not having participated in its consummation. And this leads us to inquire in what different manner Henry Block could have promised himself a profit of two or three thousand dollars on 500 barrels of specked wine, in consideration of the fact, which is patent on the face of the plaintiffs' account, that plaintiffs sold the Block firm, during the tenure of the guaranty, near 800 barrels of good wine for the total price of \$7,500. In any view that can be taken of this testimony, it is evident that it cannot be considered; and, leaving it out of consideration, Lazard's admission, to the plaintiffs' attorneys, of his liability under the contract of guaranty or suretyship, stands unimpaired and binding. Not only so, but it leaves the relinquishment on the part of C. Lazard & Co. in their attachment suit without justification or excuse, for it cannot be seriously argued that the judicial admissions of a party to a suit can be altered at will, to the detriment of the other party, or with respect to those persons having an adverse interest in them. C. Lazard & Co. attached all the assets of Henry Block & Bro. Theirs was the first and ranking attachment on their property. The assets attached proved to be of very much less value than the amount of the claims of the attaching creditors, which included the amount of C. Lazard's guaranty. Having included the amount of this guaranty in the account sued on, and C. Lazard having made the affidavit for the attachment, the judicial admissions therein

contained operate like stipulations *pour autrui* in matters of contract, which cannot be recalled by the party making them after they have been accepted and acted upon by the party in whose favor they are made. Rev. Civ. Code, art. 1890. And in this case it is apparent that the effort of Lazard & Co. was, by their attachment, to realize their own claim against the Block firm, and at the same time recoup the amount of C. Lazard's obligation of guaranty to the plaintiffs; and, finding themselves in this position at the time demand was made on them for payment, it seems reasonable and likely that these attaching creditors examined the situation of their suit, and ascertained that they were about to sustain a heavy loss, and hastened to make the necessary remittitur. While there is no positive proof of such examination having been made by the plaintiffs, yet the inference is clear that it was made, as they acted on the advice of counsel in entering their remittitur, and notifying the attorneys of the guarantees that C. Lazard was not bound as guarantor. In our view, the attaching creditors cannot be permitted to thus alter their position in that suit for the purpose and with the view of defeating the very claim on which they attached the goods of Block & Bro., and for which they had prayed for judgment against them therein. To maintain their right to thus shift their position would be to contradict the equitable principle which is announced in *Kenner v. Holliday*, 19 La. 154, to the effect that a person having contracted to pay the debt of a third person, and received property out of which it was to be paid, cannot be permitted to defeat the debt, and retain the funds that were placed in his hands to pay it. This case comes within the equity of that principle. And this court recently said in *Williams v. Commission Co.*, 45 La. Ann. 1013, 13 South. 394, that "there are acts in judicial proceedings which bind the parties to them, even so far as third persons may be concerned."

These conclusions dispose of the second and third paragraphs of the answer, and leave the first for our determination, it involving a question of law: Was it the duty of Lachman & Jacobi to have given information to C. Lazard of Henry Block's defalcation and embezzlement, in anticipation of the former becoming the surety or guarantor for the latter's firm? In the first place, it must be kept in mind that such a course was not at all practicable, because Henry Block procured from C. Lazard the contract of guaranty in response to a telegram he received from Lachman & Jacobi on the 4th of June, 1891, and forwarded the same by mail on that date. Consequently there was neither time nor opportunity for any communications between Lazard and the plaintiffs in respect to it. No disclosures were made by Henry Block, and no questions

were asked by Lazard, with regard to the plaintiffs' reasons for demanding a guaranty, notwithstanding Henry Block & Bro. were undoubtedly indebted largely to the Lazard firm at that time, and had theretofore enjoyed good credit with the plaintiffs,—circumstances of a character to arouse suspicion in the mind of the average business man. Was the embezzlement of Henry Block a material fact, which Lachman & Jacobi were bound to disclose as a condition precedent to the validity of the guaranty; and did their failure to make the disclosure operate an equitable discharge of Lazard from his engagement? It is our deliberate conviction that such embezzlement did not constitute a fact material to the agreement or transaction of suretyship or guaranty, and it was not necessary for the guaranties to disclose it, and that their failure to disclose it does not operate the release or discharge of the defendant. To this effect is the weight of authority, as exhibited by adjudicated cases and the opinions of text writers. De Colyar, in treating of the fraud of the creditor which will discharge the surety, says that it was once supposed that a disclosure should be made of all material facts prevailing in assurances upon marine and life risks, and that their non-disclosure vitiated the contract of guaranty; but that author states that the English decisions sustaining that view have been overruled, and a different and more liberal rule established; citing, among quite a number of other cases, that of *Insurance Co. v. Lloyd*, 10 Exch. 523; and *Davies v. Insurance Co.*, 8 Ch. Div. 469. De Coly. Guar. pp. 257, 258. That author approves the rule laid down in *Hamilton v. Watson*, 12 Clark & F. 109, and which is that "the criterion whether the disclosure ought to be made voluntarily is, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction; that is to say, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that the surety might naturally expect, and, if so, the surety is to see whether that is disclosed to him." And to this class of cases the author applies the rule stated in *Wythes v. Labouchere*, 3 De Gex & J. 593, which is that "the concealment, too, must be of some material part of the transaction itself between the creditor and his debtor, to which the suretyship relates. The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, which will render his position more hazardous." *Id.* p. 261. Brandt, in treating of this subject, formulates a like rule in more concise and forcible terms, viz.: "If, in the contract of suretyship, there is

any fraudulent concealment on the part of the obligee as to a *material part of the transaction*, to induce the surety to become a party, he is not bound. But, to be material, it must be concealment of some fact or circumstance *immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches.*" (Our italics.) 2 Brandt, Sur. § 419, citing *Flanagan v. Post*, 45 Vt. 246; *Morgan v. Smith*, 7 Hun, 244, 70 N. Y. 537; *Stone v. Compton*, 5 Bing. N. C. 142; *Id.*, 6 Scott, 846. In *Comstock v. Gage*, 91 Ill. 328, it was held that the noncommunicated fact, to have the effect of a fraud upon the surety, must be one necessarily having the effect of increasing the surety's responsibility. In *Warren v. Branch*, 15 W. Va. 21, the court, on a careful review of authority, said: "Our conclusion is that, *unless inquired of by the surety*, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the suretyship, though such facts would probably have a decided influence on the surety in entering into or declining to enter into his contract of suretyship; as, for instance, in taking the bond of a cashier, the fact that he gambled largely might, and probably would, influence a surety in going on his bond, yet, such fact not being in any manner connected with the contract that he would faithfully perform his duties as cashier, the directors are under no obligation to *volunteer a disclosure of this fact to a surety;*" stating the general rule as announced by Brandt and De Colyar, *supra*. (Our italics.) In *Bank v. Brownell*, 9 R. I. 168, a similar case is stated, and the court puts the proposition thus: "We think it is going too far to say that the creditor is in all cases, and without being inquired of, bound to communicate everything that it is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely upon a bond, and it would tend to a great deal of litigation;" summarizing the rule as announced by said authors. But perhaps the most pertinent and conclusive case that is afforded by the decisions of the courts of our sister states is that of *Roper v. Sangamon Lodge*, 91 Ill. 518, in which the lodge sought to recover a sum of money from its treasurer and his sureties, and to which the defense was interposed by the sureties that the principal was treasurer, and at the time they signed the bond he "was a defaulter to the lodge for moneys previously received and misapplied; that it was known to the officers and members of the lodge that he was a defaulter, and the sureties were ignorant of the fact; * * * that it was the duty of the officers and members of the lodge, when the bond was executed, to have informed defendants that their principal was a defaulter, and defendants were

misled thereby," etc. The plaintiff demurred to the defense, and the court sustained the demurrer.

The contention of the sureties, as stated by the court, was "that such conduct on the part of the lodge was calculated to and did mislead appellants, and operated as a fraud upon them; and the concealment by the officers and members of the fact that [the treasurer] was a defaulter when they signed his bond was a positive fraud." But the court held that the defense was not a good one, citing *Morley v. Town of Matamora*, 78 Ill. 395; *Pinkstaff v. People*, 59 Ill. 148. That is exactly this case, and the identical question here presented is there decided, on the ground that it was not the duty of the lodge to spontaneously furnish proof of the principal's embezzlement. The same question was again decided in the same way in *Insurance Co. v. Holway*, 55 Iowa, 571, 8 N. W. 457. In *Magee v. Insurance Co.*, 92 U. S. 93, a similar case is stated, and a like demurrer was sustained in the lower court, and the judgment was affirmed by the supreme court, citing with approval the English decisions quoted by De Colyar. The theory of our law and the tenor of our jurisprudence is the same as that of other states of the Union. In *Bank v. Beatty*, 10 La. Ann. 378, suit was brought against the cashier and certain of his sureties, and the defense of the latter was the same as it is in the instant case,—undisclosed embezzlement of their principal; but the court held the sureties bound. The decision of the court was, in effect, that such of the assets as did not exist in kind "existed in claims of the same amount" upon (the cashier personally) "for undetected embezzlements." "The principal contract was not, either wholly or in part, affected with nullity, and, being good and valid, the validity of the collateral undertaking follows. The consideration of a contract does not pass to the surety. His obligation arises from the consideration received by his principal." Vide *Mouton v. Beauchamp*, Id. 666. But, if the rule of our law applicable to suretyship be applied, this defense is wholly unavailing, because the Code declares that "the surety may oppose to the creditor all the exceptions belonging to the principal debtor, and which are inherent to the debt; but he cannot oppose exceptions which are personal to the debtor." Rev. Civ. Code, art. 3060. Not only so, but, as the defendant Lazard's obligation is, in terms, joint and several with the debtors, Henry Block & Bro., he is to be dealt with and "his engagement is to be regulated by the same principles which have been established for debtors in solido." Id. art. 3045. Altogether there is no escape from the conclusion that this defense of Lazard is a bad one, and was incorrectly maintained in the court a qua.

4. (a) It cannot be successfully urged that
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the debt sued on is not the one that was guarantied, for the manifest reason that the language of the agreement is that "I [C. Lazard] hereby agree to become surety for Henry Block & Bro. for the sum of \$10,000, jointly and severally with Henry Block & Bro.," and there is no limit, restriction, or designation of any particular debt or account, either present or future; and the surety is bound by the terms of his contract.

(b) It is not a good defense that some of the items of indebtedness matured after the date fixed in the agreement, as the limit of his obligation. It is only material to inquire whether the items of indebtedness were contracted prior to the expiration thereof.

(c) It is not a good defense that some of the items of plaintiff's account were contracted by Block & Bro. prior to the date of the defendants' contract, for the reason previously stated,—that his engagement was general "to become surety for Henry Block & Bro. for the sum of \$10,000." The only limit of any kind that is fixed in the agreement is that it is not to remain in operation after the 15th of October, 1891.

Having examined with due care the various defenses set up by the surety or guarantor, and all the authorities on the subject, we have reached the conclusion that the judgment which was rendered by our learned and conscientious brother of the lower court is erroneous, and must be reversed. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plaintiffs, Lachman & Jacobl, do have and recover of and from the defendant C. Lazard, as surety for Henry Block & Bro., the sum of \$10,199.64, with 5 per cent. per annum interest from judicial demand, subject to a credit of \$594.18 as of date of filing suit, and all costs of both courts.

(46 La. Ann. 1246)

LAND v. MULLIN. (No. 1,285.)

(Supreme Court of Louisiana. June 15, 1894.)

DIVORCE—ADULTERY—EVIDENCE.

Question of facts only involved.

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

Bill by W. Bert Land against Sarah E. Mullin for divorce. Judgment for plaintiff. Defendant appeals. Reversed.

Robert Whetstone, for appellant. C. T. Dunn, for appellee.

McENERY, J. The plaintiff sued his wife for a divorce for adultery. The averment in the petition is "that Sarah E. Mullin has been unfaithful to her marriage vows, and has committed adultery with several different men within the last six or seven years; that in July, 1892, petitioner surprised his

said wife and Edward Bird in the act of adultery in petitioner's own house, no one being a witness to the same but petitioner." The wife answered, denying the accusations of the husband, and reconvened, praying for a separation from bed and board and a dissolution of the community on account of cruel treatment and defamation of her character. There was a judgment of divorce in favor of plaintiff, and giving him the custody of the daughter, Laura. The wife appealed.

If the charges of adultery made against the wife prior to July, 1892, were sustained, they were condoned by the husband's continued cohabitation with her. The particular act of adultery charged to have been committed in July, 1892, is not sustained by the evidence in the record. The petition alleges that the husband was the only witness to the act. The son, John Land, in his testimony, says he was present on the day the adultery is alleged to have been committed with one Bird in July, 1892, and that he was with his mother all that day, and positively denies any improper relation between his mother and Bird. This testimony is to some extent corroborated by the daughter, Laura. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered, adjudged, and decreed that there be judgment on the reconventional demand in favor of the defendant wife. It is ordered and decreed that there be a separation from bed and board between the plaintiff and defendant, and a dissolution of the community existing between them, and that she be entitled to retain the custody of her daughter, Laura. It is further ordered that this case be remanded to the lower court to settle the community interest of plaintiff and defendant, plaintiff to pay all costs.

No syllabus. Facts only involved. Judgment reversed.

(71 Miss. 906)

MURPHY et al. v. KLEIN et al.

(Supreme Court of Mississippi. March 19, 1894.)

LIMITATION OF ACTIONS—JUDGMENT—RUNNING OF STATUTE—EXECUTION.

An execution regularly issued within seven years will stop the running of the statute against a judgment, though issued for that sole purpose, and without expectation of thereby securing satisfaction.

Appeal from chancery court, Warren county; Claude Pintard, Chancellor.

Action by John Murphy and others against George M. Klein and others to subject property fraudulently conveyed to the satisfaction of a judgment. From a decree for defendants, plaintiffs appeal. Reversed.

Wade R. Young, for appellants. Dabney & McCabe, for appellees.

COOPER, J. The appellants, who are judgment creditors of John A. and George M. Klein, exhibited their bill to subject to the satisfaction of their judgment certain real and personal property, which, it is claimed, was fraudulently conveyed by their debtors to the other defendants. It appears from the bill of complaint that the judgments which are the foundation of the proceedings were rendered more than seven years before the bill was filed; but it is averred that they have been kept alive by the issuance of successive executions. The defendants answered the bill, and then, by way of cross bill, alleged that, while the judgments in favor of complainants were apparently good and valid, yet, in fact, they were void or discharged by the statute of limitations; that none of the executions issued under the judgments were bona fide, and for the purpose or in the hope of collecting and enforcing the judgments. The prayer of the cross bill is that the defendants thereto be summoned and required to answer under oath, "stating whether or not they have ever caused executions to be issued on their judgments, respectively, and, if so, when and for what purpose; and what effort, if any, they made to have levies of said executions made, or whether they simply caused them to be sued out, if at all, for the purpose of having them issued, without any purpose or expectation of having any levies made thereunder; that, on final hearing, your honor will decree on this cross bill that all of said judgments are invalid or discharged, and no longer are of any force, virtue, or effect, and that respondent George M. Klein, and respondent E. B. Klein as executrix, be relieved of the same, and that the original bill be dismissed." The defendants to the cross bill interposed a demurrer, which was overruled, and from that decree they prayed and were granted an appeal by the chancellor, in order that the principles involved may be settled.

We are urged by counsel on both sides to decide the question, which they say was intended to be raised by the demurrer, and which was considered and decided by the chancellor, and which is presented, if the demurrer is one to the relief prayed by the cross bill. But counsel for the appellees insist that, having expressed the opinion as to what we would decide on a case presenting the question, we must sustain the decree of the court below, because, they say, the demurrer is one to the discovery, only, sought by the cross bill, and not to the relief prayed, and defense to discovery, only, cannot be made by demurrer. Story, Eq. Pl. § 546. We will dispose of the objection to the form and nature of the demurrer first; for, if it be true that the demurrer is not one to relief, anything we should say in reference to the main question argued would be dictum. The pleader does not seem to have had any very clearly-defined purpose in preparing the demurrer; and whether it is one to discovery

or to the relief prayed we are at a loss to determine from an inspection of the demurrer itself. But it is evident that both court and counsel dealt with it as a demurrer to the relief, and so will we. The single proposition presented by the cross bill is that the statute of limitations on judgments is not affected by executions sued out and dealt with by the plaintiffs in the usual manner, unless they were taken out for the purpose, with the hope, and in the expectation of thereby securing satisfaction of the judgment. This contention is without merit, and finds no suggestion of support in the cases cited by counsel. *Harris v. West*, 25 Miss. 156; *Seavy v. Bennett*, 64 Miss. 735, 2 South. 177; *Jackson v. Scanland*, 65 Miss. 487, 4 South. 552. In *Harris v. West*, the plaintiff had the clerk to issue execution, which he then took to the sheriff, and had him return as not executed for want of time. In *Seavy v. Bennett* and *Jackson v. Scanland*, there had been no execution sued out at all by the plaintiffs. These cases decide that there must be a real, as distinguished from a mere formal, suing of execution; but there is nothing in them which gives countenance to the suggestion that, because the plaintiff knows or believes the defendant to be insolvent, and that the execution will be fruitless, his right to direct its issuance in the usual manner is impaired, or its effect, when issued, is at all limited. If the argument for appellees be sound, the statute of limitations of the right to sue out executions against insolvents cannot be suspended at all; for one cannot believe what he has no ground for believing, and no one can expect to have fruit from an execution against a barren defendant. If the plaintiffs sued out their executions in the usual manner, and caused them to be put in the hands of the proper officer, so that they might have been levied, if property subject thereto could have been found, they are not precluded from any benefit flowing from such action, merely because they pursued that course, for the purpose of preventing the bar of the statute of limitations from attaching, and had no hope or expectation of securing satisfaction of their judgments thereby. The decree is reversed, the demurrer sustained, and cause remanded.

(71 Miss. 771)

WEIS et al. v. BASKET et al.

(Supreme Court of Mississippi. April 9, 1894.)

ATTACHMENT—SALE OF PERISHABLE GOODS.

Under a statute authorizing the officer to sell attached goods, after another person has interposed a claim, only when the goods are live stock or chattels which it is expensive to keep, or perishable articles (Code 1880, §§ 1774, 2618), cotton ginned and baled cannot be sold.

Appeal from circuit court, Leflore county; W. T. Rush, Special Judge.

Action by J. Weis & Co. against Basket &

Aron. There was a judgment for defendants, and plaintiffs appeal. Reversed.

E. F. Noel, for appellants.

COOPER, J. After Weis & Co. had interposed a claim to the property seized under the attachment for rent sued out by Weis & Goldstein against Bright & Connerly, the officer had no authority to sell, unless the property seized was "horses, mules, or other live stock, or chattels which it was expensive to keep, or perishable articles." Acts 1882, p. 139; Code 1880, §§ 1774, 2618. Cotton ginned and baled is not of a class of chattels expensive to keep or perishable in its nature, within the meaning of the law. *Goodman v. Moss*, 64 Miss. 307, 1 South. 241. So far as is disclosed by this record, Weis & Goldstein were not landlords of Bright & Connerly, and they had no right to sue out the attachment for rent under which the cotton was seized. Reversed and remanded.

MERCHANTS' & PLANTERS' BANK v. MILLSAPS.

(Supreme Court of Mississippi. May 7, 1894.)

PROMISSORY NOTE — ACTION BY INDORSEES — DEFENSES—FAILURE OF CONSIDERATION.

1. Code, § 3503, allows the maker of an instrument for the payment of money, when sued by the assignee or indorsee, to plead want or failure of consideration, in the same manner as if the suit had been brought by the payee. *Held*, that the maker of a note is not estopped to deny the existence of a consideration because he knew, when executing it, that it was to be discounted by a certain person, if he made no representation to, and concealed no fact from, such person.

2. The maker of a note, the consideration for which has failed, is not bound to pay it because he secures an extension thereof from the indorsee, if he makes no promise to pay it in order to obtain the extension.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

"Not to be officially reported."

Action by Merchants' & Planters' Bank against R. W. Millsaps on a promissory note. Judgment for defendant, and plaintiff appeals. Affirmed.

Calhoon & Green, for appellant. Nugent & McWillie, for appellee.

COOPER, J. The assignments of error are that the court below erred in overruling the plaintiff's demurrer to the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 8th pleas, and in sustaining the defendant's demurrer to the replication to the 1st, 2d, 3d, 4th, 5th, 6th, and 7th pleas, and "in sustaining defendant's demurrer to plaintiff's replication to the 5th, 8th, and 9th pleas, filed after demurrer sustained to the 17th replication." The plaintiff was successful on the first two trials of the cause in the lower court, but on appeals to this court the judgments were reversed. The cases, as presented on those

appeals, are reported in 69 Miss. 918, 13 South. 837; 13 South. 903. The former appeals were from judgments upon verdicts; the present, as it may be conjectured from the errors assigned, deals with the action of the court upon the pleadings. The matters in controversy are not, in their nature, complicated, but have been greatly confused by the prolixity of the pleadings. Without regard to merely formal or immaterial issues presented, the substance of the controversy is this: The defendant, Millsaps, on the 20th day of September, 1890, executed his promissory note, payable to the order of H. K. Johnson, for the sum of \$2,916.67, payable in 60 days after the date thereof. This note, Johnson, on the same day, indorsed to appellant, for value; and, the note not having been paid, this suit is brought against Millsaps, the maker thereof. He pleads in defense that the note was given for the purchase of one-third of the capital stock of certain street-railroad companies, which Johnson was to deliver to him, and that the purchase was made by him in reliance upon certain representations and warranties made by Johnson that the aggregate indebtedness of the said companies did not exceed a certain fixed sum; that Johnson never delivered the stock; and that the stock had no real value, because the indebtedness of the companies exceeded their corporate assets, being very far in excess of the amount represented by Johnson. The former trials of the cause have involved the truth of the matters set up in the pleas of the defendant, and their sufficiency to meet the case of the plaintiff, as we have above stated it; and the result has been that this court has held (1) that the consideration of the note had failed; and (2) that under our statute allowing the maker of an instrument for the payment of money, when sued by the assignee or indorser, the benefit "of all want of lawful consideration, failure of consideration, payments, discounts and sets off, had or possessed against the same previous to notice of assignment, in the same manner as though the suit had been brought by the payee" (Code, § 3503), the defendant could avail himself of the defenses interposed against the plaintiff.

The present appeal presents certain facts, the existence of which, the plaintiff contends, precludes the defendant of the benefit of the defenses he has hitherto successfully interposed. The numerous pleas and demurrers and replications and demurrers found in the record are all directed to bringing before the court, in one form or another, these facts, which, shortly stated, are: (1) That prior to the 20th day of September, 1890 (the date of the execution of the note sued on), Johnson had agreed to sell, and Millsaps to buy, a part of the capital stock of the street-railway companies, and had on July 22d entered into a written agreement, by the terms of which the sale was to be

consummated on the 20th day of September, at which time Millsaps was to have delivered to him one-third of the capital stock of the said companies, and was to pay therefor the sum of \$15,150, less one-third of the aggregate indebtedness of said companies, which was then to be ascertained and fixed. That said parties met on said date for the purpose of consummating their contract of sale; but inasmuch as a larger part of the stock which Johnson had agreed to sell was then pledged to one Gunn, and Johnson was then unable to control it, and inasmuch as the amount of the corporate debts could not then be fixed to the satisfaction of Millsaps, the parties were not in condition to carry out their contract. That Johnson nevertheless expected Millsaps to pay him the purchase price of the stock at that time, as he claimed Millsaps had agreed to do, and to leave the amount of the corporate debts to be thereafter ascertained, and the stock to be thereafter redeemed from Gunn, and delivered to Millsaps. That Johnson then informed Millsaps that he must have money, and had relied upon getting it at that meeting. That Millsaps, knowing that the existence of the margin of value between the property of the corporations and the corporate debts had not been ascertained, and knowing that this margin constituted the thing to be bought and sold, then and there agreed that the sum of \$2,916.67 was the amount of such purchase price representing such margin. That Johnson then insisted that Millsaps should pay to him said sum of \$2,916.67. That defendant agreed to execute his note for said sum, to which Johnson replied that the note would do him no good unless he could get it discounted, and that he would go out, and learn whether or not this could be done. That Johnson soon returned, and told defendant that plaintiff would discount the note; and thereupon the defendant executed and delivered the note to Johnson, knowing that the margin of value that constituted its value had not been ascertained, and that Johnson was to immediately obtain the money from the plaintiff on the faith of the note being binding on the defendant. That Johnson immediately presented the note to the plaintiff, who, believing it to be a valid and binding note, and without notice of any defect in or want of consideration thereof, bought said note from Johnson for its full value. This is pleaded by the plaintiff as an estoppel against the defendant to deny the validity of the note. (2) By the second count of the declaration the plaintiff avers that after the execution and delivery of the note sued on by Millsaps, and after it had been purchased by the plaintiff, and Millsaps notified of the fact, Millsaps, on the 17th day of November, 1890, wrote to Johnson the following letter: "Jackson, Miss., Nov. 17th, 1890. H. K. Johnson, Greenville, Miss.—Dr. Sir: I expected to be able to visit Greenville before

this. Please have the note I gave for the stock extended till I come over to aid in the consolidation, so that I can have the stock delivered at time of the payment, & oblige yours, truly, R. W. Millsaps." The plaintiff avers that upon presentation of said letter, and in consideration of the request of Millsaps for an extension of time, the plaintiff agreed to extend the time for the payment of said note, and forbore to demand payment thereof according to its terms, whereby Millsaps became liable to and promised to pay to plaintiff the money mentioned in said note.

We can perceive nothing in what was done by Millsaps at the time of the execution of the note to Johnson, by reason of which he is precluded of defending against the note in the hands of the plaintiff. Johnson was not acting for him in applying to the bank to procure the note to be discounted, and there is no suggestion that he made or authorized any representation to be made to the bank, or concealed any fact then known by him to exist. The writing signed by him has a fixed and known legal meaning, and the plaintiff was as distinctly informed by the face of the paper as though the words had been therein written that it bound the defendant only if given upon consideration which should not fail. Persons who deal with the payees of notes and bills of exchange which are subject to our anti-commercial statutes must look to them for indemnity against losses sustained by reason of nonliability of the maker because of want or failure of consideration of the instrument. The maker of a note may, it is true, estop himself to deny the existence of a consideration for the promise he makes; but the mere execution of a note in good faith, knowing or expecting it to be discounted or disposed of by the payee to any one of the public, or to some particular individual, cannot operate as an estoppel. To so hold would be to repeal, in effect, the statute by which the defenses enumerated are allowed.

The second count in the declaration contains no cause of action resting on the obligation of the defendant to pay the note regardless of its validity because of the supposed extension thereof. Millsaps did not authorize Johnson to promise for him that the note should be paid if an extension should be granted, nor to make any representations or agreements in reference thereto. The judgment is affirmed.

CAMPBELL, C. J., being interested, takes no part in this decision.

(103 Ala. 301)

GUILFORD et al. v. REEVES et al.

(Supreme Court of Alabama. May 23, 1894.)
GARNISHMENT—DISSOLUTION BY BOND—JUDGMENT.

Where a garnishee answers admitting the indebtedness, but alleges that such indebt-

edness has been previously garnished in another action against defendant, and defendant gives bond to dissolve the garnishment, as provided by Acts 1890-91, p. 590, judgment cannot be rendered on the bond until the claim under the previous garnishment has been adjudicated, and then only for the amount remaining in the hands of the garnishee after satisfying such claim.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action by J. S. Reeves & Co. against J. C. Guilford and others. From a judgment for plaintiffs, defendants appeal. Reversed.

J. S. Reeves & Co. obtained an attachment against J. C. Guilford, which was levied upon a stock of goods, and was also levied by serving writs of garnishment on several insurance companies. The several garnishees answered, and disclosed in their answers that they had issued fire insurance policies in favor of the said Guilford upon certain property; that the property covered by said policies had been destroyed by fire; and that they were liable under said policies to the holders thereof. It was also stated in the answers of the said garnishees that they had been garnished in other suits against the said Guilford, and in one of the answers it was suggested that one O. M. Hill claimed the amount to which the said Guilford was entitled under the policy. The said Guilford executed bond, as provided by the act of February 12, 1891 (Acts 1890-91, p. 590), with the other appellants as sureties thereon, to have the garnishments dissolved. J. S. Reeves & Co. obtained a judgment against the said Guilford for the amount of their debt, but no judgment was rendered against either of the garnishees. On motion of the said J. S. Reeves & Co., the court rendered judgment in their favor against the said J. C. Guilford.

G. L. Comer and T. W. Espy, for appellants. W. D. Roberts, for appellees.

McCLELLAN, J. It is quite true that, when the defendant to a cause in which the process of garnishment has been resorted to, and the garnishee has answered indebtedness, executes bond, as provided in the act of February 12, 1891 (Acts 1890-91, p. 590), for the dissolution of the garnishment, no judgment can be rendered against the garnishee, for the plain reason that the garnishment has been dissolved. *Balkum v. Strauss* (Ala.) 14 South. 53. But it is equally true that the bond stands precisely in the stead and place of the garnishee, and that no judgment can be rendered upon it or against any of the obligors therein as such obligors unless and until the plaintiff in action and garnishment would have been entitled to judgment against the garnishee had the bond for the dissolution of the attachment not been given. If, for any cause, the plaintiff, notwithstanding admission of indebtedness by the garnishee, would not have been entitled to judgment against the garnishee, as, for instance, when it is made to appear that a

third person has a superior claim to the money due or to become due in the hands of the garnishee, then he cannot have judgment on the bond. In the case at bar the answer of the garnishee alleges that the garnishee had been notified that C. M. Hill, a stranger to the pending suit, claimed the money which the answer admitted to be due from the garnishee to the defendant. The answer also showed that other writs of garnishment, in other actions against the defendant here, had been served on the garnishee, but whether before or after or simultaneous with service of the writ in this case does not appear. On this answer, the bond standing in the shoes of the garnishee, the case was brought, in our opinion, directly within the provisions of section 2984 et seq. of the Code, and no judgment on the bond could be rendered (as no judgment against the garnishee, had the bond not have been given, could have been rendered) until the proceedings required by those sections were had, and upon them the claim of Hill had been adjudged against him, or, if he were a resident, two notices of the garnishee's suggestion of his claim had been returned not found. Meantime the law requires the court to suspend the proceedings against the garnishee, and, as we hold, where bond has been given for a dissolution of the garnishment, against the obligors on the bond. That course was not taken in this case. To the contrary, no steps were taken to notify Hill to the end that his claim might be propounded and tried, but judgment was rendered for the plaintiff against the obligors on the bond, without the proceedings provided for in the statutes being had. This was clearly erroneous. That judgment will be here reversed, and the cause will be remanded.

The pendency of garnishments against the garnishee here in other suits against the defendants here, whether prior or subsequent to the writ in this case, is not a matter for suggestion by the garnishee, under section 2984 of the Code. *Association v. Weems*, 69 Ala. 584. But where there are other prior garnishments, and the admitted indebtedness is not sufficient to satisfy the demands of the two or more plaintiffs, or where the several writs are contemporaneous, and the indebtedness is not sufficient to satisfy all the claims in full, it would seem that, in the case first supposed, the cause should stand over until the amount of the prior demands, including costs, has been ascertained by judgment against the bondsmen in that or those cases, and judgment in the subsequent garnishment should then be rendered against the bond in the subsequent case for the balance, only, of the fund, and in the second case, where the service of the several writs is simultaneous, judgment against the bond in any one case should be for only such part of the indebtedness as each plaintiff is entitled to under the rule for the division of proceeds of property at-

tached or levied upon simultaneously at the suit of two or more creditors of the defendant, and that no judgment against the bond could be had in any case until all the claims thus entitled to share in the fund had been ascertained by judgment against the defendant in each of them. These conclusions appear to result necessarily from the position we have declared in respect of putting the bond in the shoes of the garnishee; the provision of the statute that the bond shall be "for the payment of the amount of such judgment as may be [i. e. might have been put for the dissolution on bond given] rendered against the garnishee in such proceedings, and the cost thereon" (Acts 1890-91, p. 591); and the adjudications of this court on this question in a case where no bond had been given (*Warren v. Matthews*, 96 Ala. 183, 11 South. 285).

Reversed and remanded.

(102 Ala. 33)

WILLIAMS v. STATE.

(Supreme Court of Alabama. May 23, 1894.)

FELONIOUS ASSAULT—SELF-DEFENSE—CONFESSION BY DEFENDANT—EVIDENCE TO SHOW ADMISSIBILITY.

1. On examination of a sheriff as to admissions made by defendant just after his arrest, it was proper for defendant's counsel to ask if he, or some of his posse, did not shoot and wound defendant in making the arrest, as this was a circumstance to be considered in determining the competency of the admissions.

2. Where the evidence shows that prior to the assault the party assaulted made threats against defendant, and that he was in the act of drawing a pistol on defendant when he fired, a charge as to self-defense should be given.

Appeal from circuit court, Walker county; James J. Banks, Judge.

Jack Williams was convicted of a felonious assault, and appeals. Reversed.

The testimony for the state tended to show that the defendant, before the finding of the indictment, shot John Halton. The facts in reference to the ruling of the court upon the evidence are sufficiently stated in the opinion, as is also the tendency of the testimony for the defendant. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The defendant had the right to act on appearances, and if the jury find from the evidence that, at the time the defendant fired at John Halton, he reasonably believed that said Halton was about to kill him (defendant), or do him some great bodily harm, and that defendant fired to prevent such injury to his person, then the jury should find the defendant not guilty." (2) "If the jury find from the evidence that the conduct of John Halton was such as to reasonably lead the defendant to believe that Halton was about to inflict some great bodily harm on his person, and the jury further find that defendant was not at fault in

bringing on the difficulty, that the defendant could not have retreated without increasing his danger, and that defendant, acting on such reasonable belief of great bodily harm, fired a pistol at said Halton, and wounded him, then the jury should acquit the defendant."

Appling, McGuire & Collier, for appellant.
Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant in this case was indicted, tried, and convicted of a felonious assault, and sentenced to suffer imprisonment in the penitentiary for a period of five years. During the trial an exception was reserved to the ruling of the court admitting certain facts as evidence, and for refusing two charges requested by the defendant. The deputy sheriff, a witness for the state, was interrogated as to admissions made by the defendant just after his arrest, and while under arrest, in regard to the shooting. After stating facts to show that no undue influences were used to induce the confessions, the defendant's counsel asked the witness "if it was not a fact that he or some of his posse had shot and wounded the defendant in making the arrest?" The witness "answered in the affirmative, and stated that the defendant was shot in making the arrest by some of his posse." The solicitor then asked the deputy to state the facts and circumstances which caused the shooting. This was objected to by the defendant. The objection was properly overruled. The defendant himself, by his counsel, called out the fact that at the time of the statements he was wounded, and the evidence showed that the wound was inflicted by some one making the arrest, and was made while under and immediately after the arrest. It was the duty of the court to ascertain all the facts and circumstances calculated to influence the defendant to make the confessions, in order to adjudicate their competency; and it was right for the jury to know under what circumstances they were made, in order to properly weigh them. The motion to exclude the evidence was properly overruled for another reason. It was competent for the witness to state that the defendant had concealed himself, and the motion to exclude the statement of facts included the fact of the concealment as well as other facts. The court is not bound to separate legal from illegal evidence, conceding that a part was illegal. The first charge requested by the defendant was clearly erroneous. We need not refer to it further.

The court erred in refusing the second charge requested. The defendant attempted to justify under the rules of self-defense. He introduced evidence tending to show that, prior to the time of the difficulty, John Halton (the party upon whom the alleged assault was committed) had made threats against him, and "that he was in the act of

drawing a pistol on defendant, in a threatening attitude, from his hip or side pocket, when defendant fired;" that defendant was standing near a fire, in company with several other persons; and that Halton was "circling" around him when he fired. The record states that "Halton was in the act of drawing a pistol." No part of the evidence tends to show how the difficulty was brought on, or who was the aggressor, or in fault. Considering the charge in relation to the evidence, the words, "about to inflict some great bodily harm on his person," are properly referable to the fact "that he was in the act of drawing a pistol on defendant, in a threatening attitude, from his hip or side pocket." The proof was sufficient upon which to predicate a charge of self-defense. The charge itself, as we construe it, asserts the law properly. It might have been better expressed, but, as framed, it could not mislead the jury. *Holmes v. State* (Ala.) 14 South. 864; *Keith v. State*, 97 Ala. 32, 11 South. 914; *Gibson v. State*, 89 Ala. 121, 8 South. 98.

Reversed and remanded.

(103 Ala. 345)

RICH v. McINERY.

(Supreme Court of Alabama. May 22, 1894.)

ACTION FOR FALSE IMPRISONMENT — PLEADINGS — EVIDENCE — MALICE — WANT OF PROBABLE CAUSE.

1. Where a complaint alleged that defendant procured the arrest and imprisonment of plaintiff, upon a charge of larceny, with malice and without probable cause, a plea alleging that the arrest and imprisonment were by a policeman who had reasonable cause to believe plaintiff guilty of larceny was demurrable, as falling to deny that the arrest was made at the request of defendant, without reasonable cause for belief on the latter's part that plaintiff was guilty, and as not denying that defendant caused the arrest maliciously, and without probable cause.

2. In an action for false imprisonment, the officer's statement to plaintiff, at the time of the arrest, that defendant had accused plaintiff of stealing, is admissible as part of the *res gestae*.

3. Where malice and want of probable cause are alleged, they must be proved.

4. Where one requests an officer to arrest another, it is immaterial whether or not he acts maliciously, or whether or not there is want of probable cause, unless the officer makes the arrest because it is requested, and not of his own volition.

Appeal from city court of Decatur; William H. Simpson, Judge.

Action by Michael McInery against William Rich for false imprisonment. Judgment for plaintiff, and defendant appeals. Reversed.

The evidence for the plaintiff tended to show that on July 28, 1888, he was in the jewelry store of the defendant, looking at some rings; that a short time after he left said store he was arrested by two police officers of the city of Decatur; that after said arrest he gave bond for his appearance at the mayor's court the next morning; that in obedience to said bond he appeared at the

court, and the cause was continued until the afternoon; that at the hearing of the cause against him, in the afternoon, he demanded of the defendant, who was the prosecutor, a warrant for his arrest; that at the defendant's request the case was continued until the next morning, in order that he might sue out a warrant; and on the next morning, the defendant failing to appear, the prosecution against the plaintiff was dismissed. The testimony of Thomas Turley and William Griffin, the two police officers who arrested the plaintiff, tended to show that the arrest was made at the instance and upon the demand of the defendant, Rich; that when one of the officers told said Rich, after he had accused the plaintiff of having stolen a ring, that he (the officer) knew McNery, and that Rich must be mistaken as to his charge against him, Rich told the said officer to arrest him; and that in obedience to said direction the officer arrested the plaintiff. The plaintiff testified that when he was arrested the officers told him that Rich accused him of stealing a ring. The defendant objected to this testimony, and moved the court to exclude the same, on the ground that it was hearsay, and a statement not made in the presence of the defendant. The court overruled the objection, and the defendant duly excepted. The testimony of defendant and Nelson and Crass, witnesses in behalf of the defendant, tended to show that he did not accuse the plaintiff of having stolen a ring from him, and did not direct the officers to arrest the plaintiff, but that he told the officers of the circumstances of the plaintiff having been in his store to look at some rings, and when the plaintiff left he missed a ring which he had shown him, and the police officers asked if he (Rich) wished the plaintiff arrested; that he declined to order the plaintiff arrested; and that, thereupon, the officers said that under the circumstances they would arrest the plaintiff.

The court, at the request of the plaintiff, gave to the jury the following charges: (1) "If the jury believe from all the evidence that defendant procured, ordered, or directed the arrest of plaintiff, and that he was arrested, then I charge you that if defendant did this merely upon suspicion that plaintiff had stolen a ring from his store, and without reasonable cause to believe that plaintiff was guilty thereof, then defendant is liable in this action in such a sum as you may believe, from all the evidence, that he has been injured, not exceeding five thousand (\$5,000) dollars." (2) "If you believe from all the evidence in this case that defendant procured, ordered, and directed the arrest of plaintiff, and that he was arrested at defendant's request, then if you believe that in fact no ring was in fact stolen from defendant's store, and that consequently plaintiff was not guilty of having stolen the same, then I charge you that the defendant is liable in

this suit, and your verdict should be for the plaintiff." (3) "If you believe from all the evidence in this case that defendant appeared at the mayor's court upon the next day after the arrest of defendant, and stated to the mayor of the town of Decatur that he would prepare, or have prepared, a warrant for plaintiff, upon a charge of stealing a ring from defendant's store, upon the next morning, and that thereupon, and because of this, the mayor continued the examination or trial of plaintiff until the next morning,—if you believe these facts, if facts they be,—then this is some evidence, to which you may look in connection with all the evidence in the case, tending to show that defendant authorized and directed the arrest of plaintiff; and if you believe that he did so procure, order, and direct the arrest of plaintiff, without a reasonable cause to believe that plaintiff was guilty of the charge, then defendant is liable in this suit." (4) "The burden of the proof is on the defendant, Rich, to prove to the satisfaction of the jury that the ring was stolen." (5) "I charge you that the probable cause that will excuse the defendant in this case, if you believe defendant ordered and directed the arrest of plaintiff, there must have been a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty; and even this probable cause is not sufficient to avail the defendant in this cause unless you believe that a ring was in fact stolen from defendant's store." (7) "If the jury believe from the evidence that no felony had in fact been committed, and that defendant maliciously, and without probable cause, directed the arrest of plaintiff by the policemen, they must find for the plaintiff, and, in assessing plaintiff's damages, may take into consideration the injury to his feelings caused by his arrest and imprisonment, and it is not necessary to prove by witnesses the amount of such damages. The jury may assess damages as they deem proper, not exceeding the amount claimed in the plaintiff's complaint." (10) "Unless the jury are reasonably satisfied that the ring was in fact stolen, then it is immaterial whether Rich had probable cause for believing that the plaintiff had committed the theft."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by him: (1) "If the jury believe the evidence, they will find for the defendant." (2) "Whether the ring was actually stolen or not, if you believe from the evidence that the defendant had probable cause for believing it was stolen by plaintiff, then your verdict should be for defendant." (3) "If the minds of the jury are in a state of doubt, from the evidence, as to whether defendant Rich ordered the police officers to make the arrest of plaintiff, then the verdict of the jury should

be for defendant." (4) "If you believe from the evidence that plaintiff took the ring mentioned out of the store without the knowledge of defendant, this would be felony, under the laws of Alabama; and, if you believe from the evidence that the defendant had probable cause for believing that plaintiff did take the ring, then, whether he took the ring or not, the defendant would not be liable." (5) "If you believe from the evidence that the evidence of the witnesses Turley, Griffin, Crass, Nelson, and Rich conflicts as to whether Rich told the officers, Griffin and Turley, that he would not make the charge of larceny against the plaintiff, and that he did not make such charge before plaintiff was arrested, and this was all the evidence upon this point, and that these witnesses are equally credible and worthy of belief, then your verdict should be for defendant." (6) "If you believe from the evidence that the plaintiff was arrested by the officers without being instructed by the defendant to do so, then defendant is not liable; and in determining this you must look to the evidence of the witnesses Griffin, Turley, Rich, Nelson, and Crass, and if you find theirs is all the evidence upon this question, and they are equally credible and worthy of belief, and that Turley and Griffin testified that they were instructed by defendant to arrest plaintiff, and that Rich, Nelson, and Crass testified that defendant did not instruct Turley and Griffin to arrest him, then your verdict should be for defendant."

Harris & Eyster, for appellants. O. Kyle, for appellee.

HEAD, J. False imprisonment is the unlawful restraint of a person, contrary to his will. But two things are requisite, viz. detention of the person, and unlawfulness of such detention. 7 Am. & Eng. Enc. Law, 661, 662. Malice is not material, except in aggravation of damages. Nor is probable cause of guilt on the part of the party imprisoned, when the imprisonment is under a criminal charge, material, except as it may be rendered so by the provisions of sections 4262 and 4266 of the Code, in cases to which those sections are applicable. 7 Am. & Eng. Enc. Law, 663, 664. If the imprisonment is under legal process, but the prosecution has been commenced and carried on maliciously, and without probable cause, terminating in the discharge of the defendant, it is malicious prosecution, and not false imprisonment. *Id.* 663. The action for damages for false imprisonment is in trespass; for malicious prosecution, in case. In *Ragsdale v. Bowles*, 16 Ala. 62 (decided in 1849), the averments of the complaint were that the defendant, "falsely, maliciously, and without probable cause, charged the plaintiff with the crime of felony, and, upon said charge, falsely, maliciously, and without probable cause, caused the plaintiff to be arrested by his

body, and to be imprisoned, and kept and detained in prison for a long time, to wit, for the space of one day, then next following, and at the expiration of which said time he, the said defendant, caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution." The action was instituted and intended as one for malicious prosecution, and was prosecuted and defended in the court below and in this court as such. The defendant demurred to the declaration on the ground that it did not sufficiently aver the termination of the prosecution. Dargan, J., began the opinion of this court with the statement that "this was an action on the case, for a malicious prosecution," and proceeded to dispose of the demurrer, above mentioned, to the declaration, and held that the averment touching the termination of the prosecution was insufficient, and that the count was therefore bad, considered as a count for malicious prosecution. But he proceeded further to say that the count was good for false imprisonment, and for this reason held that the demurrer was properly overruled. The idea underlying this conclusion, manifestly, was that the descriptive words, "falsely, maliciously, and without probable cause," were sufficient to show that the acts of arrest and imprisonment charged were unlawful; and there being no allegation that they were done under a valid warrant, the prosecution of which had terminated in the discharge of the defendant, the count was held to contain all the essentials of trespass for false imprisonment. It was clearly, however, not intended to affirm by this decision that, in order to give an action for false imprisonment, it was necessary that the arrest and detention should have been under a criminal charge, preferred falsely, maliciously, and without probable cause. These characteristics, while they constitute unlawfulness, in themselves, sufficient to show trespass, and support an action of that nature, when the arrest is not under legal process, are yet restrictive of the unlawfulness by which the action may be supported; and they were material to the action then before the court only because they were alleged and constituted the only character of unlawfulness which was alleged. For instance, it was never intended to be decided that a wrongful imprisonment, not based upon a criminal charge, would not give an action of trespass for false imprisonment, or that an unlawful imprisonment, without legal process, based upon a criminal charge, effected without malice and with probable cause, would not give such an action. Suppose the case of an arrest and imprisonment by a private person, in good faith, upon a charge of misdemeanor not committed in his presence, of one actually guilty of the offense. Surely, in such a case, an action for false imprisonment would lie. Shortly after the decision of *Ragsdale v. Bowles*, supra, the Code of 1852 was adopted, and in it

a schedule of forms of complaints was promulgated. Among these forms is one headed, "For False Imprisonment." With the case of *Ragsdale v. Bowles*, evidently, before the codifier, he substantially conformed this form to the declaration in that case, and wrote it thus: "A. B. Plaintiff vs. C. D. Defendant. The plaintiff claims of the defendant — dollars, as damages for maliciously, and without probable cause therefor, arresting and imprisoning (or, if the case be so, causing the defendant [?] to be arrested and imprisoned) on a charge of larceny, (or other felony as the case may be) for — days, viz.: on the — day of —." This form was carried into the Codes of 1867 and 1876 without change, and into the Code of 1886 so changed as to correct the mistake whereby the word "defendant" was used when "plaintiff" was intended, and to adapt the form to an arrest under any criminal charge, whether felony or otherwise. It thus appears, as we said of the declaration in *Ragsdale v. Bowles*, that the form of complaint prescribed by the Code is highly restrictive of the nature and character of the wrongful acts which, under the general principles of law, will support an action of trespass for false imprisonment. Pursuing that form, the action is maintainable only when the arrest and imprisonment are done or caused by the defendant, upon a criminal charge, with malice and without probable cause. We are of opinion it was not the intention of the legislature to make this form exclusive. We cannot suppose it was designed to abolish the probably graver offenses of false imprisonment, civilly actionable, which are not characterized by the elements the form makes essential. This question, however, is not now before us, since the present complaint pursues the form prescribed. It alleges arrest and imprisonment of plaintiff, by the procurement of the defendant, upon a charge of larceny, with malice, and without probable cause. Being alleged, these elements must be shown to have existed, to justify a recovery by the plaintiff.

By statute, a marshal or policeman of an incorporated city or town, as well as sheriffs and constables, may, within the limits of his county, arrest a person without a warrant when he has reasonable cause to believe that such person has committed a felony, although it may afterwards appear that a felony had not in fact been committed. Code, §§ 4260, 4262. In making the arrest the officer must inform the person of his authority, and the cause of arrest, except when he is arrested on pursuit. *Id.* § 4263. There are other cases, not necessary to mention, in which arrests may be made by officers without warrant. See sections of Code, *supra*. The defendant interposed a special plea, setting up that the alleged arrest and imprisonment of plaintiff were had and made by a policeman of the town of Decatur,—an incorporated town in Morgan county, Ala.,—the said policeman having

reasonable cause to believe that the plaintiff was guilty of the offense of grand larceny. The plaintiff demurred to this plea, assigning as grounds that it fails to deny that the arrest was done, caused, or effected at the instance, request, or command of the defendant, without reasonable cause for belief on the part of the defendant that the plaintiff was guilty of grand larceny, and that it fails to deny that defendant caused the arrest of plaintiff maliciously, and without probable cause. These pleadings are aptly framed to present the question they are intended to present, which is whether the facts stated in the plea, taken in connection with the facts averred in the complaint, and not traversed by the plea, do not show the injury complained of was consequential upon the defendant's wrong, by reason whereof the plaintiff's remedy is in case, and not in trespass. The argument in support of the plea is that as the arrest was by an officer upon a charge of felony, who had reasonable cause to believe the plaintiff guilty, the act was lawful on the part of the officer; and the defendant, therefore, in procuring the arrest, procured the commission of a lawful act, and his conduct being characterized by malice and want of probable cause, his wrongdoing consisted, not in causing an unlawful arrest, but a lawful arrest in an unlawful manner. The vice of the argument, we conceive, is that it erroneously supposes that the rightfulness or lawfulness of the officer's act in arresting one, without warrant, who, he has reasonable cause to believe, has committed a felony, can be predicated upon the command or direction of another, procuring him to do the act. Such lawfulness on the part of the officer is predicable alone of information possessed by him, affording him reasonable cause to believe that a felony has been committed by the party arrested. Hence, the arrest must be of the officer's own volition, based upon this reasonable cause, and must not be induced by the command or direction of another. If he acts by the command or direction of another, and arrests and imprisons one upon a charge of felony which has not been committed, or which, if committed, the party commanding the arrest has no reasonable cause to believe was committed by the person arrested, the act is unlawful on the part of the officer himself, as well as the person who procured it. Code, § 4266. And this is true although, at the same time, he may have had reasonable cause to believe the party guilty. If he acted upon the command or request of another, without which he would not have made the arrest, the act cannot be legally considered as resulting from the reasonable belief of guilt. We do not mean to intimate that the officer's information, which will give him reasonable cause of belief, justifying the arrest, on his part, may not be derived from another, who may at the same time command or request him to make the arrest. We wish it under-

stood that the distinction we draw is that the command or request must not be the moving cause of the officer's act, but his act must proceed alone from his reasonable cause of belief of the party's guilt, based upon his information of facts touching guilt, howsoever derived. Whether he so acted will always be a question of fact, to be determined upon the consideration of all the circumstances of the particular case. As a corollary, if the officer was not induced by the command or request given by another, but acted alone upon reasonable cause to believe the party guilty, then such command or request, though given, cannot be deemed a cause of the arrest, and the party giving it would be guilty of no trespass, without regard to the motive with which it may have been given. The plea in question, in legal effect, confessed that the act of the officer was caused by the command of the defendant, and seeks to avoid its consequences by the allegation that he (the officer) at the same time, had reasonable cause to believe that the plaintiff was guilty of the felony mentioned. It does not go so far, even, as to allege that this reasonable cause of belief concurred with the defendant's command, in inducing the officer to act. The demurrers were properly sustained.

We have seen that the plaintiff took upon himself to allege that the defendant caused him to be arrested and imprisoned, on a charge of larceny, maliciously and without probable cause. We construe the larceny charged to mean grand larceny, under our statutes, as the pleader has not alleged it to have been of a smaller grade. The pleas and replications, as we interpret them, do no more than put these allegations in issue. On the trial it appeared that the arrest was made by police officers of Decatur; and plaintiff, while testifying, was permitted to state, against the objection and exception of defendant, that the officers said at the time of the arrest that Rich (meaning defendant) had accused him of stealing a ring. There was no error in this ruling. All that was said by the officers while making the arrest was admissible as *res gestae*. Besides, there was evidence tending to show that they acted by command and procurement of the defendant, and, if the jury believe that evidence, all that the officer said or did in furtherance of such command could be considered as evidence against him. The court tried the case upon the theory that the existence of malice and want of probable cause, actuating the defendant to cause the arrest, if he did cause it, were immaterial. We have shown that they were material, by reason of being alleged. It was incumbent on plaintiff to satisfy the jury of both. All the charges, therefore, given for the plaintiff, except the seventh, were erroneous, in view of this principle. For like reason the second charge requested by defendant ought to have been given.

All the other charges requested by the defendant were properly refused. The third exacts too high a measure of proof that defendant caused the arrest. The fourth incorrectly defines larceny, for reasons too obvious to require mention. The fifth and sixth were properly refused because of their argumentative character.

The fifth charge given at the instance of plaintiff correctly defines "probable cause" to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty." Under the complaint, as framed, if the defendant had such probable cause to believe that the felony had been committed, whether it had been committed or not, and that the plaintiff was guilty thereof, the plaintiff was not entitled to recover.

The seventh charge given for the plaintiff, while it protects defendant against a recovery if he acted without malice, or with probable cause, yet authorizes a recovery against him if he directed the arrest of plaintiff by the policemen, whether those officers acted in pursuance of such direction, or entirely of their own volition. As we have already said, if they were not moved or induced to make the arrest and imprisonment by the direction or request of defendant, it is immaterial whether he gave such direction of request or not, or, if he did, how malicious may have been his motive in giving it, or how palpable the want of probable cause. We remark, further, that if the defendant did no more than accuse the plaintiff of the theft, and give information to the officers of the fact upon which he based the accusation, upon which accusation and information the officers acted, of their own volition, without command, direction, or request of the defendant, then defendant is not liable in this action, although he may have acted maliciously and without probable cause in making the accusation and giving the information.

The seventh charge is also erroneous in assuming that the plaintiff suffered injury to his feelings. Whether he did or not was a question for the jury, not the court. For the errors pointed out the judgment of the city court is reversed, and the cause remanded. Reversed and remanded.

BRICKELL, C. J., not sitting.

(34 Fla. 77)

NUTT v. CODINGTON et ux.

(Supreme Court of Florida, July 3, 1894.)

MECHANIC'S LIEN—NOTICE—WIFE'S SEPARATE ESTATE—PLEADING—EVIDENCE.

1. The act of 1885 (chapter 3611) did not require any notice to be given of the lien thereby secured to mechanics, laborers, and material men.

2. If a bill filed by a mechanic against a married woman and her husband to enforce a lien claimed under the act of 1885, chapter

8611, on the wife's separate property for labor performed and material furnished thereon, contain sufficient allegations to show a proper charge on such estate, it will sustain a decree, upon sufficient proof of the claim, in favor of complainant, independent of the lien given by the statute. Whether the statute referred to gives a lien on the separate property of a married woman, not decided.

3. A married woman is incapable of making a contract for labor performed or material furnished on her separate property that will bind her in a personal judgment, but her estate may be charged for such a demand under her contract.

4. Where it is sought by bill in equity to charge the separate estate of a married woman for labor performed and material furnished in the improvement thereof, it is incumbent upon the complainant to show that the demand sued for was for labor and material furnished on the wife's property, and constituted a proper charge on said estate; and a decree adverse to the complainant will not be reversed when the testimony leaves it in doubt whether or not such demand was for labor and material furnished on the wife's property, or on other property in which she had no interest.

(Syllabus by the Court.)

Appeal from circuit court, Polk county; G. A. Hanson, Judge.

Bill by James H. Nutt against E. W. Codington and wife to enforce a mechanic's lien. Decree for defendants. Plaintiff appeals. Affirmed.

J. W. Brady, for appellant. Wilson & Wilson and Wall & Knight, for appellees.

MABRY, J. A bill in chancery was filed by appellant against appellees, and it alleges, in substance, that in September, 1886, Nutt entered into a contract with E. W. Codington, agent for his wife, Anna V. Codington, through A. E. Pooser, contractor, to furnish material and do the work necessary in plastering a certain dwelling house situated on Floral avenue, in the town of Bartow. It is alleged that the house and lot on which it is located belonged to Mrs. Codington; that the contract for said plastering was fully complied with, and completed in the month of January, 1887, and that there was then due the complainant, Nutt, for the material furnished and work done in plastering said house, the sum of \$198.94, a copy of the account being filed with the bill, and consisting in a statement that Anna V. and E. W. Codington were indebted to James H. Nutt, for lime and laths furnished and work done in plastering house throughout, \$198.94. It is also alleged that complainant had filed a lien against the building in the office of the clerk of the circuit court for Polk county, a copy of which is also filed with the bill. The prayer is that the building be sold and the proceeds applied to the payment of complainant's claim, costs of court, attorney fees, and for process.

The answer alleges that E. W. Codington entered into a contract with A. E. Pooser for the erection of a dwelling house on Floral avenue, but it is denied that said contract was made by E. W. Codington as the

agent of his wife, or that he acted in any way as her agent. It is admitted that the real estate sought to be charged with a lien was the property of Mrs. Codington, but alleged that in making said contract E. W. Codington acted for and on behalf of himself only, and that it was not the understanding of either of the respondents, or said Pooser, that Mrs. Codington should in any way subject herself or separate estate to any liability concerning said contract. It is admitted that Nutt furnished materials and performed work in the construction of said building, but alleged that, if he made any contract for furnishing said materials and performing said work, it was made with A. E. Pooser, the contractor for the erection of said building, and that Mrs. Codington had no knowledge whatever of said contract, and that Nutt had never given to her or her husband any notice that said material had been furnished or work performed in the erection of said building, or that the contractor was indebted to him (Nutt), and that he looked to the respondents, or either of them, for what was due thereon. It is also alleged that the contractor, Pooser, had been overpaid by E. W. Codington for the entire contract price for building said house before the filing of the lien mentioned in the bill, and before either of the respondents had any knowledge of any claim by the complainant against Pooser; also, that but a small portion of the amount sought to be recovered by complainant was for labor actually performed by him, and that if he can recover at all it cannot be for any greater amount than that claimed for said labor, as no lien was filed or claimed for materials furnished. After replication and testimony taken, the bill was dismissed on final hearing at complainant's cost, and the appeal is from the final decree.

The testimony shows that E. W. Codington made a contract in 1886 with A. E. Pooser to erect a house in Bartow, Fla., on a lot belonging to his wife, Anna V. Codington, and that Pooser entered into a contract with appellant, Nutt, to furnish the material and do the plastering in said house. Nutt completed his part of the contract by the last of December, 1886, and the bill was filed on the 15th day of December, 1887, for the purpose of subjecting the house and lot to the payment of what Nutt claimed as then due him on the plastering contract. It appears that, about the time Nutt completed the plastering, an agreement was entered into between E. W. Codington and A. E. Pooser, the contractor, by which the building was to be finished under the direction and management of Codington. It seems that he, at this time, had advanced a large proportion of the contract price for building the house, and was apprehensive that there would not be enough to complete it, and the agreement was for him in person to pay the hands for the remaining work to be done on the house. There is a conflict in the evi-

dence whether, by this agreement, Codington was to pay the laborers only for work performed after the agreement, or for that done as well before as after, and not paid for by Pooser. Nutt's labor was performed before the agreement was made, and the testimony tends to show that Pooser, the contractor, was paid more than the contract price for building the house, considering the cost of labor after the agreement. It is shown that Nutt made his contract with Pooser, and not with Codington or his wife, although he (Nutt) says that after doing some of the work E. W. Codington agreed to see him paid. This is denied by Codington. The act of 1885 (chapter 3611) required no notice to be given of the lien thereby secured to mechanics, laborers, and material men, and repealed the section in the act of March 7, 1877, on that subject. *Barbour v. Van Camp*, 26 Fla. 40, 7 South. 162. The bill in this case has for its object the subjection of a married woman's property to the payment of a claim for improvements placed thereon, and it must be conceded that it was incumbent upon the complainant to show that the demand he sued for was a proper charge on the property. The conditions under which such a claim can be enforced, and a married woman's separate property subjected in equity to the payment of debts, have frequently been considered by this court. *Thrasher v. Dolg*, 18 Fla. 809; *Blumer v. Pollak*, Id. 707; *Harwood v. Root*, 20 Fla. 949; *Schnabel v. Betts*, 23 Fla. 178, 1 South. 692; *O'Neil v. Percival*, 25 Fla. 118, 5 South. 809; *Garvin v. Watkins*, 29 Fla. 151, 10 South. 818; and other cases. The married woman not being able to bind herself by contract in such cases, it devolves upon a complainant to show that his demand is such as will be enforced by a court of equity.

If it be conceded here that the complainant had a lien on the house and lot of Mrs. Codington by virtue of the act of 1885 (chapter 3611), for work done thereon, which he could enforce in a court of equity, our conclusion is that the decree dismissing the bill must be affirmed on the testimony in reference to the establishment of complainant's claim. He testified that he completed the work, and, "according to Mr. Pooser's account, they took my books when I was sick, and agreed that this amount that we are now suing for was due me on the house, of which I have never received a cent." He was asked if the amount he was suing for was then due him, and stated: "Yes, sir; according to their count. I could not understand it on account of having received some money. The money came through Mr. Pooser." He was also asked, on cross-examination, how many yards of plastering there were in the house, and stated: "I cannot tell you, sir, just now, as the calculation is laid one side, and I cannot find it, but the measurement was satisfactory to Mr. Pooser, and all other parties besides." On redirect

examination, the witness was asked if the amount agreed upon at his room at the time of the settlement made by Pooser and Codington represented what the latter owed him, or what Pooser owed him, on general account, and said: "I was in bed sick, and I had been light-headed for two days, but was better on that day than I had been. They told me that they had come to settle up their affairs on that house. I told them that I was not in a fit state to do any figuring that day, but Mr. Codington was fully bent on having us settle on that day, so I told him that my books were in my drawer, and that they could reckon up the money that I have received on that job. After figuring it up there was fifty dollars that Mr. Codington claimed he had paid to Pooser, and that the money came to me from Pooser with the understanding that the money came from the Gold block. I saw that things were not going very satisfactory, and, with Mr. Pooser owing me so much money, I was glad to settle in almost any kind of way, and I agreed to let them go on with their settlement. They took the amount of yards of plastering and the amount of bricks that were used on that house, and I agreed to stay by their figures, and Mr. Pooser gave me the amount of their figures, for which amount I am now suing." It is shown beyond question that Nutt had been working for Pooser on other contracts, and that there was a general unsettled account between them. Codington testified that he was present at the settlement spoken of by Nutt, and did some of the figuring himself, and had the figures at the time of testifying. He stated that the amount Nutt and Pooser agreed there was due upon the house was not correct. He says: "I find the amount inaccurate as he [Nutt] has it, the dollars being one hundred and eighty-nine, instead of one hundred and ninety-eight [the amount sued for]. I find the amount figured due him at that time on general account to be one hundred and seventy-eight dollars and sixty-one cents, leaving the amount of ten dollars and forty cents, which he claimed on my house, over the full amount which was decided was due him on general account from Mr. Pooser." The only other witness examined was Pooser, but his testimony is very indefinite as to whether or not the claim made by Nutt was for work on the Codington house. He was asked if he knew the amount of work that Nutt did on that building, and said: "No, sir; I do not. I am not prepared to answer that." He was also asked if the figures given by him at Nutt's room when he was sick represented what was due for work and material furnished Codington, and replied as follows: "I cannot say that I can. Mr. Codington came to me claiming that Mr. Nutt had made an overcharge in his brick account. He and I then went and counted the brick in the bulk as near as we could,

and there was no mistake; there and within the plastering was all right. As I had been paying Mr. Nutt on other bills, we went to see Mr. Nutt to ascertain the exact amounts that had been paid to him by Mr. Codington and myself. I carried my books to Mr. Nutt's bedroom. Mr. Nutt was in bed when we got there, and we found out just how much had been paid him, according to his statements and my own. I turned the two statements over to Mr. Nutt and Mr. Codington." From Nutt's testimony it appears that he was not relying upon his own knowledge of the work done in the house, but upon the statement given him while sick. Pooser and Codington made up a balance from the books then produced, but Pooser disclaims any knowledge of the exact amount of work done by Nutt on the house, nor does any one testify that the books from which the statement was made were accurate and properly kept. There is a difference between Pooser and Codington about what the balance ascertained at Nutt's house represented, but taking the entire testimony together, without setting out any more of it here, we are unable to say that it is of such a character and weight as to overcome the conclusion of the chancellor adverse to the complainant below. This conclusion is summed up in the following language of the decree appealed from, viz.: "The court is of the opinion that, aside from every other question, it is incumbent upon the plaintiff, before he can ask a decree against Anna V. Codington, to prove specifically the items of his account and the value of the work and materials,—there being no contract with her,—and this he has failed to do." There is nothing in the evidence to justify a conclusion that Mrs. Codington was bound by the amount rendered on the settlement referred to by Nutt, and, so far as she was concerned, it was necessary to prove, as decreed by the court, the items of the demand, and the value of the improvements actually placed upon her house.

Not feeling authorized to disturb the conclusion reached on the evidence, our decision is that the decree appealed from must be affirmed on the evidence, and it is so ordered.

(34 Fla. 13)

OPPENHEIMER v. GUCKENHEIMER et al.

(Supreme Court of Florida. June 18, 1894.)

PRACTICE ON APPEAL—SCIRE FACIAS—EFFECT OF APPEARANCE.

1. The issuance and service of a scire facias ad audiendum errores are essential to give the appellate court jurisdiction of the person of the defendant in error, and without such writ and service this court cannot adjudicate the case. But such writ and service are not necessary to give this court jurisdiction of the cause, and, should the defendant in error file in this court a general appearance in a cause properly brought here by writ of error, the necessity for the issuance or service of the scire facias ad audiendum errores will thereby be waived.

2. The defendants in error made a motion in this court to dismiss the writ of error issued in the cause on the ground that the plaintiff in error had not filed briefs within the time required by the rule of the court on that subject. On a subsequent day, this motion, by leave of the court, was amended so as to recite that defendants in error came specially for the purpose of the motion, and for no other purpose, and moved the court to dismiss the writ of error, because no briefs had been filed as required by the rule, and no scire facias ad audiendum errores had been issued in the cause, or served upon the defendants in error. Held, that by the motion as first made to dismiss the writ of error because no briefs had been filed the defendants in error appeared generally in the cause, and it was a waiver of the issuance and service of the scire facias ad audiendum errores.

(Syllabus by the Court.)

Error to circuit court, Polk county; Barron Phillips, Judge.

Attachment by S. Guckenheimer & Sons against William T. Munfort and J. S. Oppenheimer. L. S. Oppenheimer interposed a claim. Judgment for plaintiffs, and claimant brings error. Motion to dismiss. Denied.

R. W. Williams, for the motion. Wilson & Wilson and Sparkman & Sparkman, opposed.

MABRY, J. An attachment suit was instituted in the circuit court for Polk county by S. Guckenheimer & Sons against W. T. Munfort and J. S. Oppenheimer, and the attachment writ was levied upon certain goods as the property of defendants. L. S. Oppenheimer interposed a claim to the property levied on, and on the 8th day of April, 1893, a verdict and judgment were rendered in the claim suit against the claimant. After motions in arrest of judgment and for a new trial were overruled and final judgment entered, the record recites that the claimant, by his attorneys, in open court applied for and entered an appeal from the judgment rendered to the June term, A. D. 1893, of the supreme court of the state of Florida.

On the 4th day of October, 1893, four days before the expiration of the time in which a writ of error could have been sued out from said judgment, such writ issued, returnable to the January term, 1894, of this court, and was at the time of its issuance properly served by being lodged with the clerk of the circuit court of Polk county.

A motion was filed in this court on April 20, 1894, by the attorney of record for the plaintiffs in the claim suit, reciting that the appellees in the cause of L. S. Oppenheimer, Appellant, vs. S. Guckenheimer et al., Appellees, move the court to dismiss the appeal because the same was entered to the June term, A. D. 1893, of the supreme court, and that the attorneys for appellant had failed to file briefs in the cause, and 100 days had expired since the beginning of the January term, 1894, of this court, and that the record showed that said appeal had been abandoned. Notice was given for the hearing of this motion on the 8th day of May,

1894. On the 7th day of May, 1894, counsel for defendants in error entered the following motion upon the motion docket, viz.: "Oppenheimer, Plff. in Error, vs. Guckenheimer, Deft. in Error. Comes now the defendant in error, and moves the court to dismiss this cause, for the reason that it is a civil cause returnable to the January term, 1894, and was not submitted on brief by the plaintiff in error within ninety days from the return day, which ninety days expired before the filing of this motion."

Counsel for plaintiff in error entered a motion on the 8th day of May, 1894, for leave to file briefs in the cause, for reasons stated in affidavits on file. At the motion hour on May 8, 1894, counsel for defendants in error stated at the bar of the court that he desired to amend the motion entered on the 7th, and add another ground for dismissing the writ, as he had then discovered that no scire facias to hear errors had been issued in the cause. Counsel for plaintiff in error then stated that they had appeared in obedience to proper notice to contest the motion to dismiss for failure to file briefs, and were not then prepared to meet a motion to dismiss, because no scire facias had been issued. The motion entered April 20th to dismiss the appeal was then denied, because there was no such case on an appeal in this court, and by leave of the court counsel for defendants in error amended the motion entered on May 7th, so as to read as follows, viz.: "Come now the defendants in error, specially for the purpose of this motion, and for no other purpose, and move the court to dismiss this cause for the reasons that it is a civil cause returnable to the January term, 1894, and was not submitted on brief by the plaintiff in error within ninety days from the return day, which ninety days expired before the filing of this motion; that no writ of scire facias ad audiendum errores has been served upon the defendants in error or their attorney, and no such writ has issued, or been returned to this court, as shown by the record." This amended motion coming on regularly for hearing upon notice at the succeeding motion day, the same being the 12th day of this month, counsel for plaintiff in error entered another motion for an order that scire facias issue nunc pro tunc, for reasons set forth in affidavit filed. The three motions in the cause above recited, not disposed of, were submitted by counsel for the consideration of the court on the same day.

It is not shown or claimed that any scire facias to hear errors was ever issued, either by the clerk of the circuit court for Polk county or by the clerk of the supreme court. The writ of error, however, was issued and served within proper time, and this brought the case properly to this court. The issuance and service of a scire facias ad audiendum errores are essential to give the appellate court jurisdiction of the person, and without such

writ this court cannot adjudicate the cause. The scire facias, being the legal notice to the defendant in error that the cause is properly pending in the appellate court, may, however, be waived by him; and, although no such writ has been issued or served, a general appearance in the cause in the appellate court will be sufficient to give the court jurisdiction of the person of the defendant in error. It was held in *Williams v. La Penotiere*, 26 Fla. 333, 7 South. 869, that an application to the appellate court by counsel for defendant in error for an order granting leave to withdraw the transcript with a view of testing its correctness is an appearance in that court, and cures any defect there may have been in the service of the scire facias ad audiendum errores. There is no room for doubt, we think, that by appearing and filing a motion by a defendant in error in this court to dismiss a cause for the reason that plaintiff in error had not complied with the rule of the court as to filing briefs, would cure any defects as to the issuance or service of the scire facias to hear errors. Such a motion would be an appearance in the case, and that is precisely what the defendants in error did in the case before us by filing the motion of May 7, 1894. At the time that motion was first entered there was no effort or purpose manifested by it to limit the appearance of the defendants in error, but the evident purpose was to have the writ of error dismissed, because the briefs had not been filed in time. An appearance in the cause having been made for the purpose indicated, was a waiver of any want of or defect in the service of the scire facias, and was effectual to give the court jurisdiction of the persons of the defendants in error, and the court still has such jurisdiction, unless the amendment of the motion on the 8th of May had the effect to withdraw the general appearance already entered, and to limit it solely to an objection to the issuance and service of the scire facias. We do not question the right of a defendant in error to specially appear for the purpose of objecting to the issuance or service of a writ of scire facias, and that by so doing he would not subject himself to the jurisdiction of the court for any other purpose. But we do not see that such effect can be given to the motion as amended on the 8th of May, as defendants therein limit their appearance specially for the purpose of the motion; and the first ground of the motion is to dismiss the suit because plaintiff in error had not filed briefs within the time required by the rule on the subject. This, as we have said, constitutes such an appearance as waives all objections to the issuance or service of the scire facias, and defendants in error are still relying upon it as one ground for dismissing the writ of error. The other ground of the motion relates to the scire facias, and would not alone, coupled with a proper special appearance, be a general sub-

mission to the jurisdiction of the court. Where a defendant in error appears specially for the purpose of objecting to the issuance or service of the scire facias, and thereby presenting the question of the jurisdiction of the court over his person, he must restrict his motion to the ground of such jurisdiction, and must not include therein some other ground that recognizes the jurisdiction of the court over his person, and amounts to an appearance in the cause by him. *Aultman & Taylor Co. v. Stelman*, 8 Neb. 109. The making of the motion here to dismiss for failure to file briefs was an appearance in the cause, and the statement in the amendment to the motion, that defendants in error appeared specially for the purpose of the motion, and for no other purpose, does not have the effect to deprive the court of the jurisdiction over their persons acquired instantly upon the entry of the motion that amounts to such an appearance. The defendants in error voluntarily appeared in the cause, and thereby waived all objections to the issuance of the scire facias, and the motion to dismiss on this ground should be overruled.

We think the reasons assigned in the affidavit of counsel for not filing briefs within the time required by the rule of this court on the subject are sufficient to authorize the filing of them now, and orders will be made denying the motion to dismiss the writ of error, and sustaining the motion for leave to file briefs.

The motion for an order to grant the issuance of scire facias to hear errors nunc pro tunc will be denied. Orders will be entered in all of said motions in accordance with this opinion.

(103 Ala. 333)

LOVENTHAL et al. v. MORRIS.

(Supreme Court of Alabama. May 22, 1894.)

ACCOUNT STATED—SUBSEQUENT CREDITS—ACTION ON.

Where a merchant renders a statement of goods sold, which is assented to by the debtor, and payments are made on account at various times thereafter, he cannot recover the balance due in an action on a stated account, without proof that a new account showing the balance claimed had been rendered and assented to. *Head, J., dissenting.*

Appeal from circuit court, Limestone county; H. C. Speake, Judge.

Action by B. S. Loventhal & Son against Hassie L. Morris on a stated account. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Issue was joined upon the plea of the general issue, and upon the special pleas of the statute of limitations of three years, and the statute of limitations of six years. On the trial on the case, as is shown by the bill of exceptions, the plaintiffs introduced in evidence the following statement of their account with the said defendant, which was verified by the affidavit of B. S. Loventhal:

Mr. H. L. Morris, in account with B. S. Loventhal & Son, 300 N. Market Str.

Dr.

1886.			
Sept.	17.	To mdse.....	\$ 67 50
Oct.	6.	" ".....	78 78
Oct.	7.	" ".....	28 25
Oct.	20.	" ".....	108 00
Oct.	22.	" ".....	13 85
Nov.	10.	" ".....	225 72
Nov.	27.	" ".....	43 25
Dec.	7.	" ".....	226 88
Dec.	8.	" ".....	7 75
1887.			
Jan.	15.	" ".....	228 92
Feby.	21.	" ".....	63 02
Feby.	23.	" ".....	13 40
Apr.	7.	" ".....	21 10
Apr.	29.	" ".....	60 50
June	7.	" ".....	65 50
Aug.	5.	" ".....	129 67
Aug.	8.	" ".....	8 35
Nov.	15.	" cash.....	24 86
			\$1,413 30

Cr.

1886.				Amount over	\$1,413.30
Sept.	17.	By cash.....	\$ 20 00		
Oct.	19.	" ".....	47 00		
Oct.	22.	" ".....	15 50		
Nov.	10.	" ".....	160 00		
Nov.	27.	" ".....	125 00		
Dec.	7.	" ".....	100 00		
Dec.	20.	" ".....	100 00		
1887.					
Jan.	14.	" ".....	120 00		
Feby.	21.	" ".....	110 00		
March	12.	" ".....	35 00		
March	31.	" ".....	25 00		
Apl.	8.	" ".....	10 80		
Apl.	29.	" ".....	20 00		
May	27.	" ".....	15 00		
July	6.	" ".....	20 00		
Aug.	4.	" ".....	10 00		
Aug.	8.	" ".....	5 00		
Sept.	5.	" ".....	25 00		
Nov.	12.	" ".....	100 00		
Dec.	9.	" ".....	20 00		
Dec.	23.	" ".....	50 00		
1888.					
Jan.	28.	" ".....	20 00		
Feb.	20.	" ".....	20 00		
Mch.	19.	" ".....	10 00		
Apl.	5.	" ".....	10 00		
Nov.	21.	" ".....	15 00		
Dec.	17.	" ".....	50 00		
				\$1,258 30	
				\$ 153 00	

B. S. Loventhal, as a witness for the plaintiffs, testified that the verified account introduced in evidence was correct, and that he, on October 25, 1887, rendered a statement of said account sued on, and presented it to the defendant, and that the defendant did not dispute the correctness of the same. This witness further testified that at the date of the purchase of each bill, as shown in the stated account, he rendered to the defendant a statement of each item comprising the indebtedness, and that the defendant never made objection to any of the said statements. He further testified that the defendant visited the plaintiffs' place of business in Nashville on August 5, 1887, and that at that time he, the witness, presented to the defendant, for payment, the account sued on, and the defendant then and there admitted the justness of the same. The defendant, as a witness in his own behalf, testified that the "plaintiffs had never rendered to him any

account against him for payment, at any time or place, nor was he informed of the amount claimed of him by plaintiffs until this suit was brought." The other facts are sufficiently stated in the opinions. Upon the introduction of all the evidence the plaintiffs requested the following written charges: (1) "If you believe the evidence, you must find for the plaintiffs." (2) "If you believe from the evidence that on, to wit, August 5, 1887, the defendant visited the plaintiffs' place of business at Nashville, and at that time the plaintiffs presented to the defendant for payment the account here in suit, and the defendant then admitted the justness of the account, then you must find for the plaintiffs." (3) "If the jury believe from the evidence that a bill of each article sold was furnished by plaintiffs, giving each article and price of each article, and the amount of each bill purchased, and the date of purchase, that makes it an account stated, unless the defendant objected to the bill as rendered within a reasonable time." The court refused to give each of these charges, and to each refusal the plaintiffs separately excepted. They also separately excepted to the court's giving, at the request of the defendant, each of the following written charges: (1) "The fact that the defendant could have found out, if he had tried, the amount of the account, does not make it a stated account." (2) "The amount here in suit must be found to have been admitted or recognized by the defendant before you can render a verdict against the defendant."

W. T. Sanders and J. J. Turrentine, for appellants. McClellan & McClellan, for appellee.

COLEMAN, J. Plaintiffs, Loventhal & Son, sued the defendant upon a stated account, to recover \$155. The complaint contains five counts, each counting for the same amount, and all upon a stated account, averring different times at which it is alleged the account was stated between the parties, the last being the 15th day of November, 1887. The account sued upon as a stated account appears in the statement of facts, and will show for itself. An open account is one in which some item in the contract is left open, undetermined by the parties, or where there are current dealings between the parties, and the account, because of contemplated future dealings, is kept open. Whether the account consists of a single item or many items, if the terms of the contract have not been adjusted and agreed upon, the demand is an open account. *Battle v. Reid*, 68 Ala. 149; *Gayle v. Johnston*, 72 Ala. 254. An account becomes stated when a specified indebtedness is admitted to be correct. The mere admission of indebtedness alone will not render an account stated, but the admission must be of the sum charged, and claimed to be due. The omission may

be express, or it may arise by implication of law, as where an account is rendered to a debtor, and he retains it, and makes no objection within a reasonable time. *Nooe's Ex'r v. Garner's Adm'r*, 70 Ala. 443; *Burns v. Campbell*, 71 Ala. 271; *Hirschfelder v. Levy*, 69 Ala. 351; *Rice v. Schloss*, 90 Ala. 416, 7 South. 802; *Langdon v. Roane's Adm'r*, 6 Ala. 527; *Ryan v. Gross*, 48 Ala. 374; *Goodwin v. Harrison*, 6 Ala. 438. These decisions of our own state are conclusive that an account where there are debits and credits, does not become stated until there has been an adjustment, and an assent to the conclusion. In 1 Amer. & Eng. Enc. Law, p. 110, it is said: "When two persons, having had monetary transactions together, close the account by agreeing to the balance appearing to be due from one of them, this is called an 'account stated.' It is of importance from the fact that it operates as an admission of liability by the person against whom the balance appears; or, in the language of the common law, 'the law implies that he against whom the balance appears, has engaged to pay it, to the other, and on this implied promise or admission an action may be brought. But, if one of the parties does not agree to the balance, an action upon an account stated can not be maintained.'" And on page 113: "To make an account stated, there must be a mutual agreement between the parties as to the allowance of their respective claims, and to establish such an account * * * there must be proof of assent to the account as rendered." In the case of *Volkening v. De Graaf*, 81 N. Y. 268, opinion by Folger, C. J., the principle is very fully and clearly stated. The court says: "This is strictly a cause of action on an account stated. To maintain the action as averred in the complaint, the plaintiff must prove an account stated. That, and nothing else, will support his allegations. An account stated is an account balanced and rendered, with an assent to the balance, express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance. *Bass v. Bass*, 8 Pick. 187. The emphatic words of a count upon an account stated were in former days 'insimul computassent,' that they, the plaintiff and defendant, accounted together; and the count went on to say that on such accounting the defendant was found in arrears and indebted to the plaintiff in a sum named, and, being so found in arrears, he undertook and promised to pay the same to the plaintiffs. 2 Chit. Pl. 90; 1 Chit. Pl. 358." When suit is upon an account stated, no proof is required to show the correctness of the items of the account. The recovery is upon the assent to the balance, and the subsequent agreement to pay that balance, as if upon a promissory note. As was said in *Goodwin v. Harrison*, supra: "An account is said to be open whenever there have been running or current dealings between the parties

which are kept unclosed with the expectation of further transactions between them. In such a case it is obvious that the accounts are open." Now, compare the account sued upon with the several counts of the complaint, and apply the foregoing principles of law to the evidence. There is no pretense that the account sued upon as a stated account, or any other account, at any time, showing a balance of \$155, or any account whatever of debits and credits, showing any balance, was ever rendered to the defendant; much less one either expressly or impliedly assented to, and agreed to be paid, by him. Balancing an account on one's own books, done without the consent of the other party, is not a stated account in law. *Nostrand v. Dittmis*, 28 N. E. 27.

The argument based upon the proposition that the complaint does not aver any particular time when the account was stated, but only when the balance claimed was due, is too technical and strained. A complaint upon an account stated, which did not aver when it was stated, would be as defective as a suit upon a note which failed to aver when it was made. The suit itself is upon the express or implied promise to pay. The time when the promise to pay was made is not the essence of the promise, and it is not necessary to prove it strictly as laid, but it is the subsequent agreement to pay which sustains the cause of action. The suit is strictly upon a stated account, and it must be proven as laid to authorize a recovery. An indebtedness is not sufficient. The defendant was not called upon to plead or prove payment to defeat a recovery, unless the case made by the complaint could be made out. The issue was whether an account, showing a balance, had been rendered to the defendant, and assented to by him. But, independent of this, the defendant was not called upon to introduce evidence of payments which were admitted by the plaintiff to have been made and credited. It may be, as stated in *Fitzpatrick v. Harris*, 8 Ala. 32, that where an account is made out with debits and credits, and presented to a debtor, he cannot claim the credits without submitting to the debits; but this rule cannot be so applied as to prevent a debtor from showing certain charges of debits to be incorrect, without losing the benefit of the creditor's evidence, independent of the account, to the effect that the debtor had made certain payments which were credited on the account. We do not see how this question, or the questions of the applications of payments, can arise upon the pleadings in this case. They are principles applicable to suits upon open accounts. So the principle declared in the case of *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703, cannot apply to the case at bar. In that case the complainant counted upon an open account, and also on an account stated between the parties. To the plea of the statute of limitation of three

years the plaintiff replied that the parties were merchants, and the account between merchant and merchant. Of course, the statute of limitations of three years was no answer to the count upon a stated account. It was only available so far as the plea applied to an open account, but, the replication being general, the plaintiffs were required to make it good. This they failed to do. The evidence in fact showed that an account had been stated between the parties, and assented to by the defendant.

It is said that the defendant "does not deny that bills were rendered for every item of merchandise charged, including those of January, February, April, and June, 1887." The defendant's testimony on this point is as follows: "That plaintiff never rendered to him any account against him for payment at any time or place, nor was he informed of the amount claimed of him by plaintiff until this suit was brought. * * * Did not know what the account was. That he bought some goods in August, 1887,—about \$130. That the bill was correct. That he bought no goods in 1887, prior to August. That he got the bills every time, and never discovered any error in them." This language cannot be construed into an admission that bills were rendered to him in January, February, April, and June, 1887. He says he bought no goods prior to August. The statement "that he got bills every time" certainly means that he got bills for the goods that he bought, but cannot be construed to be an admission that he had bills rendered to him for goods which he denies having purchased, and of which he was never informed. But, as said before, all these questions are eliminated from this case. The suit is not upon the original consideration for goods sold, which requires proof of the items, but upon a subsequent promise and agreement to pay a balance for an account rendered. This the plaintiff has wholly failed to show. The plaintiff does not pretend that he ever made out a bill for the item of \$24, nor sent any statement containing such a charge to the defendant, and on the trial testified to its correctness as a proper charge, or item of the account, independent of any bill rendered, or assent to such a charge, express or implied. We think it perfectly clear that the trial court did not err in holding that the plaintiff had failed to prove his case. Affirmed.

HEAD, J. (dissenting). There are six counts in the complaint, each claiming \$155 as due upon an account stated. The first is as follows, after properly stating the names of the parties in the caption: "The plaintiffs claim of the defendant one hundred and fifty-five dollars, due from him on account stated between the plaintiffs and defendant on the 18th day of March, 1888, which sum of money, with the interest thereon, is still unpaid. The account is verified by affidavit." Each of the others is in the same words, except

that a different date on which the account was stated is given, and the averment that the account is verified by affidavit is omitted. The second avers that the account was stated on the 7th day of June, 1887; the third, on the 6th day of August, 1887; the fourth, on the 8th day of August, 1887; the fifth, on the 15th day of November, 1887; and the sixth, on the 25th day of October, 1887. It will be observed that neither of these counts states that the amount of the alleged account stated was \$155. That is the sum sued for as due on an account stated on the day named. It will not be denied, I apprehend, that under either of these counts, if the plaintiffs proved, to the satisfaction of the jury, that on the day specified an account was stated between the parties, showing an amount due the plaintiffs (no defense being proven), the plaintiffs would be entitled to recover the amount of the stated account, not exceeding the sum sued for. The fact that the amount of the account, as actually stated, was more or less than the sum sued for, would create no obstacle to a recovery. If the amount was greater than the sum sued for, it may have been reduced by a subsequent payment, or the plaintiff may, of his own volition, remit the excess. In either case the plaintiff could well declare and recover for a sum less than the account stated. So, also, if he declares for a greater sum, he may yet recover the sum proven. These principles are elementary, and of every-day application. If we apply to this case the strictest notions of pleading and evidence, holding the plaintiffs to a correspondence of allegations and proof, and concede that there is a failure of proof, or conflict in the evidence, in support of those counts which lay the account stated on March 18, 1888, June 7, 1887, and October 25, 1887, respectively, yet, upon the undisputed evidence, as I conceive, the plaintiffs were entitled to the general affirmative charge in their favor on account of the three remaining counts. Let us see, then, what the record shows. In the first place, the plaintiffs introduced in evidence, without objection, a sworn account in their favor against defendant, wherein the latter was debited with sundry bills or items of merchandise, on sundry days during the years 1886 and 1887, beginning with September 17, 1886, and ending with August 8, 1887; there being 17 of such bills, the smallest of which is for \$7.75, and the largest for \$228.92. There is also charged, on November 15, 1887, an item of cash for \$24.86. The total amount of the account is \$1,413.30. The defendant is then credited with many items of cash paid on the account, ranging from \$5 to \$160, and from September 17, 1886, to December 17, 1888, aggregating \$1,258.30, leaving a balance due plaintiffs of \$155. This account, it will be observed, does not present a case of "mutual accounts and reciprocal demands" between two persons, or "mutual accounts" between merchants. The dealing was simply that of sales

of goods by the plaintiffs upon which payments in cash were made by defendant. See *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703, 709. There was, therefore, no item on the defendant's side, which it can be claimed was open, to impart to the account on plaintiffs' side the nature of an open account, if the latter was otherwise stated. This account, we have said, was verified and introduced without objection; hence, whether it be open or stated, each item of it, upon this proof, must be taken as correct, if there be no counter evidence of its incorrectness. Besides, Loventhal, one of the plaintiffs, testifies to the correctness of every item upon it. There is conflict in the evidence as to the correctness of the bills charged in January, February, April, and June, 1887, arising from the statement in the defendant's testimony that "he bought no goods, in 1887, prior to August;" but as to all the other charges there is no conflict whatever. Plaintiffs' evidence showing their correctness is in nowise denied. This establishes, then, without dispute, the correctness of the charge for cash, \$24.86, November 15, 1887. That item was, in its very nature, an account stated. There can be no such thing as an open account for money loaned or money paid, where the transaction is such that the express agreement of the parties or the law fixes the time for its repayment, for the obvious reason that the money itself ascertains its own sum, and fixes the exact measure of the creditors' recovery; and this nature cannot be changed by entering it upon a book of accounts, or an account drawn off, no more than the nature of a promissory note can be changed by a like entry. It remains still a demand for money loaned or money paid. So much for this item. Excepting the items of January, February, April, and June, 1887, there is, as I have said, no conflict in the evidence of the correctness of the account; and, further, it is shown, without conflict or dispute, that for every bill of merchandise charged upon the account, the plaintiffs rendered to the defendant at the time a complete account thereof, which was retained by the defendant without objection. This fact is shown by the testimony of Loventhal, and not denied by the defendant. The defendant himself testifies that bills were rendered of all the goods he bought, which admission, in view of the undisputed testimony that he bought all the goods charged upon the account, except those of January, February, April, and June, 1887, applies to every item upon the account with that exception. But, as I said, he does not deny Loventhal's testimony that bills were rendered for every item of merchandise charged, including those of January, February, April, and June, 1887. He expressly admits the item of August 5, 1887, for \$129.67, and that the bill was correct. He states in his testimony that no account was ever rendered to him for payment, but that was not essential. If the bills were rendered merely

to inform him what they were, and if retained, without objection, beyond a reasonable time for examination and response, they became as much stated accounts as if their rendition were accompanied by a demand for payment. Now, these facts being true, it is established beyond all question that each item charged upon the account became an account stated between the parties, and plaintiffs could have incorporated in their complaint as many counts as there are charges,—a count for each charge,—and with no other plea than those interposed in this case they would have been entitled to recover upon every count, except those for the bills of January, February, April, and June, 1887, which were in dispute, and, in consequence, were cases for the jury. This proposition is true, notwithstanding the undisputed fact that all these bills were paid except \$155, to be carved out of the last charges on the account, for the reason that, no plea of payment being interposed, evidence of payment cannot be permitted to defeat a recovery, such evidence being admissible, under the general issue, only in mitigation of damages. *McMillan v. Wallace*, 3 Stew. 185; 1 *Suth. Dam. p.* 260. In such case, where the entire demand is shown to have been paid, the plaintiff is entitled to recover nominal damages. To defeat the action by the defense of payment, it must be specially pleaded. Then what have we? (1) A count upon an account stated on August 5, 1887, sustained by the undisputed evidence that on that day an account was stated between the parties for \$129.67, in plaintiffs' favor; (2) a count for August 8, 1887, with like proof, showing \$8.35; and (3) a count for November 15, 1887, with like proof, showing \$24.86 in plaintiffs' favor; upon all three of which plaintiffs were entitled to recover the aggregate sum of \$155, with interest; that being the sum sued for. So far as these three items may be said to be affected by the preceding items of the account, the case is doubly hedged about in plaintiffs' favor. (1) As I have shown, every item on the account constituted a distinct account stated; hence neither could impart to any other the character of an open account. (2) The three items were the last transactions, and so entered. The law applied the payments which were made (\$1,258.30) to the satisfaction of the debits in the order they were incurred and charged. *Marks v. Robinson*, 82 Ala. 69, 2 *South. 292*; *Golden v. Conner*, 89 Ala. 598, 8 *South. 148*. This paid every item upon the account preceding the three in question, and a part of one of those. If it be said that some of those items were in dispute, and that the jury might have found that the defendant did not purchase the goods they call for, in consequence of which the admitted payments exceed the amount the defendant really owed, the answer is, the defendant, under the facts of this case, can claim no benefit of these payments without at the same time admitting the correctness

of the debit side of the account, for the reason that there is no evidence whatever of any payments, except the plaintiffs' admission of them by entering them as credits on the account they introduce. In such case it is the settled rule that the debtor must take the account as a whole, or not at all. *Fitzpatrick v. Harris*, 8 Ala. 32. Indeed, it may well be inquired whether the defendant, by disputing some of the debits and offering no evidence of any payments, has not taken the admitted payments entirely out of the case, full independent proof of the debits being made by the plaintiffs.

From what I have said it results obviously that the plaintiffs were entitled to the general affirmative charge which was refused, as well as the second special charge. I do not consider whether the first special charge they requested was abstract or not. The charge given for the defendant is, to my mind, clearly erroneous. Unquestionably, the jury believed, from this charge, that it was essential for the plaintiffs to prove that an account for \$155—the amount sued for—had been stated between the parties. That is certainly not the law. The amount as actually stated may have been more or less than the sum sued for, and yet a recovery be had.

I have considered this case according to very strict rules of pleading and practice in favor of the defendant. I have, in a measure, laid aside the rule that, in general, "allegations of number, magnitude, quantity, value, time, sums of money, and the like," as Greenleaf puts it, need not be proved as laid; and have left out of view the exceeding liberality which the law, as adjudged in this state, indulges in support of actions on the common counts. Illustrating that liberality, a recovery may be had on a promissory note in an action upon an account stated. 1 *Brick. Dig. p.* 148, § 199. In a case where the declaration showed that the account was stated after the issuance of the writ, under the old practice, a demurrer for this cause was held bad. The court treated the allegation of time as immaterial, and said all that was necessary to show was that the account received the assent of both parties, which was the essential matter. *Carlisle v. Davis*, 9 Ala. 858. In a simple action upon account in the Code form, a recovery may be had upon proof of an account stated. So firmly is this the rule, that a plea of the statute of limitations of three years to such an action is bad on demurrer, unless it avers that the demand sued for is an open account. 2 *Brick. Dig. p.* 228, § 129. In truth, in all cases where money is due as upon an assumpsit, even in cases of special contracts, where nothing remains to be done but the payment of money, the flexible common counts may be used to promote justice by doing away with technical averments and proof. They bring out and enforce the essence of the rights of the parties, shorn of

technicalities. Such being their office, can it well be doubted that, upon one common count upon account stated, although a single time be averred, a recovery may be had for the aggregate of sums due upon sundry accounts stated, at different times, before suit brought; or a recovery be had upon an account stated at a different time, and for a different sum from those alleged? If not, then where, I inquire, is the possible obstacle to the plaintiffs' recovery in this case? I am of opinion the judgment of the circuit court should be reversed, and the cause remanded.

(46 La. Ann. 1417)

FREIBERG et al. v. LANGFELDER (LANGFELDER, Intervener). (No. 1,288.)

(Supreme Court of Louisiana. June 11, 1894.)

FRAUDULENT CONVEYANCES—DATION EN PAYMENT—ENTIRETY OF CONTRACT.

In a dation en payment the thing transferred to the wife must bear a just proportion in value to the amount due the wife. A sale is an entirety, and there is no contract when there is no agreement as to the price. If the property transferred to the wife exceeds appreciably the debt due her, she cannot be permitted to retain a part of the property transferred, and remain a creditor to the community for the difference.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

Action by L. Freiberg & Co. against A. Langfelder. Pauline Langfelder intervened, and appeals from the judgment. Reversed.

Gunby & Sholars, for appellant. Boatner & Lamkin and Stubbs & Russell, for appellee.

PER CURIAM. The plaintiffs, creditors of A. Langfelder, proceeded against him by attachment, and caused to be seized under their writ the bar-room fixtures attached to his saloon, and the liquors, cigars, etc., in the same, which, on the day previous, Langfelder, the husband, had transferred to his wife, the intervener, in satisfaction of her paraphernal funds used by him in the conducting of his business. Plaintiffs' debt in the attachment is below the lower limit of the jurisdiction of this court. The intervener claims property which it is alleged is worth the sum of \$5,036.02, and the amount of the debt of the husband to her \$4,450. If the intervener had been cast in the suit, she would have been entitled to an appeal. The same right must be accorded to the defendant. The matter in dispute is over \$200. The motion to dismiss the appeal is therefore denied.

On the Merits.

The property transferred to the wife was inventoried, each item in it valued, and the total value of all the property amounted to \$5,036.02. The evidence satisfies us that the

husband, Langfelder, received from his wife, and used, the sum of \$3,750 in his business, which he never returned to her. This sum is made up of \$3,000 given to her by her brothers and \$750 by her father. The other amount, \$700, which forms a part of the price of the dation en payment constituted no part of the wife's paraphernal funds. This amount was loaned, through the solicitation of Mrs. Langfelder, by her brother to Langfelder. In the act of transfer the articles transferred to the wife are taken at a valuation of \$4,400. We must accept as the value of the goods the valuation placed thereon in the itemized account, as the party transferring had access to the invoices, and was thus enabled to affix a true valuation to each item on the inventory. The difference between the amount really due the wife and the value of the articles transferred on the inventory amounts to \$1,286. The difference in the price agreed on by the parties in the dation is \$700. The law favors the giving in payment to the wife to replace her paraphernal effects, and high and extraordinary privileges are accorded the contract. But there must be a just proportion in value in the thing given to the debt of the wife. Gross inequality cannot be entertained. It would offer a temptation to shield the husband's property from the pursuit of creditors, and afford an opportunity to carry out the intention. In this case each article was valued. The husband knew the value of the goods he was transferring to his wife, and an amount approximate, at least, to the debt could have been easily ascertained. There was no room for varying opinions as to value, and no conditions to depreciate the value of the goods transferred. It was just as easy to stop when the wife's debt had been reached as it was to extend the itemized account. In fact the parties had it in their power to do what we cannot. We cannot arbitrarily accept for the wife articles in the inventory equal or approximate to the amount of her debt. If we ignore the inventory, and accept the \$4,400 for the goods transferred, as the price of the sale, we are confronted with greater difficulties in affording the relief demanded by intervener. We would make a contract for the parties they never intended to make. The wife never intended that the price should be \$3,750, and the husband never intended to transfer goods worth \$4,400 for \$3,750. We have ascertained \$3,750 is the true amount due by the husband to the wife. The wife has in possession, on this view of the case, \$700 that belongs to the community. There is no decree that we can render that could make this amount available for community creditors. We cannot affirm the sale and decree her to be the owner of the property, and this amount subject to community debts, as, in the end, it would lead to seizure of the wife's separate property to pay the husband's debts, which is prohibited by law. The contract of sale is an entirety. We cannot separate the

price, and decree one part of it valid and the other illegal. The sale cannot be both null and valid, as the price, the thing, and the consent are essential to its validity. Therefore we cannot say that the vendee ought to have a part of the thing conveyed and the vendor a part of the price. Our conclusion is that there was no valid sale to the wife, and the title to the property in controversy never passed out of the husband of the appellant. The views herein expressed are supported by abundant authority. *Hayden v. Nutt*, 4 La. Ann. 67; *Metcalf v. Clark*, 8 La. Ann. 286; *Spurlock v. Mainier*, 1 La. Ann. 301. The articles inventoried and sold to the appellant by the husband are liable to the pursuit of the judgment creditors. Our former decree rendered herein is reversed and annulled, and it is now ordered that the judgment appealed from be avoided and annulled, and the intervention herein be dismissed, at intervenor's costs.

(46 La. Ann. 1214)

BRANSFORD v. BRANSFORD (HATHAWAY et al., Interveners). (No. 1,290.)

(Supreme Court of Louisiana. June 16, 1894.)

HUSBAND AND WIFE — DISSOLUTION OF MATRIMONIAL COMMUNITY.

1. When the wife sues her husband for a separation of property, and a dissolution of the matrimonial community, she carries the burden of proving that the disorder of his affairs is such as to endanger her separate property in esse, or her future acquisitions.

2. If she claim a moneyed judgment against the husband, or the recognition of her paraphernal title to property he has transferred to her, in satisfaction, in whole or in part, of her claims against him, she must administer clear and satisfactory proof of her husband's indebtedness, to sustain her action as against intervening creditors.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

Action by Ida L. Bransford against John S. Bransford for a dissolution of the matrimonial community. Messrs. Hathaway and others intervene. Judgment for plaintiff, and interveners appeal. Amended and affirmed.

Potts & Hudson, for appellants. Gunby & Sholars, for appellee.

WATKINS, J. Plaintiff, a married woman, sues her husband for a dissolution of the matrimonial community, a separation of property, and her right of administration thereof, grounded on his insolvency, and the generally disordered condition of his financial affairs, endangering her paraphernal rights and claims, as well as her future acquisitions. The property petitioner claims is specified, as well as the sources from which same was derived, and various items of indebtedness of her husband are enumerated, and the resulting balance due is fixed at \$1,460, for which she demands a personal judgment. Several

of the defendant's judgment creditors intervened, and resisted plaintiff's demands, denying her paraphernal ownership of the property claimed, and the reality and validity of the indebtedness she prefers against her husband; charging same to be fictitious and fraudulent, and the act of restitution by defendant, to his wife, of the property claimed, as a part of a scheme on the part of the defendant to defraud his creditors, and put his property beyond their reach. The defendant made default. On these issues the case was tried, and judgment pronounced in favor of the plaintiff for the sum of \$1,066, dissolving the community, decreeing her the owner of the property specified, in her own paraphernal right, and giving her the separate administration and control of same; and from that judgment the interveners have appealed.

It is evident that in this case, as well as all others of its kind, the principal question is whether the plaintiff had a valid, subsisting debt or demand against her husband. If she had, the defendant was entitled to convey to her property in partial satisfaction of it, as he did, and she is entitled to judgment for the resulting balance. Otherwise, the charge of unreality and fraud is substantiated, and the judgment must be reversed, and a decree pronounced in favor of interveners.

The issues before us are identically the same as they were in the court below, with the exception that the money demand of the plaintiff is restricted to \$1,066, as that is the amount for which judgment was pronounced in her favor, and she has not answered the appeal, and demanded an alteration of the decree. The following are the items of defendant's indebtedness, as recited in the act of restitution, and reiterated in plaintiff's petition, viz.: (1) The sum of \$200, which was paid to the defendant as the one-third of the purchase price of the plantation known as the "Indian Village Place," to which the plaintiff was entitled as an heir of her deceased father, John A. Covington. (2) The sum of \$416, which was likewise paid to the defendant as the one-third of the purchase price of the plantation known as the "Lowery Place," to which plaintiff was entitled as heir. (3) The sum of \$400, which was likewise paid to the defendant as the one-third of the price of certain mules, stock of cattle, sheep, etc., which were disposed of, and to which plaintiff was entitled as heir. (4) The sum of \$1,250, which was likewise paid to the defendant, as the proceeds of certain policies of life insurance which had been compromised and surrendered, to which plaintiff was entitled as assignee. Claim is made for the first three amounts, as having been derived from the sale of property of the plaintiff's father's succession, made by his legal heirs and surviving widow, and of which plaintiff was and is beneficiary to the extent of one-third, on the following theory: That, during his lifetime, John A. Covington acquired sundry small pieces of improved real

estate, situated in the vicinity of the place where he conducted a mercantile business which was operated in the name of John A. Covington & Son. That J. A. Covington was twice married; and of the first marriage the plaintiff and her brother, J. Y. Covington, were the sole surviving issue at his death; and of the second marriage there was no issue,—his second wife surviving him. Of the various properties which J. A. Covington purchased, some were acquired during the second, but the greater part during the first, community. Consequently, the three parties in interest agreed among themselves to make a division of the effects of the deceased, on the basis of one-third to each; and hence, when a piece of property was sold, one-third of the proceeds was delivered to each,—the share falling to the plaintiff being delivered to her husband, the defendant. After his father's death, J. Y. Covington, the son and partner, continued to operate the mercantile business as before, to pay its debts and wind up its affairs; there having been no formal administration of the succession, and the heirs taking unqualified control of the property and affairs of deceased as their own, as an inheritance, without objection or complaint by creditors. The interveners, however, insist that J. A. Covington was largely indebted at the time of his death, and consequently there was nothing remaining in his succession for his children to inherit, and they have no inheritance. There is on the record no proof of J. A. Covington's indebtedness at time of his death, except the statement that J. Y. Covington made as a witness in another suit, to which the plaintiff was not a party or a privy; and, as she urges the objection that it was *res inter alios acta*, we must decline to consider the evidence, as the objection was undoubtedly good, and should have been sustained by the judge *a quo*. But, if the proof be as interveners' counsel insist it is, it could not affect the question, for the reason that, by the simple and unconditional acceptance of J. A. Covington's succession by his heirs, and the appropriation and sale of its property and effects, the succession is no longer in esse,—it becoming absorbed by the heirs. In addition, J. Y. Covington took charge of, and subsequently conducted, the mercantile business of J. A. Covington & Son, and liquidated its affairs, and presumably settled its debts. At least, it is reasonable to suppose that they have been settled, as we hear of no complaints, suits, or judgments by his creditors, and the heirs have peaceably taken possession of his property, sold it, and divided its proceeds. Under these circumstances, we think that we are not at liberty to entertain a doubt of the reality and validity of the plaintiff's inheritance from her father.

As to questions of fact, we are of opinion that there is just as little doubt as to the amount plaintiff was entitled to have received on the score of the sale of the Indian Village and Lowery places; but as to the

\$400 she claims on the score of stock, etc., sold, we cannot express an opinion, inasmuch as the district judge rejected that item, and plaintiff asked no amendment of his judgment.

In regard to the second item, the proof is clear to the effect that the sum of \$416 was delivered into the possession of the defendant for the plaintiff; and there is no proof that the money was afterwards returned to her. But in regard to the first item the proof is not quite clear. The party who made the purchase of the Indian Village property states that he paid \$500 in cash to J. Y. Covington, in two different payments, and gave his note for the balance, of \$100, and that neither the plaintiff nor the defendant was present at the time. Covington rather confuses the matter in his statement, by making an explanation of the two transactions at the same time; but he substantially declares that he "paid \$150 of that which Bransford received." And, taking this statement in connection with that of Parker, it becomes reasonably certain that the defendant did receive this \$150, which is \$50 less than the sum allowed by the judgment appealed from.

The transaction with regard to the life insurance policies was substantially as follows, viz: J. Y. Covington, being somewhat embarrassed financially, obtained a loan of money, upon the indorsement of two friends, to the extent of about \$8,000, and as collateral security he assigned to them two policies of life insurance, for \$2,500 each. Having subsequently returned the money borrowed, the pledgees transferred the policies to the plaintiff, at the request of the beneficiary, her brother. For reasons of his own, which were not disclosed, the agent opened communication with the plaintiff, as assignee, with a view of compromising the risk, and recalling the policies. The negotiation was attended with some difficulty and delay. Of this the agent says: "I then called upon Mr. Bransford, made known my business to him, and offered to pay Mrs. Bransford the amount of the premiums paid, with interest, if she would surrender the policy. The matter was submitted to her, and declined. During the next six or eight months, I made her, through her husband, four or five offers. Finally, I offered to pay her \$1,000 for the remainder of the policy. Every offer was in turn declined, [and] in the meantime one or two half-annual premiums were paid. During the last week in February, 1893, Mr. Bransford called me in his store, and said that he was hard pressed for money, etc., and that, if I would pay \$1,250 for the policies, that he was of opinion he could induce his wife to sell them. I submitted the offer to the company, [and it] was accepted. * * * I then wrote out a receipt for Mr. Bransford to send to Mrs. Bransford to sign; and drew my check, No. 15, on the Capital State Bank, at Jackson, Mississippi, payable to my own order, and

left it with Mr. F. P. Stubbs to deliver to Mr. Bransford upon the delivery of the policy and receipt signed by Mrs. Bransford. In a few days the receipt was received, * * * and, upon the receipt of the policies and premium receipt, I handed Mr. Bransford my check No. 15, before mentioned, amounting to \$1,250." It thus appears that not only were the policies duly assigned by Covington's pledgees to Mrs. Bransford, at her request, but the insurance company recognized her as the legal assignee of them, and, as the result of an eight-months negotiation with her, purchased them from her, and paid \$1,250 for them, giving the agent's check to the defendant. The president of the Ouachita National Bank states that he recollects the check, and that same was collected through his bank for account of J. S. Bransford, and that the proceeds were placed to the credit of his account, and drawn out again, on his checks, at different times. The averments of interveners' petition with reference to these insurance policies are that defendant "never owed his wife anything on account of his insurance policies; that Bransford paid the premiums on said policy, and whatever accrued thereon was the result of a contract made during the community, and belonged to the community. They further specially deny that defendant received any cash, or property," etc. The theory of interveners is manifestly incorrect. The policies were issued in favor of J. Y. Covington, and were payable to him or his assignee. Either he or his pledgees paid the premiums. After the demands of his pledgees had been satisfied, and they had been reimbursed the amount of the premiums they had paid, the policies were at once assigned to Mrs. Bransford, at Covington's request. He swears to this as a witness. There is neither allegation nor proof of any fraud or simulation in the transaction, on the part of Covington. He was not made a party to this suit, and no attempt was made to annul the assignment of the policies to Mrs. Bransford on any ground. Covington owed the interveners nothing; and being an unmarried man, without nearer kindred or heirs than his sister, he had a perfect legal right to transfer the policies to her as he did; and it was near eight months subsequently that she sold them to the company, and her husband received the money. But our attention is attracted to the fact that the proof discloses that, at the time of these transactions, J. Y. Covington had a latent interest in the defendant's business,—having, from time to time, loaned him money to be employed in his business; and consequently, when Bransford collected the \$1,250 from the insurance company, and checked it out of bank for the benefit of his firm, same inured to Covington's benefit also. But that is a non sequitur, for, if Bransford was indebted to Covington for advances of money, his disbursement of the \$1,250 among other creditors did not benefit

Covington, nor reduce the amount of his claim. Certain it is that no part of the \$1,250 was paid to Covington, as the proof shows that Bransford subsequently sold his entire stock of goods for about \$5,000 in cash, and out of the proceeds of sale he paid Covington about \$1,500 in full of his claim, assuming all of the liabilities of the mercantile business. If there is anything in these transactions which even tends to show fraud or simulation, or an interest in the community, it is not discoverable. To our minds the proof of the paraphernal character of the plaintiff's claim to the insurance money is just as clear and as free from doubt as the claims which arose out of her inheritance from her father's succession. In *Stauffer v. Morgan*, 39 La. Ann. 632, 2 South. 98, the identical question under consideration was examined and decided. In that case the creditors of the husband attached property standing in the name of his wife, as that of the community; and she intervened, claiming that it was her separate, paraphernal property, having been purchased with her separate means, under her administration and control. The principal question was as to the paraphernality of the funds with which the wife's alleged acquisition was made; and the controversy chiefly turned upon the question of whether there was an actual, completed donation of a check which the groom gave to his fiancée, on a New York bank, just prior to their marriage,—the attaching creditors denying the effectuality of the donation, and the interveners affirming it. The court said: "Granting the correctness of the proposition of law [contended for by plaintiff's counsel], we are satisfied that the presentation of the check to the firm on which it was drawn, and the placing of the proceeds, under her instructions, to her credit, was an effective collection of the check, and a reduction of the proceeds to her possession;" thus completing the donation by a manual delivery of the proceeds and avails of the check. So, in this case, the donation of the insurance policies was perfected by their surrender to the company, and their payment of the price to her husband upon her receipt. The assignability of such a policy of insurance as that under consideration is sustained by the current and weight of authority in this state. *Succession of Hearing*, 26 La. Ann. 326; *Succession of Bofenschen*, 29 La. Ann. 711; *Putnam v. Insurance Co.*, 42 La. Ann. 739, 7 South. 602; *Pilcher v. Insurance Co.*, 33 La. Ann. 322. And in the recent case of *Stuart v. Sutcliffe*, 46 La. Ann. —, 14 South. 912, all of the authorities are collated, reviewed, and the doctrine reaffirmed.

From the foregoing summary of law and fact, it follows that the plaintiff's title to the property is supported by a good and valid consideration, and was properly recognized by the judgment appealed from; that there was a valid and subsisting in-

debtedness, on the part of the defendant to the plaintiff, in excess of the estimated value of the real estate; to the amount of \$1,066, as specified in the judgment,—less the sum of \$50, as we have ascertained from the evidence, and by which amount it should be reduced; and that on account of business complications, and his suspension of business, and the general disorder of his affairs, the plaintiff is entitled to a separation of property, the dissolution of the matrimonial community, and the control, management, and administration of her separate estate and property. Rev. Civ. Code, art. 2425. The judgment should be amended and affirmed.

(34 Fla. 33)

PICKETT v. BRYAN et ux.

(Supreme Court of Florida. June 12, 1894.)

REVIEW ON APPEAL—BILL OF EXCEPTIONS—STIPULATIONS.

1. Where it appears from the bill of exceptions that testimony not incorporated therein was submitted to and passed upon by the court or jury, the appellate court will not review the evidence to ascertain whether or not it sustains the judgment or verdict. The rule is settled that the decision of the trial court will not be disturbed, as being contrary to the evidence, when all the testimony that was before the court is not properly presented to the appellate court.

2. The appellate court will not consider agreements of counsel to amend and supply deficiencies in bills of exceptions properly certified to by the trial judge and found in the transcript. The action of this court must bear upon the action of the trial court, and bills of exceptions certified to by that court must be regarded as the only evidence of matters in pais transpiring at the trial.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Action by Joseph L. Pickett against Joseph D. Bryan, Jr., and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

E. M. Cheney and A. W. Cockrell & Son, for appellant.

MABRY, J. Pickett, the appellant, sued Bryan and wife, appellees, in ejectment to recover possession of a certain parcel of land situated in Volusia county, Fla. The record shows that when the case came on for trial upon the issue tendered by the plea of not guilty a jury was waived, and the court, after hearing the evidence, rendered judgment in favor of defendants, from which an appeal was taken by the plaintiff.

The bill of exceptions recites that when the issue joined between the parties came on to be tried by the court, by consent, without a jury, the plaintiff, to maintain the issue on his behalf, offered in evidence a certain patent issued by the United States to Seymour Pickett, his heirs and assigns, bearing date the 15th day of November, A. D. 1888, and then closed his case. The patent contains, among others, the following recitals, viz.:

That there had been deposited in the general land office of the United States a patent certificate of the register of the United States land office at Gainesville, Fla., dated September 5, 1888, whereby it appeared that the claim of Seymour Pickett to a certain tract of land situated in Florida was confirmed by the act of congress approved February 8, 1827, and that said claim had been regularly surveyed by a designated description, and, as shown by a plat on file in the general land office of the United States, duly authenticated on the 29th day of September, A. D. 1888, by the signature of the surveyor general for the state of Florida. It is also recited that a final decree had been rendered in the United States district court for the northern district of Florida, on the petition of Joseph L. Pickett, adjudging that the Seymour Pickett grant, according to the survey thereof as shown by the said plat in the surveyor general's office, take precedence to the grants to Ambrose Hull and P. R. Del Calla, and any survey of said grants, so far as the same conflicted with the said survey of the Seymour Pickett grant. The patent purports to convey to Seymour Pickett, his heirs or legal representatives, and to his or their heirs, the tract of land embraced in the said survey and plat, and bears date the 15th day of November, A. D. 1888. As shown by the bill of exceptions, this was all the testimony offered by the plaintiff.

It also appears that defendants, to maintain the issue on their part, offered in evidence certain portions of the fourth volume of Duff Green's edition of the American State Papers, for the purpose of showing that Seymour Pickett derived title to the land in question from the Spanish government, and that the plaintiff and his ancestors had a right of entry on the said lands continuously since 1849, and that the United States did not have the legal title to the land at the date of said patent. This testimony was admitted over the objection of the plaintiff. The bill of exceptions further recites that defendants offered in evidence certain deeds and evidence to prove that they and those through whom they claimed title had been in the open, adverse, and continuous possession of the said premises under a written instrument since 1849. Extracts from the fourth volume of American State Papers, referring to the Seymour Pickett grant, are found in the record, but no deeds or evidence in reference to defendants' claim to the land appear. The extracts do not show that the plaintiff here had any interest in the Seymour Pickett grant.

On the bill of exceptions found in the record it is entirely clear that the judgment must be affirmed. If it be conceded that the patent vested title in Seymour Pickett, or his heirs or assigns, there is nothing to show that the plaintiff, Joseph L. Pickett, had any interest in the land sought to be recovered. It is not made to appear that Seymour Pick-

ett is dead, and that the plaintiff is his heir; nor does it appear that the plaintiff has acquired, in any way known to the law, the title to said land. As shown by the bill of exceptions, the plaintiff failed entirely to show that he had any right to recover possession of the land as against the defendants. He shows neither title nor previous possession, and on such a showing the judgment of the trial court would have to be affirmed.

But, still further, the bill of exceptions does not set out the deeds and evidence under which defendants claimed adverse possession, although it does appear that testimony under such a defense was submitted to and passed upon by the court. The decision of the trial court will not be disturbed as being contrary to the evidence when all the testimony that was before the court is not presented to the appellate court. *Marshall v. State*, 32 Fla. 462, 14 South. 92, and authorities cited.

After the record was filed in this court, an agreement was filed here, signed by counsel for plaintiff and defendants, consenting that the bill of exceptions be amended by inserting therein certain matters set out in the agreement. We cannot look to this agreement to supply any deficiencies in the bill of exceptions, or as furnishing any matter resting in pais, tending to make a different issue than that upon which the trial court acted, as shown by the record and bill of exceptions, properly certified to by the judge, and found in the transcript. There is no method known to the law of informing this court of the proceedings in pais had upon the trial of a cause except a bill of exceptions. It was said in *City of Jacksonville v. Lawson*, 16 Fla. 321, that: "Our action must bear upon the action of the court and the statute, and the rules plainly point the method of bringing such proceedings here to be reviewed. We must not be expected to decide moot questions, such as may be presented upon stipulations of counsel; for such course is liable to result in great abuse of public justice, and may be unjust and prejudicial to a circuit judge, if it should happen that the counsel have presented a case, and obtained a reversal or affirmance of supposed rulings, which would surprise the judge when brought to his notice. Hence the statute and rules have made provision of the means by which questions may be brought here for review, and while these methods are possible we have no right to adopt any other. This court is bound by the law." *Robinson v. Matthews*, 16 Fla. 319; *Burroughs v. State*, 17 Fla. 643; *Smith v. State*, 20 Fla. 839; *Pine v. Anderson*, 22 Fla. 330. This court has never shown any disposition to relax the rule above stated, and we think the only safe course is to adhere to it. On the record proper and bill of exceptions under the signature of the judge, to which alone we can look in this case, the judgment must be affirmed, and it is so ordered.

(24 Fla. 68)

HODGES v. FRIES et al.

(Supreme Court of Florida. June 22, 1894.)

LIABILITY OF LANDLORD — FAILURE TO DELIVER POSSESSION—DAMAGES—REVIEW ON APPEAL.

1. In a suit by a tenant against a landlord to recover damages for a failure of the latter to deliver possession of the leased premises according to contract, the measure of damages generally is the difference between the rent agreed upon and the value of the premises to the tenant for the term, and such other damages as result directly and necessarily as the natural consequence of the breach of the contract, and are capable of being estimated by reliable data.

2. Profits that are speculative or conjectural are not generally regarded as elements in fixing damages, not because there is anything in their nature per se which demands their rejection, but because they cannot be estimated with reasonable certainty.

3. On appeal, the findings of a referee on the evidence will be accorded the same consideration and weight as are given to the verdict of a jury, and, where there is sufficient testimony to sustain the findings, it will not be set aside unless the testimony against them is so strong as to indicate that due consideration had not been given to the entire testimony.

4. If a plaintiff, by reasonable exertions or care, could have prevented damages resulting to him by reason of the wrongful act or acts of the defendant, he should have used such exertions and care to avoid the damage, and, so far as he could thus have prevented them, he cannot recover therefor.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; James M. Baker, Judge.

Action by Sarah J. Hodges against A. P. Fries & Co. Judgment for plaintiff, and plaintiff appeals. Affirmed.

Mrs. Hodges, the appellant, sued A. P. Fries and J. W. Morrison, as partners doing business under the firm name of A. P. Fries & Co., for damages for the breach of an alleged rental contract. The declaration filed in the case contains two counts. The first one alleges, in substance, that appellees, on the 27th day of February, 1889, contracted to rent to appellant one-half of a store, numbered 41 East Bay street, in the city of Jacksonville, to be used and occupied by her for one year from the 15th day of March, 1889, for the sum of \$35 per month, and that appellant on said date demanded possession of the half of said store, and possession of the same was postponed by appellees on the pretext that the said store was being repaired and fitted up for her use, and as soon as said repairs were finished, which would be at an early day, possession of the half of said store would be delivered to her; that appellant was delayed from time to time until the 15th day of April following, when she was refused possession of the half of said store by appellees, who then informed her that they had rented the entire store to other parties. The damages sued for are \$5,000, and the alleged causes of the same are as follows, viz.: That appellant broke up and abandoned a lucrative millinery business in which she was engaged in Lake City, Fla., and moved a large and valuable stock of millinery goods to Jacksonville, and also

moved herself, with her large and dependent family of children, to the latter place, on the faith of said contract, and relying upon the promise of appellees to give her possession of the half of said store on the 15th day of March, 1887, when and where she could resume her business, she having good prospects of a compensatory spring trade, out of which she had every reason to have expected to make a large sum of money, to wit, \$5,000, all of which profits and gain she lost in consequence of the failure of appellees to let appellant have the half of said store; and appellant incurred further loss and damage, in consequence of the violation of said contract, in the unnecessary expense in breaking up her business in Lake City and having to support her family in Jacksonville, without being able to engage in business, between the 15th of March, 1889, and the 15th day of April following, she being led to believe from assurances from appellees that she would soon get possession of the half of said store, whereas she had not been able to resume her said business up to the time of bringing her suit. The second count alleges that, subsequent to the making of the contract for the half of said store, appellees offered to rent to appellant the entire store for \$50 per month for one year, and she was given the option of taking the entire store at any time before the repairs then being made on it were completed; that before said repairs were completed, to wit, on the 1st day of April, 1889, appellant decided to take the entire store on the terms mentioned, and so informed appellees, who then and there refused to let her have said store, in whole or in part, and then informed her that they had rented the entire store to other parties. By reason of the failure to obtain the possession of said store, it is alleged that appellant was damaged in the sum of \$5,000, for the reasons and on the grounds set forth in the first count of the declaration.

A demurrer to so much of the specifications of damages in the declaration as are based upon the claim for loss of profits was sustained, and appellees filed two pleas, one denying the making of the contract for the rent of either the half or the whole of the said store as alleged, and the other alleging that appellant, after entering into negotiations for the rent of the whole or half of the said store, declined and refused to take a lease of either. The declaration was subsequently amended by repeating in substance the allegations of the original as to the contract for the rent of the said store room, and the refusal of appellees to comply with their said contract, and alleging damages as follows, viz: That appellant incurred great expense and outlay of money in moving herself and family, consisting of several young, dependent children, from Lake City, Fla., where they had resided for many years, to Jacksonville; the cost and expense of sup-

porting appellant and her children, during the time she was waiting to get possession of the half of said store, amounting to the sum of \$500; the cost and outlay of money in freight on the shipment of a large stock of millinery goods, of value the sum of \$5,000, from Lake City to Jacksonville, and in money paid for drayage, packing and storing said goods, as well as loss of goods and other legitimate expenses and losses in and about the removal of said stock of goods, and in and about the keeping of the same preparatory to appellant's going into said store. It is further alleged that appellees well knew when they entered into said contract that appellant was engaged in the millinery business in Lake City, and by said contract they induced her to break up and abandon said business in Lake City, which it is alleged was lucrative and paying, and move her said business and stock of goods to Jacksonville, by promising to rent to her one-half of said store, and to deliver possession of the same at the time mentioned, for the purpose of resuming her said business in Jacksonville. It is also alleged that appellant was not able to procure another store equally favorable to her business after appellees refused to give her possession of the one she had rented, or during the time she was waiting to get possession of the same.

The bill of particulars filed with the amended declaration consists of: Cost of moving appellant and family from Lake City to Jacksonville, and for support of family while waiting to get possession of store, \$500; cost of moving stock of goods, freight, drayage, loss of goods, including storage, \$1,000; interest on value of goods, \$500.

On the issues presented by the pleas mentioned, the case was tried before a referee, who rendered judgment in favor of appellant for \$5.50 and costs, from which she has appealed.

Cooper & Cooper, for appellant. H. Bisbee, for appellees.

MABRY, J. (after stating the facts). The first error assigned and presented here in behalf of appellant is that the court erred in sustaining the demurrer to that part of the declaration claiming damages for loss of supposed profits from trade. Counsel for appellant say that "the declaration and the plaintiff's joinder in demurrer show that the damages claimed for loss of alleged profits in trade were based on the legal proposition that where a store is rented for the purpose of trade, and in which to resume a business already under way, which necessarily enters into the contemplation of the parties, such loss of trade forms a ground of damages, if proven; the basis of proof being what she had annually realized net before the breaking up [of the business]."

We can only look to the declaration in determining its sufficiency on demurrer, and

what is stated in the joinder in demurrer to the declaration cannot affect its allegations on such issue. From the original declaration we understand that appellant claimed as recoverable damages profits that she had good reasons to expect from a millinery business prevented or postponed without cause by the refusal of appellees to let her have the half of the store room mentioned. The contract for the rent of the store, and which it is alleged that appellees violated, was executory, and, according to the allegations of the declaration, their action in the premises was without excuse. No money was paid on the lease contracted for, but a price was fixed, and possession was refused without cause. Under such circumstances, the tenant would without doubt be entitled to recover the difference in value between the price agreed on and the rental value of the room at the time of the breach of the contract. The original declaration claims more than that as damages. The feature of it demurred to asserts that the profits which the tenant had good reason to expect from the business to be carried on in the premises refused are recoverable as damages. Considering the declaration in this light, as it has been presented, we will pass upon the correctness of the court's ruling thereon.

The primary object in awarding damages at common law is compensation to the injured party, and the damages allowed for this purpose must be the natural and proximate result of the wrong done. In cases of breach of contract, with few exceptions, the common-law rule aims to give compensation for the loss sustained, and to put the injured party in the same condition in which he would have been had the contract been performed. As between vendor and vendee, when the former fails to perform his contract of sale and conveyance of real estate, by reason of his inability, without fault, to make title, an exception to the general rule as to awarding damages was early established. *Flureau v. Thornhill*, 2 W. Bl. 1078. It was there established that in such cases the vendee could recover only the amount of payments made, with interest and costs. The rule established by the case referred to has been extensively followed in this country, though some courts, it seems, have departed from it. Efforts have been made to have the same rule applied to the violation of rental contracts between landlord and tenant on the theory that the latter is a purchaser pro tanto of an interest in real estate. The rule established in *Flureau v. Thornhill* has not met with general favor, and the courts have shown no disposition to extend it beyond the facts of that case. In England this rule has not been applied as between landlord and tenant where the former, in violation of his contract, has withheld possession of the leased premises from the latter, and the general rule, that the measure of damages is the loss a plaintiff has proximately sustained by reason of the breach of

the defendant's contract, obtains in such cases. *Lock v. Furze*, 19 C. B. (N. S.) 96; same case on appeal, L. R. 1 C. P. 441. In these cases it is said that the plaintiff was entitled to recover the value of the leased premises for the term, and also the expenses to which he has legitimately been put in endeavoring to obtain it.

In New York and Missouri it has been held that, when damages are claimed solely from the failure of the lessor to give the lessee possession of the leased premises, the plaintiff can only recover the difference between the rent, as provided for in the contract of lease, and the rental value of the premises. *Dodds v. Hakes*, 114 N. Y. 290, 21 N. E. 398; *Hughes v. Hood*, 50 Mo. 350.

Our view is that the general rule for awarding damages should apply in such cases, and the plaintiff should generally be allowed to recover the difference between the rent reserved and the value of the use of the premises for the term. If other damages result as the direct and necessary or natural consequence of the breach of the contract by the defendant, we do not see why they cannot also be recovered, provided they are capable of being estimated by reliable data. *Ward v. Smith*, 11 Price, 19; *Brigham v. Carlisle*, 78 Ala. 243; *Snodgrass v. Reynolds*, 79 Ala. 452; *Adair v. Bogle*, 20 Iowa, 238; *Woodbury v. Jones*, 44 N. H. 206.

In estimating damages, profits that are speculative or conjectural are not generally regarded as elements. Such profits are rejected, not because there is anything in their nature per se which demands their rejection, but in obedience to the well-established common-law rule that all damages recovered for a breach of contract must be proven with certainty, and not left to speculation or conjecture. The rule on the subject is well expressed, we think, in the case of *Brigham v. Carlisle*, supra, as follows, viz.: "The law presumes that a party foresees the natural and proximate result of a breach of his contract or tort, and hence these are presumed to be in his legal contemplation. For such damages, as a general rule, the party at fault is liable. But there are damages which are in the contemplation of the parties at the time of making the contract, and are the natural and proximate results of its breach, which are not recoverable. The parties must necessarily contemplate the loss of profits as the direct and necessary consequence of the breach of a contract, and yet all profits are not within the scope of recoverable damages. There are numerous cases, however, in which profits constitute, not only an element, but the measure of damages. While the line of demarkation is often dim and shadowy, the distinctive features consist in the nature and character of the profits. When they form an elemental constituent of the contract, their loss the natural result of its breach, and the amount can be estimated with reasonable certainty, such certainty as satisfies the mind

of a prudent and impartial person, they are allowed. The requisite to their allowance is some standard, as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained.

* * * On the other hand, mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of recoverable damages." *Masterson v. Mayor, etc.*, 7 Hill, 61.

It may be that profits, though not recoverable as such, should be allowed to be proven in some cases, as affording facts from which a jury may properly estimate the value of the lease to the tenant; but they should not be allowed for this purpose unless they form a constituent element of the contract, and the amount can be estimated with reasonable certainty from established data. The cases of *Brent v. Parker*, 23 Fla. 200, 1 South. 780, and *Sullivan v. McMillan*, 26 Fla. 543, 8 South. 450, are authority for the admission of evidence as to the loss of profits in a suit for a breach of contract where they are susceptible of estimation by satisfactory proof.

Under the allegations of the declaration before us, the profits and gains supposed to have been sustained by reason of the failure to commence the millinery business in the store contracted for in Jacksonville are too remote and conjectural to form an element of recoverable damages for a breach of the alleged contract. They are not susceptible of any satisfactory estimation by established data, as plaintiff had never engaged in such business at that place. The cases of *Giles v. O'Toole*, 4 Barb. 261, and *Green v. Williams*, 45 Ill. 206, in both of which damages were claimed for profits which might have been made in the millinery business in the premises withheld, decide that they could not be recovered, because they were too remote and speculative. 1 Sedg. Dam. 183.

The other assignments of error relate to the findings of fact by the referee, and his conclusions as to the law applicable to the facts. The referee found from the evidence that appellant and appellees entered into a contract whereby one-half of the store mentioned in the declaration was to be occupied by the former for one year, and that possession was to be given to her as soon as the repairs then being placed on the store were completed; that said contract was entered into after appellant moved with her goods to Jacksonville, but before the removal of the goods to rooms of appellees; that the store was ready for occupancy about the 1st of April, 1889, and appellant stood ready to accept the store under the contract, but appellees refused to let her have possession; that at the time of said refusal appellees offered to rent to appellant another store in the same locality, practically

as good for the purposes of her business as the store contracted for, and for the same rental price, and that she, without legal excuse, refused to accept it; and that the rental value of the store room contracted for, as it was when the contract was made, and when possession was refused, was \$50 per month by the year,—the contract price,—and that there was no difference between the actual rental value of half of the store and what appellant agreed to pay for it. The referee also found that appellant expended \$5.50 in the removal of her goods from the depot in Jacksonville to rooms of appellees, and that this item was the only damages legally recoverable for the breach of the said contract.

The conclusion of the referee on the facts must, in our judgment, be sustained. On appeal, the findings of a referee on the testimony are to be accorded the same consideration and weight as are given to the verdict of a jury. *McClenny v. Hubbard*, 20 Fla. 541; *Broward v. Roche*, 21 Fla. 465. That is, where there is sufficient testimony to sustain the finding, it will not be set aside on appeal unless the testimony against it is so strong as to indicate that due consideration had not been given to the entire testimony.

From a careful consideration of the correspondence between the parties before appellant moved to Jacksonville, we reach the conclusion that it cannot be said that there was by said correspondence any completed bargain as to the rent of either the half or the whole of the store room in question. That there was an agreement about the 15th of March, 1889, after appellant moved to Jacksonville, for her to have one-half of the store room described in the declaration, when the repairs then being placed on it were completed, is supported by direct and positive testimony, and under the rule announced we are not authorized to disturb it. Upon such finding, it was proper for the referee to exclude all costs and expenses incident to the move to Jacksonville, and incurred before the contract was made. Whether such costs and expenses would be allowable as damages for a breach of the contract, had it been entered into before appellant moved from Lake City, and before such costs and expenses were incurred, we need not say. As such expenditures had already been made when the contract was entered into, they did not, of course, enter into the contemplation of the parties in making the contract.

Appellant and one of the appellees, J. W. Morrison, were the only witnesses who testified as to the value and desirability of the store offered in lieu of the one she was to have, being the one described in the declaration. Morrison testified that the store offered Mrs. Hodges was as good in every respect as the one she wanted, and says, using his language, that "as far as desirability is concerned, I should think that the Simkin store [the one offered] was a more desirable

store than number 41 East Bay, as it is the same size, has a plate-glass front, and is one door nearer the business center of the city." Mrs. Hodges denies that the Simkin store was as desirable for her business as the one she was to have, but she does not deny that the two stores were in the same locality, adjoining or near each other, and of the same structure and size. No difference in pecuniary value is shown. It is clear that she was offered the Simkin store, then owned by appellees, on the same terms as the other store, and on the testimony we do not feel authorized to disturb the finding of the referee that the Simkin store was practically as good for the business contemplated as the other one. This conclusion justified the exclusion by the referee of any consideration of the amounts expended by the appellant in securing other rooms in different portions of Jacksonville, in which to carry on her business, after she refused to accept the Simkin store. It is a well-established legal rule, and of constant application, that if a plaintiff, by reasonable exertions or care, could have prevented damages resulting to him by reason of the defendant's wrongful acts, it was his duty to do so, and, so far as he could have thus prevented them, he cannot recover therefor. *Adair v. Bogle*, supra; *Dobbins v. Duquid*, 65 Ill. 464. If appellant was tendered on equal terms as good a store room as the one she had contracted for, and in the same locality, she had a right to decline it, but she had no right to claim as damages the increased rental cost of other rooms secured in different parts of the city, and the expenses attending the removal to the same.

Under the facts found by the referee, there was no basis for the claim of supposed profits that might have been realized from a millinery business in the store contracted for. Appellant expected to commence such a business in the store, and this fact was evidently known to appellees. As found by the referee, however, the business was to be opened when the store was repaired, and at that time she was tendered another room in the same locality, equally as good as the one she was to go into. Furthermore, such profits were entirely speculative, and there was no reasonably safe basis for their estimation. Appellant had never before, so far as we know, engaged in business in Jacksonville, and her business venture was entirely a new one in that place. For reasons given in the first part of this opinion, such profits could not be estimated and considered.

Accepting the conclusions of the referee on the testimony as correct, which we must do, it follows that appellant sustained no substantial damage by reason of the failure of appellees to deliver to her possession of the store described in the declaration, and that she has shown none, by her testimony, for which she is entitled to a recovery beyond that awarded by the referee.

We may add that the question of the effect

of the statute of frauds would present a serious difficulty to the right of appellant to recover on the contract alleged in this case, but it is not insisted on, and it is not necessary to consider it.

The judgment, upon the record before us, should be affirmed, and it will be so ordered.

(24 Fla. 1)

WALSH v. WESTERN RY. CO. OF FLORIDA.

(Supreme Court of Florida. June 12, 1894.)

INJURY TO EMPLOYE—PLEADING—KNOWLEDGE OF DEFECTIVE APPLIANCES.

1. A declaration by an employé against a railroad company, alleging generally, without stating specific facts, that the plaintiff was injured in consequence of the negligence of the defendant in operating and managing its road and cars, and in using defective implements and machinery, is too general, and will be held bad on demurrer; and the same rule will apply where the wife of an employé sues for his wrongful death by the company.

2. In such actions, where negligence is the basis of recovery, it is not necessary for the plaintiff, in her declaration, to set out the facts constituting the negligence, but an allegation of sufficient acts, the doing of which caused the injury, and an averment that such acts were negligently and carelessly done, will be sufficient.

3. Although it is a complete answer to the claim for damages resulting from a failure on the part of a railroad company to furnish suitable instrumentalities that the injured servant had full knowledge of the situation, and voluntarily engaged in the employment, or continued therein with such knowledge without objection, yet where a declaration alleges that the defendant company did know of the defects mentioned, and that the plaintiff, an employé of the company, did not know of them, nor had he reason to anticipate or provide against them, and they were not such risks or hazards as were required or contemplated by his employment as such servant, it will be good on demurrer.

(Syllabus by the Court.)

Appeal from circuit court, Clay county; James M. Baker, Judge.

Action by Alice M. Walsh against the Western Railway Company of Florida. Demurrer to the complaint sustained, and plaintiff appeals. Reversed.

The defendant, the railway company, demurred to the declaration, and the demurrer was sustained, with leave to amend, and thereupon the plaintiff filed an amended declaration, a demurrer to which was also sustained, and plaintiff suffered final judgment to be entered, and has appealed to this court, assigning as error the action on the latter demurrer.

The amended declaration is, in substance, as follows:

Alice Mary Walsh sues the Western Railway of Florida, a corporation duly created and existing under the laws of Florida, for that the defendant on April 28, 1888, was, and still is, such a corporation, and was owning, operating, and using a certain railroad in Clay county, Fla., and operating and using on said railroad on said day its engine and cars, and plaintiff was the wife, and is now

the widow, of John Walsh, deceased; and defendant, before and at the time of committing the grievances hereinafter mentioned, owned, used, and operated said railroad for the carriage of goods and persons in said county and state between Green Cove Springs and Belmore, and did employ divers servants to manage and operate said road, and on said day, and before then, employed said John Walsh, the husband of plaintiff, as a servant for hire and reward; and he did then and there faithfully perform his duties as such servant in the capacity of a superintendent, and on said last-mentioned date said John, following out the line of duty assigned to him by the defendant, and at the request of defendant, and in the exercise of his duties as such servant and superintendent, and for the purpose of more effectually performing the same, did go upon one of the engines belonging to the defendant, and pass over said railroad until said engine came near a certain creek in said county over which defendant's road passes. That the track of the road over which said John was then and there passing and being at work in his proper and lawful capacity as a servant and superintendent, and for hire and reward then and there paid to him, was then and there extremely dangerous, and subjected him to great hazards, risks, and dangers of life and bodily injury; by reason whereof the defendant, well knowing the premises, ought then and there carefully to have constructed, inspected, and operated the said track and the machinery and appliances incident and necessary to its proper construction, operation, and maintenance. Yet the defendant did then and there disregard its duty in this behalf in that the said track was then and there, with its appliances, so negligently, carelessly, insecurely, and improperly and defectively constructed, inspected, operated, and maintained for the purposes and uses aforesaid; and the said John, while so employed then and there as a servant and superintendent, and while then and there exercising due care and precaution, did not know and could not see the said defects and dangers in and about said track, which defects and dangers were then and there known to defendant, and by law the defendant ought and was bound to know the said dangers and defects; and defendant did then and there so negligently, carelessly, and improperly conduct itself in and about the premises, and in and about the management, construction, and maintenance of said track, that by reason thereof, and of the imperfect, negligent, and careless manner in which said defendant then and there set and allowed to be set to work the said John in his capacity of a servant and superintendent as aforesaid, without any caution or warning or instruction of or about said dangers from said defendant, the said John, then and there, and without any fault or negligence on his part, and in the course of

the lawful and proper use thereof, was then and there exposed to great and unnecessary dangers and risks, and dangers and risks not required or contemplated by his employment; whereby, and in consequence of which, said track then and there broke, gave way, fell apart, spread open, and "sloughed," and the engine jumped and fell from said track, and the said John was thrown therefrom with great violence and force, and down an embankment to the ground, and the engine fell upon him, and greatly hurt, bruised, and injured him, and thereby caused his death, and he then and there died from the effects of said bruises and injuries on April 23, 1888, in Clay county, Fla.

And, further, that there were attached to the said engine, upon which said John was then and there at work and in his proper and lawful capacity as a servant and superintendent, certain cars that were extremely dangerous, and subjected him to great hazards and risks and dangers of life and bodily injury, by reason whereof the defendant, well knowing the premises, ought then and there carefully to have constructed and inspected and operated the said cars and the machinery and appliances incident and necessary thereto. Yet the defendant did then and there disregard its duty in this behalf, in that said cars were then and there, with their machinery and appliances, so negligently, carelessly, insecurely, improperly, and defectively constructed and operated and managed for the purposes and uses aforesaid, and the said defects in and about the construction, inspection, and use of said cars and their appliances and machinery were then and there so hidden, that the said John Walsh, while so employed then and there as a servant and superintendent, and while exercising due care and precaution, did not know and could not see the defects and dangers in and about said cars and their machinery and appliances, but said dangers and defects were known then and there to defendant, and by law he ought and was bound to know the same; and defendant did then and there so negligently, carelessly, and improperly conduct itself in and about the premises, and in and about the management, construction, and inspection of said cars and their appliances, that by reason of the premises and of the improper construction, application, and adaptation of such appliances and machinery of said cars as aforesaid, and of the imprudent, negligent, and careless manner in which said cars and machinery and appliances were then used and inspected, and of the imprudent, negligent, and careless manner in which defendant then and there set and allowed to be set to work the said John in his capacity of a servant and superintendent as aforesaid, without any caution, instruction, or warning of such danger, as aforesaid, from defendant, the said John then and

there, and without any fault or negligence on his part, and in the course of the lawful and proper use thereof, was then and there exposed and subjected to great and unnecessary dangers and risks, and risks and dangers not required or contemplated by his employment; whereby, and in consequence of which, the said cars then and there broke, gave way, and fell apart and from the track of defendant's road, and the said John was then and there with great force and violence thrown from the engine aforesaid to the ground, and greatly bruised, hurt, wounded, and injured, and by reason of said bruises, wounds, and injuries received then and there he died on April 28, 1888, in Clay county, Fla.

And, further, that defendant well knew the said track of defendant's road and its said appliances and said cars and their appliances and machinery to be dangerous and perilous to the life of said John Walsh, and he was thereby subjected to dangers and perils not contemplated by said employment as such servant and superintendent as aforesaid, and that said John did not know the said dangers or perils, nor had he reason to anticipate or provide against the same, when he entered said employment as aforesaid, or subsequently till the day of his death as aforesaid; and the death of said John, and the damage hereinafter mentioned, were caused by the fault and negligence of the defendant, without fault on the part of said John.

And, further, that said John, during his lifetime, and the period of her intermarriage to him, was a kind, affectionate, and indulgent husband to her, and supported and maintained her in a proper, decent, and substantial manner, so that she had the reasonable and necessary comforts and luxuries of life, and continued to have them to the time of his death, caused as aforesaid; and that before said April 28, 1888, plaintiff was lawfully married to said John, and was his lawful wife, and is now his lawful widow.

And, further, that by reason of the death of said John, caused as aforesaid, she was and is now deprived of and has lost the said comforts, necessities, and conveniences, luxuries, and support and society of her said husband, and also his aid and assistance in the management of her domestic affairs and children, and the profit and advantage of his fortune, which she otherwise would have had and enjoyed, and she was thereby made to suffer great mental anguish and pain, and was forced to expend, and did expend, divers sums of money for the decent and proper burial of her said husband, and for the support of herself and her children, the said children being minor children, and heirs of said John.

Whereby she has suffered great damage, to wit, in the sum of \$25,000, which damage she has demanded and been refused, and hence she brings her suit.

The grounds of demurrer to this declaration as not setting forth a cause of action are as follows:

(1) The defects in the machinery, which the plaintiff's deceased husband, it is alleged, did not know of, and of which, it is alleged, the defendant did know, are not stated with sufficient certainty.

(2) It appears therefrom that the decedent was the superintendent of the company, and was in the discharge of his duty as such superintendent in riding upon the engine, by the falling over of which he is alleged to have been slain.

(3) It does not appear from said declaration that the service in which the deceased was employed by the defendant corporation did not require him to look after the track and machinery of said defendant, the alleged defect in which caused the accident by which he was killed.

(4) It does appear from the said declaration that the service in which the deceased was employed required him to look after and superintend the track and machinery, the alleged defect in which resulted in the accident whereby he lost his life.

R. W. Williams and P. C. Fisher, for appellant. A. W. Cockrell & Son, for appellee.

MABRY, J. (after stating the facts). The sufficiency of the amended declaration to which a demurrer was sustained is the only question involved here. The first ground of the demurrer questions the sufficiency of the allegation of negligence on the part of the defendant railway company. Negligence is the gist of the action, and must, of course, be sufficiently alleged. Plaintiff alleges a defective railroad track and defective cars used by defendant as grounds of negligence, and the first ground of the demurrer is that the defects in the machinery are not stated with sufficient certainty.

A declaration by an employé against the company, alleging generally, without stating specific facts, that the plaintiff was injured in consequence of the negligence of the defendant in operating and managing its road and cars, or in using defective implements and machinery, will not be sufficient. Such a declaration would be too general, and violate the rule prohibiting the allegations of mere conclusions of law. It is said in *Grinde v. Railroad Co.*, 42 Iowa, 376, that "it is not allowable to plead mere abstract conclusions of law, having no element of fact. They form no part of the allegations constituting a cause of action. But, if they contain the elements, also, of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact; as when necessities are furnished to an infant, or when a deed or mortgage is alleged as having been made, or the ownership of property,

is asserted, the general allegation is sufficient, being the ultimate fact to be established by evidence." In alleging negligence the rule does not require that the facts constituting the negligence shall be set out in the declaration, but it is sufficient if the acts constituting the injury are specified, and it is alleged that they were negligently and carelessly done. Of course, the acts, the doing of which caused the injury, being the ultimate facts to be established by evidence, must, when proven, constitute a cause of action against the defendant. In the case of *Railroad Co. v. Selby*, 47 Ind. 471, the complaint averred that the defendant railroad company did not use due care, diligence, and skill in carrying the plaintiff, but, on the contrary, the track of the railroad was in bad condition and repair, and the defendant, by its servants, negligently, unskillfully, and carelessly ran its train of cars, whereby the plaintiff was damaged in the manner specified. On demurrer this complaint was held not to be too general as to the condition of the track. The rule established by the authorities is that in actions founded upon negligence it is not necessary for the plaintiff, in his declaration, to set out the facts constituting the negligence, but an allegation of sufficient acts, the doing of which caused the injury, and an averment that such acts were negligently and carelessly done, will suffice. *Waldhler v. Railway Co.*, 71 Mo. 514; *Schneider v. Railway Co.*, 75 Mo. 295; *Mack v. Railway Co.*, 77 Mo. 232; *Railway Co. v. Keeley*, 23 Ind. 133; *Railroad Co. v. Mathias*, 50 Ind. 65; *Kessler v. Leeds*, 51 Ind. 212; *Railroad Co. v. Nelson*, Id. 150; *Johnson v. Railroad Co.*, 31 Minn. 283, 17 N. W. 622; 2 *Thomp. Neg. p.* 1246, § 28. If we concede that the rules should be applied with more strictness when an employé is suing a company in whose service he is engaged, still our judgment is that the declaration in the case before us is sufficient in the particulars mentioned. The allegations are that the defendant disregarded its duty in reference to constructing and maintaining its railroad track, and that a designated portion of it was so negligently, carelessly, improperly, and defectively constructed, inspected, and maintained that the said track broke and gave way, whereby the injury was done that resulted in the death of plaintiff's husband; and that the cars attached to the engine on which the said husband was riding were so carelessly, negligently, insecurely, and defectively constructed and inspected that they broke, gave way, and fell apart, and thereby caused him to be thrown from the engine, and suffer injuries, from the effects of which he died. The facts alleged in reference to the defective track and cars, if true, show a failure on the part of the company to perform positive duties resting upon it to provide suitable instrumentalities and safe machin-

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ery with which to work. *Railroad Co. v. Weese*, 32 Fla. 212, 13 South. 436.

If such pleading was liable to embarrass or delay a fair trial of the action, the defendant could have applied to the court, under section 55, p. 826, *McClel. Dig.*, to have it amended so as to more definitely state in what particulars the defects existed. As it stands, the declaration in the particulars mentioned shows, in our judgment, a cause of action. This conclusion does not in any way conflict with the rule that, where one cause of action is alleged in the declaration, the plaintiff will be confined to that in his proof and recovery. *Parrish v. Railroad Co.*, 28 Fla. 251, 9 South. 696; *Railway Co. v. Neff*, 23 Fla. 373, 9 South. 653; *Railway Co. v. Galvin*, 29 Fla. 636, 11 South. 231; *Railroad Co. v. Weese*, 32 Fla. 212, 13 South. 436.

The other grounds of the demurrer are based upon the view that plaintiff's husband was employed as superintendent, and as such was engaged in the performance of duties requiring him to exercise watchfulness and care over defendant's road and cars, and see that they were in proper repair, and fit for use. It is contended that an employé cannot recover for an injury suffered in the course of his employment, for defects in the machinery used, unless the employer knew, or ought to have known, of the defects, and the servant did not know, or did not have equal means of knowledge, of the defects. There is no doubt that it is a complete answer, independent of Act 1887, c. 3744, to the claim for damages resulting from a failure on the part of the company to furnish suitable instrumentalities, that the injured servant had full knowledge of the situation, and voluntarily engaged in the employment, or continued therein with such knowledge without objection or protest, and without any assurance on the part of the employer to provide better. *Railroad Co. v. Weese*, *supra*. The declaration before us, however, alleges positively that the defendant company did know of the defects mentioned, and that plaintiff's husband did not know of them, nor had he reason to anticipate or provide against them before entering into the service, or subsequently till the day of the injury. It is true it is alleged that said husband was employed as a servant for hire, and performed duties as such in the capacity of superintendent, without specifying what his duties were; but it is also alleged that the risks and hazards resulting from the defective track and cars to which he was subjected in the performance of his duties while riding on the engine were not such as were required or contemplated by his employment as such servant and superintendent, and that he was without fault in the premises. If this be true, there is no ground for the conclusion that plaintiff's husband was guilty of contributory negligence, or that he waived in

any way the performance of the duty on the part of the defendant to provide a good railroad track and safe cars in the operation of its said road. The legal presumption may be, in the absence of any allegations to the contrary, that the powers and duties of a superintendent are extensive; but the powers and duties conferred upon such an agent by different companies, as well as the usage of companies as to such matters, may differ essentially. 1 Wood, Ry. Law, pp. 498, 499. In the face of what is alleged in plaintiff's declaration we cannot assume on demurrer that her husband knew of the defects, or that it was his duty to know of them. The cause of action in the present case arose subsequent to the enactment of chapter 3744, but no contention is made that this act affects the sufficiency of the declaration in any way, nor do we see that its allegations make it necessary to enter into any consideration of said act.

The declaration, in our judgment, states a prima facie cause of action against the company, and the demurrer should have been overruled. The judgment of the court sustaining the demurrer and entering judgment for the defendant is reversed, and the cause will be remanded for further proceedings.

(46 La. Ann. 1223)

WISNER v. DELHI LAND & IMP. CO.,
Limited, et al. (No. 1,283.)

(Supreme Court of Louisiana. June 16, 1894.)

**CERTIFICATES OF STOCK — FRAUDULENT ISSUE —
ESTOPPEL TO CLAIM—SIGNATURE BY SECRETARY
—EFFECT.**

1. A stockholder having sued the corporation for the annulment and revocation of a sale of property to a director and stockholder, charging fraud and want of consideration, and the corporation having sought to justify its action by a ratification of the stockholders at a general meeting, the plaintiff will be estopped from proving that the shares of stock which were voted at the meeting were fraudulently issued without consideration; the evidence being stamped on the face of the certificates that same were certified by him as the secretary of the corporation, and issued to the stockholders as fully paid up.

2. This case is not that of a witness whose testimony is objected to on the ground that he cannot be heard to impeach the truthfulness of a certificate he had previously made as an officer, but that of a party who sues the corporation of which he is a shareholder for the annulment of a sale which the corporation has made, and charges, as a badge of nullity, the shares of stock which were voted at a general meeting approving and ratifying the sale were fraudulently issued, when in fact the certificates, signed by the plaintiff as secretary of the corporation, show on their face that they were fully paid up at the date of their issuance.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

Action by Edward Wisner against the Delhi Land & Improvement Company, Limited, and others. Judgment for defendants, and plaintiff appeals. **Affirmed.**

H. P. Wells, for appellant. Boatner & Lamkin, for appellees.

WATKINS, J. This is a revocatory action, coupled with an action of nullity, an action *sui generis*, possessing features common to both. Or, in other words, as an individual shareholder in the defendant company, and of which corporation he was a director and secretary, Edward Wisner institutes this suit for the revocation and annulment of a certain sale, in globo, of all the property of the corporation to another stockholder and director of the company, on the grounds—First, that the sale was not properly authorized by the stockholders at general meeting; second, that there was no necessity for the sale; and, third, that the sale was fraudulent, not being competitive and open, or for adequate consideration.

Preliminarily, the defendant Frederick Rohnert tendered several peremptory exceptions, viz.: (1) That the plaintiff failed to tender to the respondent the amount expended by him as the price of the property in controversy, and which has inured to the benefit of the Delhi Land & Improvement Company; (2) that he is estopped from contesting the legality of the directors' meeting held on the 3d of April, 1893, and its action in ratification of the sale to the respondent, because the action of the board of directors was ratified and confirmed at a stockholders' meeting held on the 4th of April, 1893, at which plaintiff was present, and in which he participated without protest or objection, and voted on the proposition to ratify the same; (3) that he is estopped from questioning the legality of the stock owned and voted by Hibbard Baker and Morse Rohnert at the stockholders' meeting aforesaid, on the ground that, as secretary of the corporation, he signed and issued same, and cannot be permitted to question or impeach the validity of his own official action. Reserving the benefit of his exceptions, the defendant pleaded a general denial, and averred that he became the purchaser of the land in controversy in due course of business, without fraud, and for a fair consideration. He prays that plaintiff's demands be rejected. The land company urge the same exceptions, and the additional one that the land was sold for the purpose of providing means for the payment of pressing debts of the company, and to protect the titles to other land that the company had previously sold to other persons, the title to which had not been perfected, and that the proceeds of sale had been used for that purpose, to the knowledge of the plaintiff, and he has not tendered the amounts so paid, either to the purchaser or to the company, which tender is a prerequisite to any action to annul the said sale. Reserving the benefit of said exceptions, the company made answer, and alleged that the sale was legal and fair in every particular; that the board of directors has ample au-

thority, under the company's charter, to sell, and its action was ratified by all the stockholders, except the plaintiff,—a majority thereof favoring and approving the action of the board of directors in making said sale; and that said ratification cured the defects, if any, in said sale, and supplemented the authority of the board of directors, if same was in any respect deficient.

Recurring to the averments of the petition, we find plaintiff's statement of his case to be "that he, together with Hibbard Baker, Morse Rohnert, Fred Rohnert, and William E. Robinson, of Detroit, Michigan, and D. G. Edwards and one Miller, of Cincinnati, Ohio, are, so far as petitioner is informed, the stockholders of the Delhi Land & Improvement Company, Limited, a corporation duly organized under the laws of the state of Louisiana, having its domicile at the town of Delhi, in the parish of Richland, with the said Hibbard Baker as its president, and Morse Rohnert as its secretary. He further represents that the objects and purposes of said corporation are to purchase, plat, sell, and improve real estate, as shown by its charter. He further represents that the said Baker, president, and said Morse Rohnert, secretary, did on or about the 27th of January, 1893, without any authority from either the board of directors or "stockholders of the corporation, by notarial act, pretendedly sell and transfer all of the real estate belonging to said corporation, improved and unimproved, to Fredrick Rohnert,—one of the stockholders of the corporation." The sale thus described is the one against which this suit is directed, and of it the following complaints are made, viz.: First, that, whereas the sale was made for the ostensible consideration of \$16,000, in fact the lands pretended to have been conveyed were worth more than that amount; second, that Baker, Robinson, and Morse Rohnert, on or about the 3d of April, 1893, acting as a board of directors, pretended to hold a directors' meeting without giving due notice to all the directors as the charter requires, and thereat did pretend to ratify the sale that had been previously made by the president and secretary; third, that on or about the 4th of April, 1893, the president pretended to call an annual meeting of the stockholders, without giving to petitioner or any other stockholder any notice of said meeting, and that said meeting, not constituting a majority of stockholders, in number, elected a board of directors for the year ensuing, "and, by a majority vote of those present, confirmed the act of the board of directors at its last meeting, in which said board had authorized the president and secretary to make another deed to the land sold." Of the proceeding related, complaint is made that on account of certain informalities and illegalities therein "the sale is fraudulent, null, and void, for the following reasons, viz.: (1) That the sale of all the property of the corporation is

a practical dissolution thereof, in a manner different from that provided in its charter. (2) That the pretended meeting of the board of directors was illegal, because proper notices thereof had not been given; three of the stockholders not being notified, and being consequently absent therefrom. (3) That the voting of the stockholders at the meeting was not by a majority of the stockholders in number, and that, while a majority of those voting held, or pretended to hold, a majority of the stock, there was no evidence at the meeting that the members voting were actual stockholders; that Baker was not at the time the holder of four hundred shares of stock of said corporation, and, if he was the owner of same, they are illegal, null, and void, for the reason that he caused same to be issued to himself without any equivalent,—neither money, property, nor labor having been paid therefor; that the stock voted by Morse Rohnert and William E. Robinson at the stockholders' meeting was illegal and void for the same reason. (4) That the constitution and laws of this state prohibit the issuing of any stock by any corporation until same shall have been paid for. (5) That the sale is fraudulent for the reason that Baker, Rohnert, and Robinson conspired together to deprive your petitioner of his rights in said corporation, and if it is not revoked it will result greatly to his injury, and that the ratification of said sale is fraudulent for the further reason that Robinson was induced to vote at the stockholders' meeting in favor of the ratification of the sale on the assurance of Morse Rohnert, Fredrick Rohnert, and Baker that he should still retain an interest in the lands pretended to be sold."

Thereupon an injunction was prayed for and obtained against the parties and the recorder, prohibiting them from putting deed to the property of record until further order of the court; the prayer of the petition being that the sale be annulled and revoked, and the injunction perpetuated. Upon the introduction of proof, and trial had, there was judgment rejecting plaintiff's demands, and affirming the legality of the sale, and dissolving the injunction. From that judgment the plaintiff has prosecuted a devolutive appeal.

From the foregoing synopsis of the pleadings, it appears that the only complaint of the sale, in itself, is that the consideration was inadequate, and, as to the general effect of the sale, that it operated, practically, a dissolution of the corporation in a manner different from that provided in the charter. All other charges and specifications relate to certain irregularities in the proceedings had by the board of directors and the stockholders at a general meeting, the purport and object of which were to ratify and confirm a sale of the property that was previously made to the defendant Rohnert. We gather from the admissions of fact contained in the petition that Baker, president, and Morse

Rohnert, secretary, made a sale on the 27th of January, 1893, to Fredrick Rohnert, of all the real estate that the land company owned at the time for the expressed consideration of \$16,000 in cash, the expressed object of the sale being to raise the means necessary to pay immediately pressing debts of the corporation; that subsequently, recognizing the fact to be that they, as president and secretary of the corporation, could not make a legal and valid sale of property of the corporation without first being authorized by the corporation, the president called a meeting of the board of directors, and at the meeting thus called the previous sale was ratified; that, immediately afterwards, the president called a general meeting of the stockholders, and thereat a new board of directors was chosen, and by a majority vote, at this stockholders' meeting, the action of the former board of directors was ratified. The only complaint that is made of this meeting of the board of directors is that all of the directors were not notified of the meeting; but it is not alleged that all the directors were not present at the meeting,—participating therein. And the only objection that is urged against the stockholders' meeting is that not one of the stockholders was notified; but as it appears that the plaintiff, as a stockholder, was present and voted, and now urges, as an illegality in the proceedings, that a majority in number of the stockholders did not vote for the ratification of the sale, we must conclude that a majority of the stockholders were present and voting,—the plaintiff being present, and casting the only negative vote, and the majority of those present voting in the affirmative. As a majority of the stockholders were present and participating, and those holding a majority of the certificates or shares of stock voted in favor of the ratification of the act of the board of directors in making the sale, it is difficult to perceive the basis of the plaintiff's objection; he having been present and participated in the meeting without protest or complaint of the time or manner of its organization, or as to the right of the holders of a majority of the stock to control the election. The same is true of his complaint that there was no proof exhibited at the stockholders' meeting that the numbers voting actually held a majority of stock. There was scarcely a necessity for the exhibition of such proof at the meeting, in the absence of any question or complaint on that score.

The further charge is made that Baker was not the real and actual owner of 400 shares of stock, and, if he was, same was issued at his instance and request, and without any price or value having been paid therefor; and it is alleged that the same is true of the stock certificates that were issued to Morse Rohnert and William E. Robinson. But in the defendants' exception the point is made that the plaintiff is estopped from questioning the legality of the stock which was

owned and voted by said stockholders, on the ground that, as secretary of the corporation, he signed and issued same, and cannot be permitted to question or impeach the validity of his own official action. There is in the record (brought up in the original) a certificate which states "that Morse Rohnert is the holder and owner of 167 paid-up shares in the capital stock of the Delhi Land and Improvement Company, Limited;" and this certificate bears this jurat, viz.: "In testimony whereof the president and secretary have signed their names, and caused the seal of the company to be affixed thereto, on the 4th of February, 1892, at Delhi, Richland parish, state of Louisiana. [Signed] Hibbard Baker, President. Edward Wisner, Secretary." On the same date two similar certificates were issued to Hibbard, representing 400 paid-up shares of stock, and to Edward Wisner, the plaintiff, 166 shares, all likewise signed. It thus appears that Baker and Morse Rohnert collectively owned or held possession of 567 paid-up shares of the company's stock, to the verity and genuineness of which he had certified as the secretary of the association. Not only is that the case, but these certificates were issued more than a year previous to the date of the transactions complained of, and the same were used, recognized, and voted by Baker and Morse Rohnert at the stockholders' meeting; Wisner being present, participating, and making no objection to their legality or genuineness, at a time when it was his duty to speak, if his charge is true. This is not the case of an objection urged to the testimony of a witness, on the ground that he cannot be heard to impeach the truthfulness of a certificate he had previously made as an officer. The plaintiff brings this suit for the annulment of a sale made by the corporation of which he is a stockholder, and was secretary, on the ground that the sale was illegal because the vote of the stockholders at the meeting at which same was ratified was illegal, for the reason that the stock voted thereat had been fraudulently issued, and without any equivalent having been paid therefor. How can he be heard to prove that state of facts, if true, to enable him to impeach and annul the sale for his own benefit and advantage? There may be circumstances under which such proof could be administered, but they certainly do not exist in this case. It is our deliberate conclusion that the estoppel urged is good, and must be maintained, and the proof excluded from consideration.

In regard to the charge of conspiracy on the part of Baker, Rohnert, and Robinson to fraudulently deprive petitioner of his rights in said corporation, there is no adequate proof in the record, nor of the charge that Robinson was induced to vote for the ratification of the sale because it was agreed that he was to have an interest in the property. It is uncontested and undenied that the corporation owed debts which were large

in amount, and pressing in character, and that the only means the corporation had of raising the necessary funds was the sale of its property. It is quite true that a sale had to be made of all the property of the corporation, but that fact is of no especial significance when we consider that the very objects and purposes of the association were "to purchase, plat, improve, and sell real estate." Consequently, the dissolution of the corporation did not necessarily result from the sale of all the property the company claimed to own at the time. The proof is clear that the company had purchased and sold other properties, and that it was at the time of the sale in question negotiating for more. There is no proof of the sale having been made for an inadequate price. The price of \$16,000 seems to have been reasonable and fair, when everything is considered. The results of the enterprise may have proven unsatisfactory and unprofitable. This transaction may have resulted injuriously to the plaintiff, but he will be compelled to submit to the common misfortune of those who embark in such adventures,—of being overpowered by the majority of stock in a corporation of which he is a minority shareholder. Viewing the question of want of previous tender from our present standpoint, it is unimportant. Though, in such a case as this, we are of opinion that the rights of the defendants could have been protected by a reserve in the judgment, had one been rendered in favor of the plaintiff and appellant. Judgment affirmed.

(46 La. Ann. 1261)

CRAWFORD et al. v. BINION. (No. 1,286.)
(Supreme Court of Louisiana. June 16, 1894.)

PARTITION—JURISDICTION—NONRESIDENT MINORS
—CURATOR AD HOC—JUDICIAL SALES.

1. The court where the property is situated has jurisdiction of a suit to have property sold to effect a partition of property of which minors, who are absentees, are coproprietors with major heirs, who are present, and the surviving wife. *Buddecke v. Buddecke*, 31 La. Ann. 572.

2. In the suit, minors, who are absentees, are properly represented by a curator ad hoc.

3. Purchasers at judicial sales are protected by the judgment decreeing the sale.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

John W. Crawford and others bring action against Robert L. Binion for the recovery of a three-fourths interest in land. Judgment for defendant, and plaintiffs appeal. Affirmed.

Gundy & Sholars and J. W. Willis, for appellants. Potts & Hudson and H. P. Wells, for appellee.

BREAUX, J. The plaintiffs sue for the recovery of a three-fourths interest in lands described in their petition. Their father, the

late T. S. Crawford, resided in Caldwell parish, and left a wife and four children, minors, at the date of his death. Their mother qualified as their tutrix, and shortly afterwards removed to Texas, and married, in 1878, one J. P. McGuire, from whom she obtained a divorce in 1878. In 1880, the tutrix visited relations in Madison parish, and, while in that parish on a visit, a family meeting was held, and recommended her appointment as tutrix without bond. The tutrix qualified also as undertutor. The tutrix never resided in that parish, and owned no property situate within its limits. On the 15th day of December, 1882, one of the heirs, Mary Risinger, joined by her husband to authorize her, brought suit in the district court of Richland parish to partition a plantation containing 410 acres, the property of the late T. S. Crawford. In her petition for the partition, she alleged the interest she claims and the interests of her mother and coheirs. She averred that they were absentees; also, that it was necessary to appoint a curator ad hoc to represent her mother and her mother's husband, individually and as tutrix and cotutor of the absentees; also, to represent each of the minors. The prayer of the petition is that a curator ad hoc be appointed to represent Mrs. Alice A. McGuire and her husband, individually and as cotutor. The minors are not personally named or referred to as absentees to be represented. The clerk of the district court issued an order appointing an attorney at law to represent the parties, including the minors personally. The court subsequently pronounced a judgment of partition, decreeing the sale of the plantation to effect a partition, upon terms to be fixed by a family meeting, and ordering that a family meeting be held to recommend the terms. In March, 1884, the property, under this judgment, was offered for sale, and adjudicated to John A. Hernler, the warrantor. On the 27th of November, 1888, Hernler sold the property to R. L. Binion.

The records do not contain a copy of proceedings of any family meeting in the interest of the minors to fix the terms of the partition sale as decreed in the judgment for a partition. This is urged as one of plaintiffs' grounds to annul the proceedings of partition. The plaintiffs also aver that the defendants in the suit for partition, plaintiffs in the present suit, were minors, and not represented in the proceedings; that their mother had lost her natural tutorship by her second marriage, and that the appointment of a curator ad hoc to represent their mother personally and as tutrix, and appointing the same curator to represent each of the minors, who had conflicting interests, was an absolute nullity; that the curator ad hoc never was cited, and never answered; that the court of Richland parish was without jurisdiction to settle the succession of T. S. Crawford, whose last place of domicile was the parish of Caldwell, where his succession was opened.

The plaintiffs claim rent at the rate of \$400 per annum, and that the defendants and warrantor were in bad faith.

Jurisdiction in Partition.

Primarily the inquiry suggests itself, was the court of Franklin parish vested with jurisdiction? The property was owned in indivision. No administrator or executor opposed the application to make a partition at the situs of the property. It does not appear that there were debts. The property was owned by the surviving widow and the heirs, who were parties to the proceedings. The jurisdiction of the court of the domicile does not necessarily exclude the jurisdiction of the court of the situs of the property. Co-heirs, made defendants, who are cited to appear before the court where the property is situated, and make no defense, but submit themselves to the court's jurisdiction by offering no defense, cannot be heard to question the validity of the title of the purchaser at the partition sale, who bought in good faith. The property was not owned exclusively by the succession. The surviving widow had an interest in the land. *Buddecke v. Buddecke*, 31 La. Ann. 572.

Appointment of Curator ad Hoc to Represent Heirs.

It is argued for plaintiffs that the defendants in the partition proceedings were absentees, and that they were not legally made parties to the suit; that they were not cited. To sustain the argument, they allege that the appointment of the curator ad hoc was an absolute nullity, in that it was *ultra petitem*; that the petition did not make them parties individually, nor as absentees, but simply as minors, represented by one who was no longer tutrix. In the body of the petition, it is alleged that an appointment should be made to represent the minors personally. The omission in the prayer is cured by the order appointing the curator ad hoc. The officer sets forth in the order of appointment that, after having considered the petition, he made the appointment of the curator ad hoc to represent the minors personally, as well as their tutrix. The plaintiffs themselves did not consider it a fatal irregularity, for, in their petition in this case, they allege: "(4) The appointment of a curator ad hoc to represent Mrs. A. McGuire, individually and as tutrix, and appointing the same curator to represent each of the minors, who had conflicting interests, was and is an absolute nullity." In the face of this allegation, the objection urged in argument only—that the prayer does not include the minors personally—has no merit.

The Minors Properly Represented.

This brings us to the second point presented in plaintiffs' petition to annul the partition, viz. that the minors, who had conflicting interests, could not be represented by one curator; that each absent minor must be

represented by a curator ad hoc. The law's provision upon the subject is that as to the several minors who have opposite interests in the partition, and who have the same tutor, there shall be appointed to each of them a special tutor ad hoc, whose functions shall cease after the partition has been effected. Rev. Civ. Code, art. 1369. The sale made to effect a partition is merely one of the acts of the partition. *Hooke v. Hooke*, 14 La. 23. In establishing the shares of the minors in the partition, who have opposite interests, special tutors must be appointed; also in forming lots in a partition in kind, for in forming these lots the minor absolutely parts with an interest, and becomes the absolute owner of the interest allotted to him. The necessity of such an appointment does not arise in the matter of the sale of the property to effect the partition. The rights of the defendants *inter se* remained as if no sale had been made. Their rights attach to the proceeds. In definitely settling those rights, a conflict of interest may arise, rendering it necessary to appoint a special tutor to each minor. The proceedings to sell do not suggest the necessity of appointing a different curator ad hoc to represent each party in interest. The functions of the curator are not of such a character as require such separate representation at the sale. In *Succession of Pinniger*, 25 La. Ann. 55, a similar question was considered, and the court in that case announced that the fact that there were not special tutors ad hoc appointed for the minors at the sale did not concern the purchaser; that the duty of such tutors begins at the partition, before notary, and, if not appointed at the time of the sale, they may be appointed afterwards, before the notary begins the partition. In *Emuer v. Kelly*, 23 La. Ann. 764, the court said: "In the ulterior proceedings,—that is, after the sale,—especially in the act making the partition, separate tutors were severally appointed by the minors." In the Revised Civil Code the article requiring such appointment—viz. article 1369—is found under the sobriquet "How the Notary is Bound to Proceed in Judicial Partitions," and relates more particularly to the forming of lots and the method to be followed in the partition proper.

The plaintiffs also plead, as a ground to annul the sale, that the curator ad hoc was never cited, and did not file an answer. The plaintiffs, on the trial, "admitted that the original suit (No. 841, *Mrs. M. E. Risinger v. Mrs. A. A. McGuire et al.*) has been lost or mislaid, after diligent search, except the original appraisement of the property made by B. F. Newberry and M. C. Williams (appraisement being \$1,800), to effect a partition, except, also, the original order of sale directed to the sheriff of the parish of Richland, giving the terms of the sale as agreed to by a family meeting." We are not informed whether or no a citation was among the lost documents. The minutes show that "in this case there was an answer filed." The doc-

uments being lost, this extract from the minutes supplies the loss, as it shows that an appearance was made on behalf of the defendants in the partition proceedings. Granted that the tutrix had forfeited her trust as tutrix by permanently leaving the state, her minor children, who were with her and absentees, were represented by a curator ad hoc. "If the minor, against whom one intends to institute a suit, has no tutor, the plaintiff must demand that a curator ad hoc be named to defend the suit." Code Pr. art. 116. Interpreting the article, in *Buddecke v. Buddecke*, 31 La. Ann. 574, this court held that "the minors, absentees, were properly represented by curator ad hoc." In *Zuberbier v. Prudhomme*, 34 La. Ann. 1048: Minors may be made parties through a curator ad hoc.

The plaintiffs also allege that "no family meeting was ever held in the interest of said minors, to fix the terms of said partition sale." In the admission made relative to lost documents, the records disclose that there is an order of sale extant giving the terms of the sale "as agreed to by a family meeting." Whatever may have been the informalities and irregularities of the meeting, are not before us; only the admission of record. There may have been grave irregularities, but the admission made to supply lost records is an answer to the allegation that no such meeting was held fixing the terms of the sale. Moreover, in an action for partition against minors, the terms need not be fixed by a family meeting. Rev. Civ. Code, art. 1237. In *Shaffet v. Jackson*, 14 La. Ann. 157, it was decided that, "where minors are sued for a partition, a family meeting is not necessary to authorize the suit or to fix the terms of the sale."

The Innocent Purchaser.

As to strangers, there is no good reason to hold them bound because of informality, however great, or because no family meeting at all was held. The principle is now well established that a probate sale to effect a partition is a judicial sale, and the purchaser is protected by the decree, beyond which, if the court have jurisdiction, he need not look. *Salanne's Heirs v. Moreau*, 13 La. 431. "The order of sale, it has been held, is a judgment, and that the purchasers under it are protected." *Graham's Heirs v. Gibson*, 14 La. 150; *Shaffet v. Jackson*, 14 La. Ann. 155. The court, we have determined, had jurisdiction, and the heirs were parties to the proceedings. The irregularities are not jurisdictional, and the rights of strangers to the proceedings resulting in a sale are not affected by them.

Clerical Error.

We note that in the brief it is stated that the judgment in the partition suit is fatally defective in another respect,—that it does not mention two of the plaintiffs. It is not

made a ground in plaintiffs' petition. We do not feel at liberty to annul a partition upon a ground not judicially alleged. The district judge says it was clerical error. It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed, at appellants' costs.

On Rehearing.

WATKINS, J. The point is made that two important questions were not noticed by the court: First, that the judgment ordering the partition did not fix the shares of the coproprietors; second, that the property was the separate estate of plaintiffs' father, and not that held in community between him and his wife. This proposition is coupled with the averment that the judge a quo improperly refused plaintiffs a new trial on the ground assigned, of newly-discovered evidence to the effect that Crawford entered the land in controversy prior to his marriage; and the contention of their counsel is that, if they are not allowed a new trial for the purpose of introducing the evidence newly discovered, the evidence should be considered in determining the status of the property. On this hypothesis the argument and insistence of plaintiffs' counsel is that, taking the property to be separate, and not community, the judgment of the court a quo must be reversed, and the partition sale declared an absolute nullity; for, say they, if the surviving Mrs. Crawford had no community half interest in the property, there was a one-half interest in the property that was not represented in the partition suit and sale; that this question is jurisdictional, and the fact a fundamental, radical defect, because a judgment against an absentee can have no effect beyond the property interest of the absentee which is before the court rendering the decree, the court possessing no jurisdiction in personam quoad hoc. While still insisting on all the grounds assigned in the petition for the nullity of the partition suit and sale, there have not been any specific reasons assigned for a rehearing, in other respects than those enumerated; and we are not, for that reason, authorized to review them.

1. On the first proposition—that the judgment of partition did not fix the shares of the respective coproprietors—we find the statement of our opinion to be that "the court pronounced a judgment of partition upon terms to be fixed by a family meeting, and ordering that a family meeting be held to recommend the terms; and, in treating of the nullity of the appointment of a curator ad hoc to represent the absentee defendants in the suit, the opinion draws a clear distinction between the proceedings antecedent to the act of partition and the proceedings in the matter of the partition, and held that one curator ad hoc was sufficient to represent all the defendants in the former, but that, "in establishing the shares of the minors in the partition, who had opposite interests, special tutors must be

appointed; also in forming lots in a partition in kind, for in forming the lots the minors absolutely part with an interest, and become the owners of an interest." The conclusion is clear and irresistible that there is a marked distinction between the essential requisites of a partition suit and the proceedings in effectuating a partition under the judgment ordering a partition. Recognizing this clear distinction, the judgment did not fix the shares of the heirs; and this is the effect of our opinion. In fact, this is the only basis of it.

2. On the second proposition, our opinion simply states, without any discussion, "that the property was owned in indivision," without specifying it as separate or community property. An inspection of the record discloses no record proof as to the date or dates at which the deceased, T. S. Crawford, acquired the property in dispute, except of one tract of 80 acres, which was adjudicated to him at sheriff's sale, on the 1st of April, 1854; and inasmuch as his marriage occurred on the 28th of December, 1854, it was evidently not an asset of the Crawford community. With regard to the remaining 330 acres, there is no proof except that furnished by the evidence of the widow Crawford that her deceased husband had purchased all of the lands, and made all of the improvements thereon, prior to the marriage. The judge a quo did not regard that testimony sufficient to justify the annulment of the defendants' title, derived, as it was, through a judicial partition of the property, proceedings in which had been taken on the theory that same was community. As there is only one-half interest in 80 acres affected by this ground of complaint, we are of opinion that the rule de ratione should apply, it being only 10 per centum of the total amount of land claimed. We think his decision was correct.

3. After judgment had been rendered against them, plaintiff made an unavailing application for a new trial, in order to introduce in evidence a certified abstract of land entries, found in the recorder's office, parish of Richland, showing that T. S. Crawford did enter the remaining 330 acres of land on July 31, 1854, and September 21, 1854, respectively, to show his separate ownership. His motion was formal, timely, and adequate in terms, but it is evident that it does not evidence due diligence. The evidence was important, but it was as easily obtainable before trial as it was afterwards. Its rejection was not error on the part of the judge entitling plaintiffs to relief. Rehearing refused.

(46 La. Ann. 1232)

CITY OF MONROE v. HARDY. (No. 1,292.)
(Supreme Court of Louisiana. June 15, 1894.)
MUNICIPAL CORPORATIONS—ORDINANCES—CRIMES PUNISHABLE BY STATUTE.

1. The legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance,

though general statutes exist relating to the same subjects.

2. The same act may constitute a crime against the public law of the state, and also a petty offense against a municipal regulation. The two offenses are different, and each may be punished without violating any constitutional right of the party accused.

3. Violations of city ordinances may be tried and punished summarily, without information or indictment or trial by jury.

(Syllabus by the Court.)

Appeal from recorders' court of city of Monroe; Robert Endom, Recorder.

Wesley Hardy was convicted of gaming, and appeals. Affirmed.

Gunley & Sholars, for appellant. Thomas O. Benton, for appellee.

McENERY, J. The defendant was convicted for playing, within the limits of the city of Monroe, a gambling game called "Craps." The state of Louisiana, by Act No. 7 of 1892, prohibits the playing of this game, and affixes a penalty for violating the same. The defendant, because of this state statute, contends that the recorder's court of said city, before which he was convicted, had no jurisdiction to try the case, and the city ordinance prohibiting the playing of the game of craps is null and void, being in contravention of the constitution of the state.

The legislature has delegated to the city of Monroe ample and complete power to regulate and preserve the good order and peace of the city. Gambling is denounced by the constitution as a vice, and its regulation and prohibition fall within the police powers of the city. In a certain class of offenses, there may be concurrent powers in the state and the municipal authorities to prohibit them. The decisions on this point have been so numerous and uniform in upholding this doctrine that it has passed, as an elementary principle, into the text-books. Cooley, Const. Law, p. 242; 1 Dill. Corp. § 368. The jurisprudence of this state is in accord with this doctrine. *State v. Fourcade*, 45 La. Ann. 717, 13 South. 187. In *State v. Recorder of First Recorder's Court*, 30 La. Ann. 454, it is said: That fines may be imposed by municipal corporations for a violation of their ordinances, and the state may impose a fine for violations of the same act, is well established. There can therefore be no objection to the municipal corporation imposing a fine for an act punished by a state statute, when the offense is of that nature that is embraced within the power of the municipal government to preserve public order and the public peace. The experience of municipal corporations will teach them what acts are of that nature, which are liable to promote public disturbance; and in the proper exercise of their judgment in this direction there must, presumably, be left to them a latitude of discretion, which will not be disturbed by the court unless in plain violation of personal rights.

In the instant case, we do not see, nor is it contended, that any of the personal rights of

the defendant have been violated. He has transgressed the state statute, and is liable to punishment for so doing. He has violated a city ordinance enacted in the furtherance of the good order and peace of the municipal corporation. Here are two distinct offenses,—one directed against the police power of the state, and the other against the municipal government. These offenses, committed by one act, are of that nature that two prosecutions can be instituted, since the state has delegated the power to the mayor and city council of Monroe to pass all necessary orders to preserve the good order and peace of the city. It would serve no useful purpose to enumerate the offenses daily punished by both the state and municipal corporations. It is sufficient to say that, when the act falls within the delegated police powers of the city, the prosecution for its commission may be instituted by both the city and the state,—in the former case, when the penalty imposed by the city is within the limits of the penalty it is allowed to impose, and does not exceed the limit imposed by the state. On this point the authorities are practically unanimous. Judgment affirmed.

(34 Fla. 48)

BUCKMAN v. STATE ex rel. **SPENCER.**

(Supreme Court of Florida. June 30, 1894.)

QUO WARRANTO—PLEADING—ELECTION OF MAYOR—TRIAL BY JURY.

1. The plea of non usurpavit is not a proper plea in a proceeding by information in the nature of a quo warranto, on the relation of a private person, upon the refusal of the attorney general to institute the suit.

2. The circuit courts of this state have jurisdiction to inquire, by informations in the nature of a quo warranto, into the legality of the election of a person to the office of mayor of a city or town organized under the general laws of this state for the incorporation of such municipalities; and the city or town council has no power, by any action it may take in reference to such an election, to deprive the courts of their jurisdiction over such matters.

3. The right of trial by jury on issues purely of fact, arising in proceedings by information in the nature of quo warranto, is guaranteed by the third section of the bill of rights of our constitution, which provides that the right of trial by jury shall be secured to all, and remain inviolate forever.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Browne, Judge.

Quo warranto by the state, on the relation of Champlin H. Spencer, against Courtland Buckman. Judgment for relator, and defendant appeals. Reversed.

H. H. Buckman, for appellant. Hamlin & Stewart, for appellee.

MABRY, J. An information in the nature of a quo warranto was filed in the circuit court for Volusia county, in the name of the state of Florida, on the relation of appellee, upon the refusal of the attorney general to institute the proceeding on such relation, for

the purpose of testing the right of appellant to hold the office of mayor of the town of Daytona, in this state. The information alleges, among other things, in substance, that appellee and appellant were the only candidates for said office at a regular election of municipal officers for said town held on the 24th day of July, A. D. 1889, and that appellee was duly elected by a majority of the electors of said municipality as mayor, but that the judges and inspectors of said election, or a majority of them, fraudulently canvassed the votes cast, and wrongfully declared appellant elected, and that he took the oath of office, and was then wrongfully exercising the franchises thereof.

The proceedings in the circuit court terminated in a judgment that appellant be ousted from the office of mayor of said town, and that appellee be inducted therein.

The pleadings in this case are similar in many respects to those in the case of *State v. Anderson*, 28 Fla. 240, 8 South. 1, both cases growing out of the same election. The respondent in the circuit court (appellant here) filed a motion to quash, and also demurred to the information; and, both being overruled, pleas were filed, to which a demurrer was sustained. The pleas were amended, and upon the issues of fact made on them the trial was had that resulted in the judgment mentioned.

The first two errors assigned are the rulings of the court on the motion to quash, and the demurrer to the information. In reference to these assignments of error, counsel for appellant says: "But as the court has virtually passed on the matter raised by them lately in a similar proceeding, these two grounds of error are therefore not now urged, except as such matters differ from the case referred to, and are hereafter specially set up." It is then urged, first, that the court erred in overruling the plea of non usurpavit which was filed by respondent; the contention under this head being that while such a plea would not be good as against the people, where the attorney general institutes the proceedings, the same rule does not obtain when a private individual comes in on his own relation, upon the refusal of such officer to commence the suit. This point was settled in the case mentioned (*State v. Anderson*). Where the suit is instituted on the relation of a private individual, and a prima facie right to the office is shown, the respondent must show by what right he holds. The relator having shown a right to contest for the office, and to call upon the respondent to show by what authority—quo warranto—he exercises the functions thereof, and an issue being made up to try such right between the parties, the fact that the relator may be found not entitled to the office will not authorize the respondent to hold it unless he is entitled to it. Upon such an issue the statute provides that no person shall be adjudged

entitled to hold the office then in question, except upon full proof of his title to it. As decided in the case referred to, the plea of non usurpavit by the respondent is not proper, and the court did not err in overruling it.

It is further insisted, under the assignments of error mentioned, that the court erred in overruling respondent's third original plea. It is not necessary to set out all the allegations of this plea, as the only objections to it urged here may be clearly stated without such recital. The information alleges that the town of Daytona was a municipal corporation duly incorporated under the laws of the state of Florida, and was such corporation on the day of the election therein mentioned, and that said election was ordered and held in pursuance of an ordinance duly passed by said municipality in May, 1884, and that the provisions of another ordinance, passed by said town on the 22d day of July, 1889, two days before said election was held, were enforced by the inspectors of the election up to the closing of the polls. In the second plea to the information it is alleged that the ordinance of the 22d of July, 1889, was inoperative at the date of the election because it was passed two days prior thereto, and had not then been properly promulgated. The third plea sets out the provision of the ordinance passed in 1884, prescribing that the inspectors of elections in said towns shall proceed substantially as the state laws shall direct; and, after reciting what was the state regulation as to the ballot to be used at a general election, it is further alleged that said election was held in pursuance of the act under which said town was incorporated, the said ordinance passed in 1884, and the said state regulation as to the ballot to be used; also, that on final canvass of the votes cast at said election, by the inspectors, respondent was found by them to be duly and legally elected to the office of mayor of said town, giving the votes cast for both parties, and upon the completion of said canvass the inspectors duly certified the result of the election to the mayor of said town, who, with the aldermen thereof, in regular session assembled for that purpose, and in the presence of relator, who made no protest or objection thereto, received the returns of said election, and by resolution adopted the same as the only valid result of said election. It is also alleged that the respondent then took the oath of office as said mayor, and was lawfully exercising the functions thereof.

It will be seen by an examination of the case already referred to (*State v. Anderson*) that the validity of the ordinance passed on the 22d day of July, 1889, so far as shown by the record, was passed upon, and held to be valid. The ordinance took effect from the date of its passage and approval.

The points argued by counsel under the third plea are "that the matter was *res adjudicata*, having been acted upon by the

council, a body empowered by the statute to judge of the qualifications and election returns of its own members," and that the plea set up a full defense to the relator's claims, for the reason, according to the authorities cited on this point, that the jurisdiction over such matters is vested exclusively in the town council. The fact that relator was present when the return of the inspectors was received by the council, and made no protest thereto, was not sufficient to estop him from resorting to the courts for the redress of such rights growing out of the election as he may have had. In reference to the grant of power, by the general law incorporating cities and towns in this state, to the council, to judge of the election returns and qualifications of its own members, having the effect to deprive the courts of jurisdiction over such matters, it is said in *State v. Anderson* that "the better authority, as we think,—and, it seems, the weight of it,—is against the proposition that the above grant to the council ousts, of itself, the jurisdiction of this court to inquire, upon information in the nature of *quo warranto*, into the defendant's title." But we fail to find any grant at all to the council to judge of the election of the mayor, or to entertain any contest over the title to this office. It may be that the legislature can confer such exclusive authority on the town council to pass upon the election and qualifications of the mayor as to deprive the courts of jurisdiction over the same; but no such power had been conferred upon the town council of Daytona at the time of the election, and relator had a right to resort to the court to have his right to the office determined.

What is here said covers the objections urged to the rulings of the court on the pleadings, and we find no errors, so far as the objections urged extend.

A demurrer was overruled to the amended pleas filed, and upon issues tendered thereon the defendant demanded a trial by jury. This was refused, and the court appointed a master to take testimony. Upon the report of the master the court proceeded to adjudicate the cause. The defendant excepted to the rulings of the court denying the trial by jury, and also to the proceedings before the master, and they are assigned as error. The ruling of the court on the demurrer to the amended pleas, it may be stated, is not before us for review, and we will not stop to discuss it, though we entertain some doubt about the legal sufficiency of the pleas on demurrer. Accepting the issues of fact, as was done by the court, tendered on the pleas, we proceed to consider the errors assigned.

These assignments of error present the question whether a defendant is entitled to a jury trial on questions of fact in a proceeding by information in the nature of a *quo warranto*. This right is claimed under the guaranty of the constitution. The present constitution provides that "the right of trial

by jury shall be secured to all, and remain inviolate forever." The first constitution, framed in 1838, for our state government, provided "that the right of trial by jury shall forever remain inviolate." These provisions, it is evident, were not designed to grant or create the right of trial by jury, but they were framed for the purpose of guarantying such a right already existing. It has been said that a constitution is not the beginning of government, and is adopted in harmony with existing conditions of things. The following is the language of Judge Cooley, quoted by us in the case of *English v. State*, 31 Fla. 340, 12 South. 689: "It is also a very reasonable rule that a state constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that, for definitions, we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system, which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." *Donald v. State*, 31 Fla. 255, 12 South. 695. Judge Douglas said for this court in *Flint River Steamboat Co. v. Roberts, Allen & Co.*, 2 Fla. 102, in speaking of the right of trial by jury, that "It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. 3 Story, Comm. pp. 638, 639, § 1760. In *Magna Charta* it is more than once insisted on, as the principal bulwark of our liberties, but especially in chapter 29, by which it is provided that no freeman shall be hurt in either his person or property (*nisi per legale iudicium parium suorum, vel per legem terrae*) unless by lawful judgment of his peers or equals, or by the law of the land. * * * Chapter 29 of *Magna Charta* is in force in this state by virtue of the act of November 6, 1829, adopting the common law and statute laws of England."

When the right of trial by jury is secured by constitutional provision in general terms like ours, and without any qualification or restriction, it must be understood as retained in all those cases that were triable by jury according to the course of the common law. The provision in the first constitution, framed in 1838, "that the right of trial by jury shall forever remain inviolate," contemplated, without doubt, a continuation of jury trials in all cases where such was the practice at the common law, and there is nothing in the subsequent constitutions to indicate a change of meaning in this respect. It will be re-

membered that in 1829, prior to the formation of the constitution, in 1838, the legislature had expressly adopted the common law of England as in force in the territory of Florida. But it was never understood that the right of trial by jury, secured by such a constitutional provision, extended to all cases, as there were many trials and proceedings according to the course of the common law in which juries did not participate.

The old common-law writ of *quo warranto* was a prerogative writ, to be applied for on behalf of the crown, as a matter of right, as against one who had usurped franchises or liberties, and for the purpose of inquiring by what right he claimed to do so. It was clearly a civil remedy at law, and the process to bring the party into court was a summons. In process of time the old writ became superseded in great measure by the proceeding by information in the nature of *quo warranto*. This writ, in its origin, was criminal in its nature,—designed, not only to oust the usurper of the franchise claimed by him, but to punish him by fine for such usurpation. The question of the right to exercise the franchise was, however, involved in the prosecution. This writ, at first, like the old one, could only be prosecuted on behalf of the crown; and at the present it must be in the name of the crown, and, with us, in the name of the state.

The statute of 9 Anne made some changes as to the mode of instituting this writ, confined, probably exclusively, to municipal offices; and certain crown officers were permitted by that statute, by leave of the court first obtained, to institute the suit in the name of the crown on the relation of parties claiming a right to the office. This statute extended, to some extent, the writ, so as to permit, under the conditions prescribed, a contest in reality between private individuals to the office in question. It was very much debated for quite a while whether the information in the nature of *quo warranto* was strictly a criminal prosecution, or a civil suit. It is clear, however, that for some time before the Revolution the writ was regarded in England, though criminal in form, as a civil proceeding to test the right of a party to exercise a franchise, and of ousting a wrongful possessor. It has always been considered as a civil remedy at law by the great majority of the American courts, and our own court has so regarded it. *State v. Gleason*, 12 Fla. 190; *State v. Saxon*, 25 Fla. 342, 5 South. 801; *State v. Anderson*, *supra*; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437; note to case of *People v. Richardson*, 4 Cow. 97.

The question whether or not the issues purely of fact made upon the pleadings in informations in the nature of *quo warranto* were triable by jury at the common law has given rise to some diversity of opinion in some of the American courts. In the present investigation, we are confined to the pro-

ceedings by information in the nature of quo warranto, which, in its origin, was undoubtedly criminal in nature, as well as purpose, in part. Our examination into the matter has conducted us to the conclusion that at the time of the Revolution the trial of pure questions of fact in such proceedings was by jury. It is stated in 5 Bac. Abr. p. 188, under the head of "Informations," that, "as an information of this kind [quo warranto] is now considered rather as a civil proceeding, a new trial may be granted as well where there has been a verdict in favor of the defendant as where it has been given in favor of the crown." Again, on page 187: "Where the defendant sets forth a bad title to the office, and confesses the user, that amounts to a confession of the usurpation; and if an immaterial issue is joined, and a verdict found on which the court cannot give judgment, yet they will not grant a repleader, but will give judgment on the plea." In the following English decisions, in such cases, trials by jury on the issues of fact were had, viz.: *Rex v. Bennett*, 1 Strange, 101; *Rex v. Bell*, 2 Strange, 995; *Nevill v. Payne*, 1 Croke, 304; *Rex v. Francis*, 2 Term R. 484; *Rex v. Phillips*, 1 Burrows, 293; *Rex v. Carpenter*, 2 Show. 47; *Rex v. Malden*, 4 Burrows, 2135; *Rex v. Bridge*, 1 W. Bl. 46. In *Rex v. Bennett*, all the judges of England were equally divided—the division being equal in each court—over the question whether a new trial could be granted after a verdict in favor of the defendant in such proceeding. The view that the suit was criminal then widely prevailed, but this point was finally settled in favor of the view above announced,—that the action, though criminal in form, was regarded as a civil suit for the purpose of trying the right to the franchise. It seems, also, that a bill of exceptions was allowed in such proceedings. Bac. Abr., supra. And in *People v. Sackett*, 14 Mich. 243, it was held that the appellate court would not review the proceedings on the trial of issues of fact in such cases by a jury in the circuit court, without the judge's report of the proceedings, rulings, and evidence before him.

Angell & Ames on Corporations state (section 741) "that if a prima facie case of usurpation is made out, and there appears a fair doubt on the title of the defendant, the court will not discuss the question in the summary way of motion, but send the facts to a jury." Several English cases are referred to, in which the court thought proper to send the question to a jury, or leave the parties to bring the matter more solemnly before the court on demurrer. In a great many of the American courts,—and, we think, a clear majority of them,—parties have a right to have the jury pass upon purely questions of fact in such proceedings. We refer to some of them: *People v. Albany & S. R. Co.*, 57 N. Y. 161; *People v. Doesburg*, 16 Mich. 133; *Harbaugh v. Cicotte*, 33 Mich.

241; *State v. Norton*, 46 Wis. 332, 1 N. W. 22; *State v. Burnett*, 2 Ala. 140; *Lee v. State*, 49 Ala. 43; *Com. v. Woelper*, 3 Serg. & R. 29; *Com. v. Smith*, 45 Pa. St. 59; *State v. Funck*, 17 Iowa, 365; *State v. Turnpike Co.*, 10 Conn. 157.

In *People v. Cicotte*, 15 Mich. 326, a question arose in the supreme court on issues of fact made there, as to the county to which they should be sent for trial by jury; and it was held that in such cases, "the statute being silent as to the place of trial of issues of fact involved therein, the supreme court will not send any such case for trial to a court other than that where the election took place, without the same showing as would authorize a change of venue." The supreme court of Wisconsin, in the case of *State v. Messmore*, 14 Wis. 115, ordered a trial by jury in that court on issues of fact raised in such a proceeding, on the ground that it was a case of public interest and importance, and should be then determined. That court, as we understand it, exercises its own discretion whether trials by jury shall be had there on issues of fact in such proceedings, or be sent to a trial court for such purpose. In *King v. Amery*, 1 Term R. 363, it was held that upon an application for a trial at bar the court will, in every case, exercise its own discretion upon the peculiar circumstances of the case, and where a fair trial cannot be had in the county where the matter arises the trial will be awarded in the next English county where the king's writ of venue runs. The case of *State v. Foster*, 32 Kan. 14, 3 Pac. 534, presents a complete trial by jury on issues of fact before the supreme court in an information in the nature of quo warranto. The right of trial by jury on such issues was demanded and accorded by the court, though it is stated to have been done ex gratia. Vide *Paine, Elect.* § 903, where it is stated, "The weight of authority is in favor of the proposition that at the common law an information in the nature of a quo warranto was triable by jury." *Reynolds v. State*, 61 Ind. 392; *Wood Mand.* p. 234; *High, Extr. Rem.* §§ 740, 741. There are some authorities to the contrary. *State v. Vail*, 53 Mo. 97; *State v. Lupton*, 64 Mo. 415; *State v. Johnson*, 26 Ark. 281. In the first and last of the cases just mentioned, applications for jury trials on issues of fact were made in the supreme courts and refused. In the last case mentioned the proceeding was by quo warranto. In this case it is said that, "in the proceeding by information in the nature of quo warranto. it was expressly provided by an act of parliament (3 Geo. II. c. 25) that a jury shall be struck before a proper officer on demand of the king or the respondent;" and it is argued from this fact that no such right existed at the common law, as the statute would have been useless if it did. We have not been able to find the statute of Geo. II. referred to in the opinion, and cannot say whether

or not it was declaratory of the common law on the subject; but, from the date given, it would be old enough to become law here, by virtue of the act of 1829 adopting the common law and English statutes in force prior to and down to 1776.

In *State v. Commissioners of Suwannee Co.*, 21 Fla. 1 (an original proceeding by mandamus in this court), it was held that a jury trial could not be demanded here. The view expressed was that the constitution conferred the jurisdiction on this court in such cases, and the proceeding was at common law, and according to this proceeding there was no jury trial, as the return was conclusive. Under the statute of 9 Anne, issues of fact were permitted to be made on the return, and trial had thereon; but as there was no statute requiring or authorizing such issues to be tried by jury in this court, the proceeding should be, as it was at common law, without a jury. In *State v. Vail*, supra, it was decided that the supreme court had jurisdiction in such cases, but it would generally decline to investigate them when other courts had been provided for their adjudication, and possessing the same powers as the appellate court over such matters subject to appeal, and having more facilities for the trial of such issues.

The statute of Anne in reference to permitting informations in the nature of quo warranto to be filed on the relation of private persons provides that such actions shall proceed in such manner as is usual in cases of information in the nature of quo warranto. The proceedings in the case before us were instituted in the circuit court, and we are to determine whether or not such issues of fact are triable by jury in that court, and not in the appellate court. As before stated, our conclusion is that in informations in the nature of quo warranto the right to have issues of fact determined by a jury existed at the common law, and that such right existed down to the time of the Revolution. There is nothing in the terms of the act of 1872 (chapter 1874) that will prevent a construction in harmony with such right as it existed at common law, and, as such, secured by the constitutional provisions to which we have referred.

It may be well to say that we are not dealing with a statutory regulation as to the contest of the election of a mayor of a town or city. It was decided in *State v. Anderson*, supra, that the grant of power to the council to judge of the election returns and qualifications of its own members did not deprive the courts of jurisdiction by the remedy of information in the nature of quo warranto. Rights asserted by such remedy are controlled by common-law principles, and not by statutory regulations providing exclusive modes for settling contests over municipal offices. *State v. Lewis*, 51 Conn. 113.

The issues raised on the pleas filed in the case under consideration presented questions

purely of fact, and we think the court erred in refusing to submit them to the consideration of the jury. The denial of this right, it will not be questioned, is good ground for a reversal of the judgment appealed from; and an order will be entered reversing the judgment, and remanding the cause to the circuit court.

(34 Fla. 62)

VAN DORN v. STATE ex rel. CLARKE.

(Supreme Court of Florida. June 30, 1894.)

RIGHT TO JURY TRIAL—QUO WARRANTO.

A jury trial of questions purely of fact arising in proceedings by information in the nature of quo warranto is a constitutional right, and the judgment in this case is reversed for the reasons given in the case of *Buckman v. State* (decided at this term) 15 South. 697.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Quo warranto by the state, on the relation of George H. Clarke, against Walter Van Dorn. Judgment for relator, and defendant appeals. Reversed.

H. H. Buckman, for appellant. Hamlin & Stewart, for appellee.

MABRY, J. This was an information in the nature of a quo warranto, filed in the circuit court on the relation of appellee, upon the refusal of the attorney general to institute such proceeding, for the purpose of testing the right of appellant to hold the office of treasurer of the town of Daytona, in this state.

The pleadings and issues in this case are so similar to those in the case of *Buckman v. State* (decided at this term) 15 South. 697, that a recital of them here becomes unnecessary. The ground upon which *Buckman's* Case was disposed of will control this case. After issues of fact were tendered on the pleadings, defendant below (appellant here) demanded a trial of them by jury, and it was refused. This was error. The defendant had the right to have such issues settled by the jury, and for this reason the judgment must be reversed.

(46 La. Ann. 1237)

VICKSBURG, S. & P. R. CO. v. ELMORE et al. (No. 1,296.)

(Supreme Court of Louisiana. June 13, 1894.)

PETITORY ACTION FOR LAND — PUBLIC LANDS — RAILROAD GRANT—TIME FOR COMPLETING ROAD —RIGHTS OF SETTLERS—COMPENSATION FOR IMPROVEMENTS.

1. Parties without titles, occupying lands, may be joined as defendants in a suit for the lands by plaintiff asserting ownership. *Gaines v. Chew*, 2 How. 644; *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *Derbes v. Romero*, 23 La. Ann. 644.

2. Purchasers under foreclosures of mortgages of railroad franchises and property may organize a corporation under such name as they may adopt, which, by the organization, succeeds to such franchises and property, and takes the corporate capacity of the corporation against

which the foreclosure proceedings were conducted. Act 38, 1877; *People v. Cook*, 13 Sup. Ct. 645, 148 U. S. 397.

3. The grant of lands by the United States in aid of a railroad—the state named as trustee for the road; the lands to revert to the United States if the road is not completed in 10 years; the lands being identified by the grant, and the listing approved, as directed by the act of congress—vests title in the railroad company, although the road is not built within the limited time specified in the act; the grantor not insisting on the reversion, but accepting the subsequent completion of the road as compliance with the grant. Act Cong. 3d June, 1856 (11 Stat. 18); *Schulenberg v. Harriman*, 21 Wall. 44; *Railroad Co. v. Sledge*, 6 South. 725, 41 La. Ann. 896; *Mower v. Kemp*, 8 South. 830, 12 La. Ann. 1019.

4. The state, a mere trustee, cannot declare a forfeiture of the lands granted. Act 39 of 1879; *State v. Vicksburg, S. & P. R. Co.* 11 South. 865, 44 La. Ann. 984.

5. Those who settle on such lands in the face of the grant cannot hold against the railroad company, and are possessors in bad faith, though the settlements are in contemplation of homestead entries, and are made after the 10-year limit in the grant, and the noncompletion of the road within that period; for all have notice that the grant, by its terms, takes effect from its date, and that conditions subsequent, i. e. the noncompletion of the road, may be waived, and can be insisted on only by the United States, by declaring the lands open for entry, or by equivalent act revoking the grant. Civ. Code, arts. 503, 8450-3453; *Railroad Co. v. Sledge*, 6 South. 725, 41 La. Ann. 896.

6. The claim of a possessor in bad faith for alleged improvements is, at best, sparingly admitted. On the other hand, he is liable for fruits during the entire period of his possession. And this court, without clear proof of same, will not disturb a verdict which compensates a claim for such improvements by the liability of the possessor for fruits, the verdict not being complained of by plaintiff. Civ. Code, arts. 503, 508, 2314, and articles cited; *Pearce v. Frantum*, 16 La. 422; *Gibson v. Hutchins*, 12 La. Ann. 546; *Wood v. Nicholls*, 33 La. Ann. 744; *Railroad Co. v. Sledge*, 6 South. 725, 41 La. Ann. 896; *Mower v. Kemp*, 8 South. 830, 42 La. Ann. 1007; *Donaldson v. Hull*, 7 Mart. (N. S.) 112; *Lowry v. Erwin*, 6 Rob. (La.) 192; *Rhodes v. Hooper*, 6 La. Ann. 358.

7. Nor will such verdict and judgment thereon be set aside merely because, after being charged, the jury were permitted to leave the court, and separate, before giving their verdict.

8. The verdict of the jury responds to the issues when—the plaintiff suing for the land and its revenues, the defendant claiming the value of improvements—the verdict determines that the demand for improvements is compensated by that for revenue; and the judgment following such verdict is unobjectionable. Code Pr. arts. 519, 526; *Trepagnier's Heirs v. Durnford*, 5 Mart. (La.) 456; *Downes v. Scott*, 3 Rob. (La.) 84.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; *R. W. Richardson*, Judge.

Action by the Vicksburg, Shreveport & Pacific Railroad Company against Milo Elmore and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Gunby & Sholars, for appellants. Stubbs & Russell, for appellee.

McENERY, J. This is a petitory action instituted by the plaintiff corporation against

the defendants, who, it is alleged, "without any shadow of right or title," have entered upon a tract of land owned by plaintiff, and described as the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 17, township 17, range 1 E., containing 400 acres. It is alleged that the defendants are trespassers, and have destroyed a large quantity of valuable timber, and are still wasting the same, to the great injury and damage of plaintiff, and that said defendants have occupied and cultivated said land for a period of five years. The prayer of the petitioner is that the plaintiff recover judgment against the defendants, decreeing plaintiff to be the lawful owner of said land, and in the sum of \$500 on account of the destruction of the timber on said land, and for \$4,000 for the use and occupancy of said land to the last day of January, 1892, and \$800 annually from said date until the delivery of the property to petitioner. The defendants filed an exception to the suit on the grounds (1) that there is a misjoinder of parties; (2) that the allegations in the petition are vague, indefinite, and insufficient; (3) that plaintiff is without capacity to bring this suit, there being no such corporation, under the laws of Louisiana, as the Vicksburg, Shreveport & Pacific Railroad Company. The exception was overruled, and the defendants answered in substance as follows: That the plaintiff corporation has no title whatever to the land sued for, and that the claim for damages is extortionate, far exceeding the value of the land; that the mortgage of said lands granted to said corporation by the federal government by Act 3d June, 1856, is null and void, as the road could sell only 20 miles of said lands at a time, as said road was completed, and therefore the state, holding the lands in trust for the purpose of constructing the road, could not authorize the mortgage of the lands for the uncompleted portion of the road; that on June 3, 1866, all the lands between the Ouachita and Red rivers reverted to the federal government, as on that date the road had not been completed, and became a part of the public domain, and the defendants had the right to enter upon and homestead the same; that the road was not located as provided by act of the legislature in 1857, and they deny that the lands granted to the railroad were ever transferred to plaintiffs, directly or indirectly, in the proceedings of *Henry R. Jackson et al. v. John T. Ludeling et al.*, or was ever seized or sold by the marshal, or that said land could be seized or sold, in any manner, for debt, or transferred, until the road had earned the same by its completion; that the federal government, through its interior department, has refused to issue patents to plaintiff for said lands; that the road was not constructed on the faith of the grant of said lands; that the legislature in 1879 declared the grant for-

felts, and in 1886 declared that said road had no title to said lands; that the United States register of the land office advertised said lands for entry, and defendants went on the same in good faith, believing them to be subject to homestead occupation. Defendants, separating in their defense, aver that each has made application for homestead entry, and designate the quantity of land applied for by each. The answer sets out alleged oppressive acts of plaintiff, and prays for damages to the amount of \$500.

The case was tried by jury, and a verdict returned in favor of the plaintiff, as follows: "Full possession of all the lands sued for in this case (situated in section 17), and all the improvements thereon; said improvements going in lieu of, and to offset, the claim of the plaintiff for rent and damages, including rents for the present year." A judgment in favor of plaintiff was entered in accordance with this verdict, except the order to deliver possession by January 1, 1894. To this judgment the plaintiff excepted on the ground that it was not in accordance with the verdict, and assigned this as error. At this time we state that delivery to the plaintiff could have been demanded when the judgment became final, and this extension of time could not possibly injuriously affect the defendants.

Exception.

1. The petition charges that the defendants are trespassers upon the land to which the plaintiff asserts title. It is immaterial whether they set up claim to any particular part of the land, as long as they are trespassers without title, and possess the same adversely to the true owner. They are sued jointly as naked possessors, and they have a common issue in resisting plaintiff's title. The defense of one is the defense of all the defendants, as each holds by virtue of the same title, and they are jointly interested in being maintained in possession. The primary question at issue is title to the property, and all the defendants are alike interested, regardless of the quantity of land possessed by each. *Derbes v. Romero*, 28 La. Ann. 644.

2. There is no force in this objection. The petition contains every necessary and essential averment for maintaining the action.

3. We fail to see the application of defendants' argument to the facts in this case. The record is against the pretensions of defendants. The plaintiff acquired title through the foreclosure sale December 1, 1879. The mortgage creditors purchased the mortgage property, and organized the present company. The organization was perfected, literally, in conformity to Act 38 of 1877, and a statement of the organization and formation of the corporation in compliance with section 8 of the act was filed with the secretary of state. The defendants objected to the copy of this statement—certified to by

the secretary of state—being introduced in evidence because the act of incorporation was not made by authentic act, and the copy was not a copy of an authentic document which proves itself. The act did not require the formation to be by authentic act, and following the plain direction of the statute was sufficient. The statement of the formation of the company or corporation, when filed, became a part of the public archives; and a certified copy of same is, to all intents and purposes, a copy of an authentic act, and authorizes its introduction as evidence. *State v. Cannon*, 45 La. Ann. 1231, 14 South. 130; *State v. Lake*, 45 La. Ann. 1207, 14 South. 128.

Merits.

The defendants aver that they have made application for homestead on the lands as a part of the public domain subject to homestead entry. Their claims are based on notices of the register and receiver of the land office at Monroe, La., inviting homestead settlers on the same. It is alleged that they had received instructions that the lands granted to the railroad company had been opened to public entry. No such instructions have been shown to have been issued, and it is a moral certainty that, had they been issued, the original would be found in the government records at Washington. The fact is that in 1856 Thomas A. Hendricks, commissioner of the general land office, withdrew these lands from sale, on the expected approval of the act of congress of June 8, 1856, by the president, and it may be safely asserted that since that date they have never been open to entry. This is corroborated by the decree of the United States supreme court recognizing the force and validity of the mortgage placed on the railroad and these lands, and their sale under the decree of the court, and the repeated action of one of the executive departments of the federal government in recognizing, on the certificates of the governor of Louisiana, the claim of the road to the lands granted to it by congress. This recognition is not found in this record, but it is a part of the history of the corporation,—not important in deciding this case, but merely stated incidentally. The fact still remains that the lands have not been restored to the public domain, and that no department of the federal government has done any act to disturb the rights of the road to these lands.

The other matters alleged as defenses in the answers do not concern these defendants, and are personal to the grantor. It is immaterial to them whether the road, in its construction, was diverted from its original line; how the state disposed of the trust confided to it by the general government; in what manner the lands were sold by the corporation; whether they were exempt from seizure and sale for debt; in what manner the road acquired possession of these lands.

All these matters are questions for the federal government to consider, and so long as it is satisfied with the manner in which the trust was executed, and the road built, no one else can complain. It is very certain that the defendants cannot act for the government, and by any act of theirs, or any judicial proceeding they may invoke, restore these lands to the public domain, against the wishes and desires of the federal government,—the grantor.

We have mentioned these defenses, as the defendants assert this case presents issues not heretofore decided by this court. But we think they are all embraced within the issues in the cases of *Railroad Co. v. Sledge*, 41 La. Ann. 896, 6 South. 725; *Mower v. Kemp*, 42 La. Ann. 1007, 8 South. 830; and *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 South. 865. In these cases we decided that the government of the United States not having asserted, by legislative act or judicial construction, the forfeiture for the breach of the condition, the apparent legal title is in the railroad company acquiring rights under the foreclosure of the mortgage; in other words, the title of the railroad to the lands granted is good against anybody except the government of the United States. We did not discuss the rights of the road as against the federal government, as our decree would not be binding upon that authority. In the case of *Railroad Co. v. Sledge* the defendant entered upon the railroad land with the intention of acquiring the right to enter the land if ever it should be open to public entry. In this case the defendants made affidavits for homestead entries, but the land was not open for such purposes. The defendants may have been deceived, but this does not alter the character of their entry upon the lands of plaintiff. They went on them without any color of right or authority, and stand in the same position as the defendant *Sledge* in the case referred to. Possession is solely the prima facie evidence of title. The entry on the land was unlawful; and as no title, other than the trespass, is exhibited, the defendants cannot dispute the apparent title of plaintiff. *Stille v. Shull*, 41 La. Ann. 816, 6 South. 634. Judgment affirmed.

On Application for Rehearing.

The earnestness of the argument for a rehearing in this case has prompted us to a careful re-examination; and, if our conclusions prove disappointing to the defendants, we trust they will be accepted as the result of a diligent effort on our part to give to the controversy, previous phases of which have been before us, our best attention.

When defendants (sued for land) hold by different titles, they cannot, as a general rule, be joined, because their defenses, necessarily, are different. In this case the defendants exhibit no title whatever, common or individual. There is, it is true, on the part of

some of the defendants, the averment that they made homestead entries of portions of the land; but, in our view, such entries, even if sustained by proof, would not, under the circumstances of this case, distinguish the position of those who assert such entries from that of trespassers. Hence, we have the case of the plaintiff asserting title to a tract of land on which various persons have settled. The defendants are not distinguished by any difference in the titles they hold, for they hold none. They stand on one common ground of naked possession. We are aware of no rule or test by which plaintiff could divide his action. On the other hand, all these defendants have a common interest in disputing plaintiff's title. If plaintiff had brought as many different suits as there are defendants, all could join in the defense, and to the consolidation of the suit there could be no objection. If consolidation to save costs would have been authorized, the propriety is enforced of joining all these defendants in one suit. We think, therefore, the exception of misjoinder is not well taken. Support of this view is to be found in the general rules of pleading, and, we are inclined to believe, admits of abundant support in authority. We find one case in point, and those cited in plaintiff's brief, to which we have not had access, seemed to sustain the pleadings in this case. *Derbes v. Romero*, 28 La. Ann. 644; *McCabe v. Worthington*, 16 How. 88; *Shields v. Thomas*, 18 How. 253; *Gaines v. Chew*, 2 How. 642. In the cases of *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177, the defendants, charged as possessors in bad faith, were joined in one bill, as we remember the cases. *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173.

The defendants put at issue the corporate capacity of plaintiff. The *Vicksburg, Shreveport & Texas Railroad Company* was created in 1853 to construct a railroad from the Texas line to Vicksburg via Greenwood, Shreveport, and Monroe. In aid of this railroad, or, as the act of congress expressed it, "a railroad," between these points and the line stated, congress granted, in 1856, alternate, odd sections of land, for six sections in width, on each side of the road. The grant stipulated the road should be constructed in 10 years, or the lands should revert to the United States. It is not disputed that the grant was accepted by the company, lands selected, and the listing approved by the government, as provided by the act of congress of 1856 (11 Stat. 18). Thereafter, in September, 1857, the company executed and issued bonds to a large amount, secured, as usual in railway mortgages, on its roadbed, lands, and franchises; and the mortgage specially embraced the 420,924 acres of land embraced in the grant. On these bonds, extant and unpaid in 1879, by appropriate proceedings in the United States circuit court, fifth circuit, and district of Louisiana, the bondholders foreclosed their mortgage, and, at the master's

sale under the decree of the court, acquired, through a committee selected by them, the railroad, its lands and franchises, covered by the mortgage. We do not appreciate that any objection is or can be urged to these proceedings. They exhibit the usual method by which railroad franchises are transferred when bondholders exact their rights. It has never been supposed that such proceedings end the corporate existence, for, if this were the case, railroad mortgages would confer no rights, and railroad bonds disappear as securities. It must be accepted, then, that the sale passed the corporate franchises to the purchasers. In that condition, the purchasers availed themselves of Act No. 38 of the legislature of 1877, which authorizes the purchasers of railway property and franchises to hold all such property, and operate the railroad, the same as the company that executed the mortgage. The act further authorized the purchasers to fix and divide the stock bought, adopt a name, and organize anew the company by electing a board of directors. When all this was effected, the act provided for the filing of the organization certificate in the office of the secretary of state; and, this done, the act declares the company shall be deemed a body corporate, under the name chosen, as fully as if chartered anew by the legislature. We find from the record that all these provisions were complied with by the purchasers, and the corporation once known as the Vicksburg, Shreveport & Texas Railroad Company has become the Vicksburg, Shreveport & Pacific Railroad Company, if there is any virtue in the judicial proceedings to foreclose the mortgage, and the legislative act of 1877. There was no creation of any new corporation, but the continuation of a subsisting corporation under a new name. The act has stood unchallenged for years, nor is the court advised of any ground on which it can be assailed. It is not of easy application that there can be any repugnancy to the organic law in legislation of this character, so necessary to give effect to the changes so apt to occur in the operation of railroads. The court conceives that the present Vicksburg, Shreveport & Pacific Railroad Company must be deemed clothed with all the rights of its predecessor, and is a subsisting corporation, and is competent to stand in judgment.

Nor can it be denied that the lands sued for in this case are embraced in the grant of 1856. Unless that grant has been withdrawn or annulled, the present corporation is vested with title to the lands. These defendants insist the lands have reverted to the United States by the lapse of time, i. e. the 10 years; that the company did not build the road on the original line; that the legislature of Louisiana has declared the grant forfeited; and other defenses are advanced, assailing the right of the corporation to the lands granted. It is true the railroad was not completed within the time stipulated in the grant.

It is also true, we believe, there was a deviation from the line originally designed for the road. But it is equally true the road has been completed, and the United States has never insisted on any cause of forfeiture, and has never forfeited the grant. From time to time the certificates of the completion of the road have been filed in the office of the commissioner of the general land office, and, though long after the 10-year limit, have been accepted as satisfactory evidence of compliance with the grant. So long as the grantor interposes no objection, we cannot perceive the right of defendants to urge noncompliance with conditions we must deem waived by the grantor. We do not enlarge on this point, because, in our view, unnecessary, especially in view of the elaborate decisions in *Railroad Co. v. Sledge*, 41 La. Ann. 896, 6 South. 725; *Mower v. Kemp*, 42 La. Ann. 1007, 8 South. 830; and *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 South. 865.

Nor can we understand how the state of Louisiana can forfeit lands, or declare annulled the grant of 1856. The state has no interest. It was the trustee under the act of 1856, but its functions have long since ceased, and before the legislative act in which it undertook to annul the grant. 44 La. Ann. 981, 11 South. 865.

We have given careful attention to the claims advanced in behalf of some of the defendants,—that they hold under homestead entries. If such entries had been made, they would have been in the face of the grant, and with the implied notice that the grant stood, notwithstanding all conditions and limitations, unless insisted on by the United States. In our view, the proof fails to show any homestead entries, except those held for cancellation by the officials of the land office. In our opinion the defendants stand simply as trespassers without title. It is well settled in our jurisprudence that claims for improvements by defendants in this position are admitted sparingly. We find no evidence in the record that defendants have made improvements of that character that some cases have recognized as affording a basis for a claim against the owner. *Pearce v. Frantum*, 16 La. 414; *Baillo v. Burney*, 3 Rob. (La.) 317; *Williams v. Booker*, 12 Rob. (La.) 254. But, waiving this question, it is settled that trespassers without title, and with knowledge, or presumed knowledge, of the title of the owner, owe fruits from the date of their possession, and we see no objection to the verdict and judgment that compensates any supposed liability for improvements by the claim of plaintiff for rents and revenues. *Donaldson v. Hull*, 7 Mart. (N. S.) 112; *Lowry v. Erwin*, 6 Rob. (La.) 192; *Baillo v. Burney*, 12 Rob. (La.) 256. The verdict was for plaintiff, with the addition of compensating the claim for improvements with that for revenue; judgment followed the verdict, and both substantially responded

to the issues; and we do not think the objection of the defendant on this ground is well taken.

It is undoubtedly better that juries should be kept together after the charge, and it is impliedly required by the Code. But merely because, in this case, there was a separation, we do not think the verdict should be set aside. Rehearing refused.

(46 La. Ann. 1306)

SPENCER v. SCOTT, Sheriff, et al. (No. 1,289.)

(Supreme Court of Louisiana. June 15, 1894.)

HOMESTEAD RIGHT — TRANSFER OF PROPERTY TO WIFE — EFFECT — ATTACHMENT BY CREDITORS — RENUNCIATION OF COMMUNITY BY WIFE.

1. Where a husband has legally selected and recorded a homestead, the homestead right is not destroyed by the fact that, subsequently thereto, personal property of the husband not included in the declaration is transferred by him to his wife in payment of paraphernal funds of hers received by him and converted to his own use, thus placing this property beyond the reach of his creditors. The constitution contemplates the possibility of the coexistence of ownership of paraphernal property by the wife with a homestead right in the husband where the value of the property of the wife is within the limit fixed by it.

2. If the wife has legal rights which she has enforced in a legal manner, her motives in exercising her rights do not concern the creditors of the husband. If she has no legal rights, or has enforced them in an illegal manner, the remedy of the creditors is to attack the judgment which recognizes them, and the transfer made under the judgment, to have it set aside, and the property included in the transfer subjected to the payment of their claims.

3. Where the community of acquets and gains is dissolved by a judgment of separation of property, the wife, in the absence of evidence on the subject, is presumed to have renounced the community. A wife who renounces the community stands as a third person quoad the community.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; Carey J. Ellis, Judge.

Suit by James L. Spencer against Lem Scott, sheriff, and others, to restrain the sale of certain property under execution. Judgment for plaintiff, and defendant Meyers appeals. Modified.

Gunby & Sholars, for appellant. Robert Whetstone, for appellees.

NICHOLLS, C. J. A certain piece of land in the parish of Richland, containing 120 acres, more or less, also one horse, two mares, four mules, one wagon, and one buggy, having been seized by the sheriff of that parish in execution of a writ of *fi. fa.* in the case of Mrs. Carrie P. Meyers against James L. Spencer, the seized debtor enjoined the sale of the land, of the horse, and of the wagon, and demanded a release of the same, with damages, on the ground that they were exempt from seizure and sale under articles 219 and 220 of the constitution of the state and Act No. 114 of 1890, as the said property

had been set aside and recorded as a homestead. Plaintiff in execution answered, denying that Spencer had any legal or just grounds for the injunction. She admitted that the sheriff seized the property, but denied that the same is exempt under the homestead laws of the state. She denied that her debtor ever complied with the conditions prescribed by law for securing the homestead exemption, and averred that the declaration filed by him more than 10 years before was defective, insufficient, and void. She specially denied that the horse and wagon, the sale of which is enjoined, are contained in or described by said declaration. She further averred that Spencer abandoned and forfeited all right to claim said property as a homestead by having his wife sue him for a separation of property, and obtaining a judgment dissolving the community, and decreeing him to be indebted to her for a large sum, under which judgment he attempted to transfer to her all his property not covered by the homestead claims, thereby committing a fraud on the seizing creditor, and rendering it impossible for her to collect the debt due the succession of Meyers by the community of which Spencer was head and master. She specially denied plaintiff's right to claim a homestead in the land held in division by him with his wife after the dissolution of the community, and denied the legality, justice, and good faith of his claim to a homestead after there had been a separation of property collusively entered into between him and his wife for the purpose of placing a part of his property beyond the reach of his creditors. She averred that all the proceedings in the suit for separation, and in an injunction taken out in the district court for Richland by the wife, against the sale of the four mules seized, on the ground that they were her separate property under the act of transfer mentioned, were instigated by and carried on under the direction of Spencer, and he is estopped in law and morals from asserting or claiming a homestead exemption in the community property; and denied that he is entitled to the same on any ground whatsoever. She prayed that plaintiff's demand be rejected, the injunction dissolved, and that she have judgment in reconvention against Spencer and the surety on his bond in solido for 20 per cent. on the amount of the writ enjoined, as special damages, and 10 per cent. thereon as general damages. The sheriff, who had been made a party, averred he had no interest in the litigation; that he was proceeding regularly with the execution of a legal writ when enjoined. He prayed that plaintiff's demand against him be rejected. On trial the district court rendered judgment perpetuating the injunction. The seizing creditor has, under the amendment to article 81 of the constitution, brought the case before this court on appeal. Appellee has filed an answer praying that the judgment be amended, so as

to allow him \$100 damages for attorneys' fees. A certified copy of the declaration of homestead made by plaintiff in injunction, together with the certificate of its registry in the parish of Richland, is in the record. It seems to conform to the requirements of the articles of the constitution, and to the provisions of Act No. 114 of 1880. Defendant in injunction declares it to be "defective, insufficient, and void," but we have not been informed, either in the argument or the brief of counsel, upon what this assertion is based. The only departure from article 219 of the constitution which we notice is the placing of a "mule" upon the exemption list, instead of a "work horse." It is not claimed that Spencer's wife, either at the time of the declaration of the homestead or since, has had property of her own sufficient in value to deprive the husband of his right of exemption. The property which she owned at the time of the seizure seems to have consisted exclusively of mules (among which is the one referred to in the declaration of homestead), transferred to her by her husband in payment of the judgment which she obtained against him in restitution of paraphernal funds of the wife received by him and converted to his own use.

The constitution contemplates the possibility of the coexistence of a right by the husband to a homestead with ownership of paraphernal property by the wife, provided the value of this paraphernal property be under \$2,000. The evidence shows that at the time of the declaration of homestead Spencer owned four mules, of which three died, but that he replaced these by others; that, not long before the seizure in the present suit, Mrs. Spencer instituted a suit against her husband for a separation of property, praying for a moneyed judgment against him for moneys of hers alleged to have been received by him and converted to his own use; that she obtained judgment in conformity to her prayer, and that in satisfaction of this judgment the four mules owned by her husband were transferred to her, and that they are now used in the cultivation of the farm. It is claimed that all the proceedings in the suit for separation were collusively carried on for the purpose of placing a part of the property beyond the reach of his creditors, and of committing a fraud on defendant in injunction, putting it out of her power to collect the debt due the succession of Meyers by the community of which James L. Spencer was the head, and that they were instigated and carried on under the direction and control of the husband. The reality of the claims of the wife against the husband is not disputed. No attack upon the judgment is made. The wife is not a party to this suit. The contention, as made, is that she could not, and should not, legally, in good morals and equity, enforce her judgment, in view of the exemptions claimed by the husband and the existence of debts due by him to other par-

ties. The main reliance of appellant for reversal of the judgment is in successfully holding that the dissolution of the community between Spencer and wife (brought about by the judgment of separation) had the effect to destroy the right of exemption asserted in the declaration. The theory upon which this result is based is that the dissolution of the community operated *ipso facto* a change from ownership of the property in its entirety by the community to joint ownership by each of the two spouses of an undivided one-half interest therein; that, by reason of the ownership being no longer of the property in its entirety, and of the fact that the homestead exemption cannot be made to cover undivided joint interests, the homestead in this case ceased to exist. The seizing creditor has overlooked the fact that the acceptance or renunciation of the community of acquets and gains by the wife is a matter resting entirely upon her own will, and that where it is dissolved by reason of a separation of property both allegation and proof that she has accepted are necessary to be made to justify a court in dealing with her interests, or those of the husband, from that standpoint. *Herman v. Theurer*, 11 La. Ann. 70; *Andrich v. Lamothe*, 12 La. Ann. 76; *Rev. Civ. Code*, art. 2420. Under such circumstances, the presumption is that she has renounced. It is not alleged nor proved that Mrs. Spencer has accepted the community. The renouncing wife stands quoad the community as a third person (*Lombas v. Collet*, 20 La. Ann. 80), and she is not prejudiced in her legal rights by any moral obligation which it may be supposed rests upon her to see that her husband's debts to others be paid. So far from this, the wife, in dealing with her husband in reference to her property rights, is often upheld and protected where dealings of like character between the husband and one of his creditors under similar circumstances and conditions would be liable to be set aside as fraudulent. Mrs. Spencer either had or had not legal rights against her husband's property. If she had, and enforced them legally, her motives in exercising them play no part in this controversy. If she had not legal rights, or did not enforce them legally, the remedy which the seizing creditor should have pursued was to have attacked the judgment, and the transfer under it, as illegal, fraudulent, or unreal, had it set aside, and the property covered by the transfer subjected to the satisfaction of her claim. A fraudulent judgment and fraudulent or simulated or illegal transfer could be set aside. The legal result of their having been resorted to by the spouses would not be the destruction of the homestead right, to which they were entitled under the law and the constitution. We see no reason for enjoining the sale of the horse which was seized in this case. It was not included in the exemption list which was recorded, and, besides this, there has been no attempt made to

show that it was a "work horse." We think the injunction as to it should have been dissolved. Each side should pay its own attorneys' fees. For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, amended by dissolving the injunction which issued in this case as to the horse seized, but that otherwise it stands affirmed. Costs of appeal to be paid by appellee.

(46 La. Ann. 1088)

Succession of LANAUX. (No. 11,356.)
(Supreme Court of Louisiana. March 12, 1894.)
PLEDGE—DEPOSIT WITH THIRD PERSON—FAILURE TO DELIVER TO CREDITOR—EFFECT.

1. A debtor who deposits with a third party pledges for his creditor, presumably purchased with trust funds, and who informs the creditor of the deposit, who accepts the third party as a depository, loses control and possession of said pledge. The depository holds the pledge for the benefit of the pledgee. That the third party is the clerk of the pledgor does not destroy the effect of the pledge.

2. A deposit of money lost or misappropriated by an insolvent depository does not give the depositor a general privilege on the estate of the depository for the return of the money.

On Rehearing.

1. Delivery of the property pledged to the creditor, or to the third person to hold possession for the creditor, is indispensable to perfect the contract of pledge; and, when delivered to the third person, he must, of course, know of the trust, and accept the obligation it imposes. Rev. Civ. Code, arts. 3133, 3152, 3162; Code Nap. art. 2076; 28 Laurent, Droit Civil, p. 162, pars. 464, 470, 471, 484; 3 Mourlin, Examen du Code Nap. p. 482, par. 1218; 7 Boilleux, Commentaire du Gage (3d Series) p. 129; Jones, Pledges, §§ 23, 27, 28, et seq.

2. Hence, no pledge is accomplished by the debtor executing his note in favor of his creditor; attaching bonds and certificates of stock to secure its payment; placing note and securities, in a package marked with the creditor's name, in the box of the debtor, in bank; the debtor at the same time instructing his clerk having the key of the bank box to deliver the package on the request of the creditor, and although the instructions are communicated to the creditor, and all is done in pursuance of a pledge promised the creditor, but no delivery ever having been made, and, when the debtor dies, the securities remaining in his bank box, deposited and held as his property. *Id.*

3. In such case the clerk of the debtor, because he receives the instructions of his employer to deliver the securities and communicates such instructions to the creditor, does not become "the third person agreed upon" to take possession of the securities for the creditor, required by the Code when the pledge is proposed to be perfected by that method of delivery. Least of all can we hold that by such instructions, and their communication, is any shadow of possession passed to the clerk, of securities in his employer's bank box, never taken from it until his death, when his executor takes charge of box and contents. *Id.*

4. Instructions of an employer to his clerk, with reference to the delivery of the employer's securities to one of his creditors, and communicated to the creditor, whatever their force in the life of the employer, certainly cease to have any effect when the death of the employer occurs, no delivery having ever been made.

5. Death of the debtor fixes the rights of his creditors as they exist at that moment, and

a proposed pledge, not perfected by delivery when the debtor's death occurs, confers no rights. Rev. Civ. Code, arts. 3133, 3152, 3162, 3182, 3185; *Buard v. Lemee*, 12 Rob. (La.) 243; *Boyce v. Escoffie*, 2 La. Ann. 872; *Slidell v. Pritchard*, 5 Rob. (La.) 101; *Martin v. Williams*, 3 La. Ann. 582.

Watkins, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

In the matter of the succession of Pierre Lanaux. On opposition to provisional account of executor. From a decree sustaining certain of the oppositions, Joseph R. Hymel and others appeal. Affirmed.

Albert Voorhies, for appellants Jos. R. Hymel, the Succession of O. Hymel, and Mrs. F. E. Tassin. Felix P. Poché, for appellant Mrs. F. E. Tassin. Chas. F. Claiborne, for appellants Denis Lanaux and testamentary executor. Thomas J. Semmes and Legendre, for appellant Estate of Seraphin Hymel. James McConnell, for appellee State Nat. Bank. El. Howard McCaleb, for appellees People's Nat. Bank, New Orleans Nat. Bank, and George Dionne. Beattie & Beattie, for appellee George Dionne. Farrar, Jonas & Kruttschnitt, for appellees Glover & Oden Dahl. William S. Benedict and Robert G. Dugué, for appellees Joseph Walton & Co. and Moran & Wood. John B. Fisher, for appellee People's Slaughterhouse Co.

McENERY, J. Pierre Lanaux, commission merchant and factor, died in the city of New Orleans September 6, 1892. He was the agent for Mrs. E. Tassin, Octave Hymel, deceased, and J. R. and Seraphin Hymel. These parties intrusted their funds to Lanaux for investment, without specifying and directing the mode of investment. These funds were never, except in case of Mrs. Tassin, loaned to Lanaux; and he was never authorized to use them for his own purposes, or in his business. The mandate, as shown by the witnesses and the correspondence between the parties, was to invest their funds. They were deposited by them with Lanaux for this purpose, and none other. On the accounts current furnished these several parties, it was noted that the funds had been invested, without saying in what particular manner. A short time before his death, Lanaux, for the amounts which he had for investment for these parties, made up separate packages in separate envelopes, in which were placed his individual notes for the amount due each, with bonds and certificates of stock, with the usual blank power of attorney to transfer attached to them. On each envelope or package was indorsed the name of the party to whom it belonged. They were placed in a bank box, and this box, with the key, was placed in the actual corporal possession of De Jaham, his clerk. This box was, according to Lanaux's instructions, placed in the branch depository of the State National Bank for security and safe-

keeping, through the intervention of George Lanaux, who received the box from De Jaham. De Jaham was instructed and directed by Lanaux to deliver on demand these packages to the persons to whom they were addressed. He had exclusive control of the box containing these pledges, and says he would have delivered them to the parties on demand. It is evident from the testimony of De Jaham and George Lanaux that De Jaham's possession of the box was full and complete, and adverse to that of Lanaux. Mrs. Tassin, who had instructed Lanaux in the same manner as the Hymels as to the investment of her money, subsequently met Lanaux, to whom she loaned her money on the faith of the securities set apart for her, with the understanding that De Jaham was to be the depositary of the pledges. De Jaham, after receiving these pledges, informed Mrs. Tassin of his possession of the same for her benefit; and she accepted De Jaham as the depositary then, as she had previously signified her assent to do so, when she had the conversation with Lanaux which resulted in the lending of the money. This statement of the facts in relation to Mrs. Tassin brings her case directly under the textual provisions of article 3162 of the Revised Civil Code, and the interpretation placed upon the same by this court. *Peters v. Guano Co.*, 42 La. Ann. 694, 7 South. 790; *Jacquet v. His Creditors*, 38 La. Ann. 863; *Weems v. Moss Co.*, 33 La. Ann. 973; *Conger v. City of New Orleans*, 32 La. Ann. 1250. The fact that De Jaham was the clerk of Lanaux could not affect his capacity to act as a third party chosen by the parties to be the detainer of the thing pledged. There was no inconsistency in the two relations. Having accepted the trust, so far as it was concerned, he was a stranger to Lanaux, and in no way bound, by his private relations to him, to violate his obligation as a fiduciary, and to surrender the pledge to him; and he so regarded it, as he says he would have delivered the packages, on demand, to the parties for whom they were intended. Seraphin Hymel, J. R. Hymel, and Octave Hymel were informed of the investment of their funds, either by Lanaux or De Jaham, although the testimony does not show that they were informed particularly as to the mode of investment. It is a fair inference, however, that they were informed by Lanaux and De Jaham, when they spoke to those parties, whom they had visited for the purpose of informing them as to the fulfillment of the trust imposed by them upon Lanaux. This is corroborated by the blank power of attorney which Seraphin Hymel refused to sign, the object of which was to remove and to deposit bonds, bills, stocks, notes, etc. Taking all the evidence together, the impression made upon the mind is that the Hymels had knowledge of the pledging of these bonds, stocks, etc., for them, and that they accepted De Jaham as the custodian. Seraphin Hy-

mel's reason for refusing to sign the power of attorney was that he thought his funds safely invested. This power of attorney was admitted in evidence, over the objection of the opponents; but it was admissible to show, in part, that Seraphin Hymel knew that his funds had been invested in the manner shown by the inventory and the account, and the disposition of his funds, and that he accepted De Jaham as the third party agreed on between the parties to detain the pledge. We see no good reason why the debtor cannot place the thing pledged in the hands of a third party, and inform the creditor of the fact, when, if he accepts the third party, the pledge becomes perfected. Such seems to be the doctrine indicated in *Peters v. Guano Co.*, 42 La. Ann. 694, 7 South. 790. The succession of Lanaux could have no greater rights than the decedent. If he had lived, would not the pledgees have had the right to claim the things pledged to them in the hands of De Jaham? If a demand had been made upon De Jaham for the pledges, he could not have set up title in Lanaux, and Lanaux certainly was estopped from claiming the pledges. In fact, he had completely divested himself of possession of the notes, bonds, and certificates of stock after De Jaham had accepted the pledges from him, and had been accepted as the detainer of the pledges by the pledgees. Any attempt of Lanaux to dispose of the things pledged, in the hands of De Jaham, could have been successfully resisted by the pledgees.

And another view of the case is also fatal to the demand of opponents. Conceding that there was no valid pledge of the property, the relations between Lanaux and the Hymels were not those of debtor and creditor. They never authorized Lanaux to use for his own purpose, or in his business, their funds. Their instruction to him, who was their servant and agent, was to invest these funds. They were informed that they had been invested, and it was so noted on the accounts current furnished the Hymels. Lanaux invested these funds in property of which he was the owner, and placed the same in the hands of his clerk, to be delivered on demand. The Hymels, on his death, found in his succession the property destined by Lanaux for them. This property was presumably purchased with their funds, and separated from Lanaux's property, and became their property. *Beatty v. McCleod*, 11 La. Ann. 76. It is the law that the Hymels, in order to secure the identical fund in the insolvent succession, must separate the fund from the mass of the succession, and distinguish it. But it is also the law, where trust funds have been specifically invested in property which can be identified, the property must respond to the trust fund, and stand in its stead. The Hymels therefore have the right to claim the specific property purchased with their funds by their servant and agent. *Id.*

It is contended by opponents that the notes

were null and void because signed and indorsed by De Jaham, and that he had no written authority to sign and indorse them. The mandate to sign and indorse a promissory note must be express and special, but it need not be in writing. *Boyd v. Chaffe*, 21 La. Ann. 476. De Jaham's authority to sign and indorse the notes was express and special, although not in writing. To perfect the pledge, the delivery of the bonds, notes, etc., was sufficient. *Ribet v. Bataille*, 35 La. Ann. 1171; Rev. Civ. Code, art. 2153.

On October 8, 1891, S. Hymel deposited with Lanaux \$23,000. This deposit was for the purpose of meeting current expenses of his plantation. This sum is placed on the account as an ordinary debt. It is claimed by Hymel that his was a trust fund, and that the executor must turn it over to Hymel's representatives before making a distribution of Lanaux's assets among his creditors. The fund has not been identified, nor has it been traced in its conversion into other property. The depositor has no general privilege on the property of the agent. *Lanoue v. Dumartrait*, 25 La. Ann. 478; *Succession of Stone*, 31 La. Ann. 314. It must therefore be rated as an ordinary debt against the succession fund.

The opposition to the claim of the Planters' Fertilizing Company is not well founded. The proof is insufficient to sustain it. The district judge was of this opinion, and we see no reason to disturb his ruling.

Walton & Co. and Moran & Wood's claim for a privilege for coal furnished the plantation was properly allowed, restricted as it was to coal furnished for making the crop of sugar on the several plantations.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to reverse that part of the decree sustaining the oppositions to the claims of Seraphin Hymel, Octave Hymel, Joseph R. Hymel, Mrs. F. E. Tassin, to be paid, by preference and privilege, out of certain notes and bonds, shares of stock, etc., pledged to them, and mentioned in the inventory and on the account of the executor; and it is now ordered that the opposition to the same be dismissed, and said claims be recognized as placed on the account. In all other respects the judgment is affirmed; the succession to pay all costs.

On Rehearing.

(June 9, 1894.)

MILLER, J. The question in this case is whether the appellants, the successions of Seraphin Hymel, of Octave Hymel, Joseph R. Hymel, Mrs. Florian E. Tassin, and Denis Lanaux, are pledge creditors of the late Pierre Lanaux. The account of the executor of the deceased recognized the pledges, and from the judgment of the lower court maintaining the oppositions of ordinary creditors of the deceased, and adjudging that the appellants were not pledge creditors, they

prosecute this appeal. The case has been elaborately argued in this court, both on the original trial and on the rehearing, and has engaged our serious attention. The full argument in this court has served to eliminate from consideration a mass of testimony contained in the voluminous record, well calculated to cloud the issue and mislead the court.

At the outset, it may be stated, we regard the debts of the creditors asserting the pledges as established. The pecuniary condition of Pierre Lanaux is unimportant, as this is not the revocatory action. It is of no consequence in this discussion that Pierre Lanaux, the deceased factor, had annually, for years, balances in his hands derived from the sale of the crops of the asserted pledge creditors,—was accustomed to invest for them their balances,—and all evidence tending to show that the asserted pledges were such investments has no bearing on the controversy, the creditors claiming as pledgees, not as owners, for whom the securities had been bought by their agent. The claim of ownership, and at the same time as creditors entitled to the bonds as pledgees, would be inconsistent, besides admitting of no support under the facts; and the creditors properly elected, in the lower court, to stand on their asserted pledges.

The controversy is between the creditors asserting these pledges on a large amount of the securities of the debtor, and the mass of the creditors interested in disputing the pledges, so as to secure the applications of all the debtor's assets to the payment of his debts. The requisites of the pledge are well defined. The agreement consummated by delivery of the property pledged to the creditor, or the possession of the property by a third person, agreed on to hold for the creditor, are the essentials. There is no substantial difference between our Code and the general commercial law on the subject, and in one of the recent text-books the articles of our Code are incorporated as expressing the commercial law. In this case there is no pretense of any delivery to the creditors. The claim of the asserted pledge creditors is that the securities were placed in the possession of a third person to hold for them. Rev. Civ. Code, arts. 3133, 3152, 3162; Code Nap. art. 2076; Jones, Pledges, §§ 23, 27, 28, et seq.; 28 Laurent, Droit Civil, p. 162, para. 464, 470, 471, 484; 7 Boilleux, Commentaire du Gage, p. 129. The pledges are asserted to have been made in August, 1892. Pierre Lanaux, the debtor, died in September, about a month after. There was no intercourse between the debtor and Denis Lanaux, one of the alleged creditors, having any reference to the pledge claimed for him. We draw the conclusion from the record that there was none with Seraphin Hymel, another alleged pledge creditor, leaving out of view the hearsay testimony of statements from him that his balance in the hands of the deceased factor was safe, or had been invested. With two other

of the creditors claiming as pledgees, Octave Hymel and Joseph R. Hymel, there appears to have been intercourse prior to the time of the asserted pledges, from which these creditors derived the understanding, and were assured by the deceased factor, their balances in his hands would be or were invested, and their securities placed in the safe at the New Orleans Insurance Company, in the vault of the branch depository of the State National Bank, in this city. The deceased factor was president of both institutions. With Mrs. Tassin, another of these creditors, the communications of the deceased factor were of a more special character. Her balance in his hands in July, 1892, was large, and she was solicitous to have it secured; i. e. invested in state bonds. He submitted to her his plan, thus: He would make his note for \$40,000; secure it by a pledge of state bonds and other securities; place note and securities in the hands of George De Jaham, his clerk; instruct him to put the note and securities in a bank box, in the safe of the New Orleans Insurance Company, in the vault of the branch bank, to which George Lanaux, the secretary, had sole access; at the same time he would instruct him to hold the box subject to the order of De Jaham, having the key of the box, and who would be directed to deliver the note and securities on her request. To this plan Mrs. Tassin assented.

With this review of the relations and intercourse of the deceased factor with his creditors, the next phase of this controversy is the method of the execution of the asserted pledges. On the 3d August, 1892, Mr. Lanaux directed his clerk, Mr. De Jaham, to make five notes (one for Mrs. Tassin, for her balance, \$40,000; one for \$31,000, in favor of Octave Hymel; one for \$27,500, in favor of Seraphin Hymel; one in favor of J. R. Hymel, for \$25,000; and another, for \$10,000, in favor of Denis Lanaux); to attach to each note securities deemed adequate to secure it; to place notes and securities in five packages, each marked as the property of the creditor for whom the contents were intended; and to put the sealed packages in a bank box, for which, Pierre Lanaux told his clerk, George Lanaux would call. All this was done, and De Jaham, the clerk, was instructed to deliver the packages to the creditors. On the day previous, George Lanaux had been requested by Pierre Lanaux to put a bank box in the safe of the insurance company, adding that De Jaham would give the box. On the day following the making up the packages, and placing them in the box, it was taken from Pierre Lanaux's office by De Jaham and George Lanaux, and deposited in the safe of the insurance company, in the vault of the branch bank. De Jaham had the key of the box; George Lanaux, the combination to open the safe. Nothing was said by Pierre Lanaux or by De Jaham to George Lanaux in reference to the box, save the request from Pierre Lanaux to deposit it, and

of course there was no syllable of reference to its contents. It bore the name of the deceased factor, and contained, besides the packages, his will, appointing Denis Lanaux his executor. Not a single security was ever delivered from the box. It was untouched from the time it was placed in the safe, at Pierre Lanaux's request, until his death, when it was opened, under the order of the court, to search for his will and inventory his property. The claims of the creditors asserting pledges on the contents of the box on the theory that the securities in their debtor's bank box ought to be deemed, not in his possession, but in that of these creditors, through a third person supposed to hold for them, are fortified, it is urged, by the direction of Pierre Lanaux to his clerk to deliver the packages, and by the fact that the directions, at the request of Pierre Lanaux, were communicated by his clerk to the creditors, or some of them. The testimony on this branch of the case appears to be about this: The information was given to Octave Hymel and Joseph R. Hymel that their funds in the hands of the deceased factor had been invested for them,—were in the safe of the insurance company,—and, to use the language of the witness, they ratified the investments. The testimony of De Jaham on this point is in some degree conflicting,—apt to occur in the testimony of any witness subjected to protracted examination and cross-examination as to details. But giving effect to all his testimony, and that of others, it is our conclusion his communication to Joseph R. and Octave Hymel may be epitomized in the reference by him to the investments being in the safe of the company. To Mrs. Tassin the communication of De Jaham was, in effect, that all had been done with reference to the pledge as proposed to her by Pierre Lanaux,—that is, the execution of the note; placing the note and securities in the package marked for her, the packages in the box, the box in the safe of the company in the bank's vault; his instructions to deliver to her. And De Jaham also stated that he and George Lanaux had accepted the commission confided to them by the deceased. This last statement conveyed the inference of the witness; but the fact is that George Lanaux, entirely ignorant of the contents of the box, had no such commission, and never even heard of it.

It is substantially on this state of facts this court is called on to sustain pledges of securities in the debtor's bank box never taken from it till his death, and then by his executor. It is urged on us that the facts bring the asserted pledges within the essentials so plainly expressed in the Code,—that no pledge exists without actual delivery to the creditor, or to a third person for him. The symbol of the pledge, in the Roman law, is the fist of the creditor closed on the pledge, denoting that actual possession which all recognize as linked to the pledge,

and without which none can exist. We are responding to the case of the creditors, to hold that these securities in Pierre Lanaux's box, in bank, directed to be delivered, but never taken from it, are notwithstanding to be deemed, not in his possession, but in that of some third person for the creditors. If we are to reach any such conclusion, it must be on some theory of constructive possession not capable of easy appreciation. We can hardly conceive, even on this theory urged on us, of constructive possession or constructive holding, how the case of the Hymels and Denis Lanaux can be supported. The intercourse with Octave and Joseph R. Hymel with the deceased factor, and subsequently, after his death, with De Jaham, that can be deemed to have the faintest relation to these securities, has been stated. It will not be pretended, in that intercourse, any one was agreed upon or suggested to take possession of the securities for them. Still less can it be maintained that there was ever the shade of any such possession, unless packages in Lanaux's box are to be deemed not in his, but in the possession of some other. With respect to Denis Lanaux and Seraphin Hymel, there was no intercourse with reference to the box or its contents. A day or two after the death of Mr. Pierre Lanaux, De Jaham spoke to Denis Lanaux of a letter in the box for him. That was all he ever heard of the box until the opening under the order of the court disclosed the package marked with his name. With Seraphin Hymel, all intercourse or knowledge of box or contents is a blank. The claims of these—the Hymels and Denis Lanaux—may at once be laid aside. There is no pretense of the delivery to them of the asserted pledges. It would do violence to the record, were we to maintain that there was ever the selection of any third person to hold the securities for them, and still greater violence if we held there was the shadow of any such possession.

Is the case of Mrs. Tassin any stronger? The actual custody of the box containing the securities when Lanaux died is susceptible of no dispute. Whether George Lanaux, who received it from Pierre Lanaux, or the company, or the bank in whose vault the box was placed, is deemed custodian, is immaterial. Could the possession of any one of these be deemed that of Mrs. Tassin? Neither George Lanaux nor the company nor the bank had the slightest intimation of her now asserted interest in the contents of the box. With the fact that must be conceded,—that the box was thus received and thus held,—it is plain that no other relation or ownership or accountability grew out of the deposit of the box, other than that arising daily when the customer sends his box to the bank. It must be apparent, then, that George Lanaux held that box for Pierre Lanaux, and in no sense for Mrs. Tassin, whose asserted pledge rests on the theory

of her possession, actual or constructive, of the securities in that box, claimed by her. The fact that George Lanaux received the box from, and held it for, Pierre Lanaux, must be accepted, and exert its influence in the solution of the vital issue as to the possession of these securities. Whatever qualifications may be claimed to arise from the previous negotiation between Mr. Lanaux and Mrs. Tassin in reference to the asserted pledge, or from the fact that subsequent to the negotiation he placed the package of securities bearing her name in the box, or from the additional circumstance that the clerk of the debtor, with the key of the box, had his instructions—never fulfilled—to deliver to her the package, and that the instruction, at the request of the debtor, had been communicated to her, still, whatever the force, if any, of these qualifications, or of any other the record exhibits, the unalterable fact remains that when the death of the debtor occurred, which fixes the rights of all creditors as they exist at that moment, the securities now claimed to have been in the possession of a third person, agreed on to hold for the creditor asserting the pledge, were in the debtor's bank box, deposited as his property. There is, on this branch of the case, another impressive feature. When Pierre Lanaux unfolded his plan to secure Mrs. Tassin, the payment of the large balance in his hands, along with the placing the note in her favor, with the package of securities bearing her name, in the box, and along with the instructions for delivery to his clerk, and the deposit of the box, it was part of that plan that George Lanaux, receiving the box, was to be instructed to hold the box subject to the order of the clerk. If these instructions had been given, and accepted (as doubtless they would have been) by George Lanaux, the case of Mrs. Tassin would, at least in this respect, have presented a different aspect. There would have been the basis for the argument, to whatever extent it might avail, that the box was held for De Jaham along with his mandate of delivery to Mrs. Tassin. But the deceased factor—sick when the proposed pledge was discussed, and attempted to be carried into effect, and unfitted for business—failed to bear in mind the precaution devised by him for the protection of the creditor. Death closed his lips without any instructions to George Lanaux in respect to the box. The record then places George Lanaux before the court as holding the box for him whose name it bore, and from whom it came. It cannot, therefore, for one moment, be contended that he bore the slightest relation to Mrs. Tassin. When the pledge is consummated by delivery to a third person to hold for the creditor, it is the natural result that a liability at once arises between the third person thus selected and the creditor. No such liability, in this case, existed. Laurent thus puts it: "L'article 2076 admet que le créancier gagiste

est mis en possession lorsque le gage a été remis à un tiers convenu entre les parties. Il faut donc une convention qui établisse un lien entre le tiers et le créancier gagiste de sorte que le créancier possède par l'intermédiaire du tiers." 28 Laurent, Droit Civil, p. 484. This case can be supported on no theory that George Lanaux held for the creditor, of whose asserted interest he was ignorant, and to whom he sustained no relation of trust or liability.

It is insisted, however, that this court, in solving the issue of the possession of these securities claimed by Mrs. Tassin as pledged to her, shall hold for naught that they were in the debtor's box, deposited and held for him, and never taken from it, except by his executor, when the debtor's death occurred. It is claimed that the pledge and possession of Mrs. Tassin are to be supported on the theory that George De Jaham had been selected to hold possession of the pledges for her, and actually had that possession. Her whole case rests on that theory. Is it to be maintained that De Jaham ever was selected to take the securities into his possession, or that he ever had the vestige of any such possession? All must realize the exaction of the Code that actual delivery of the pledge must be made to the creditor, or possession delivered to a third person chosen by debtor and creditor to hold for the creditor. What the Code means by this selection of a third person to hold for the creditor, and by his possession of the pledge, requires no comment. Was De Jaham ever clothed with any such agency, or vested with any such possession? De Jaham's whole function with respect to the securities was derived from the order of his employer. That was to place the package of securities in his employer's bank box, and deliver the package on the call of the creditor. That order certainly did not authorize the clerk to take the securities into his possession, to hold them for the creditor. Nothing of the kind was contemplated. If the creditor had called, she doubtless would have obtained the securities, and thus obtained the possession essential to perfect the pledge. No such call was made, and the securities remained in the debtor's bank box, undelivered. The clerk never conceived he had any authority to remove the securities from the bank box. When the creditor demanded the securities after the debtor's death, the clerk declined, stating his authority ceased with the death; adding, however, the creditor's right would ultimately be secured. His refusal without any qualification, in our opinion, defined his power, because death revokes all unexecuted orders of the principal. There was then no agreement whatever that the securities claimed as pledged to Mrs. Tassin should be put in possession of the clerk as a third person to hold for Mrs. Tassin. Nor does it in the least affect the question that the clerk communicated the order of his em-

ployer to deliver to her, nor that she signified her assent. No license of construction enables us to transform an order of the employer to his clerk for the delivery, if called for, of securities from the employer's box in bank, into a mandate that the clerk shall remove the securities, and take them into possession to hold for the creditor. Least of all can we hold the clerk ever had that possession. Placed in the debtor's bank box, deposited and held as his property, the securities remained untouched until his death, and then were removed only by the executor to inventory the debtor's property. There was clearly no delivery of the securities; none to the creditor; none to a third person to hold for her. The pledge was inchoate,—a delivery proposed, but never accomplished. The case is of the class of pledges proposed, but not perfected; and nothing is better settled than that inchoate or executory contracts of pledge, not perfected by delivery, confer no rights, as against other creditors. The death of the debtor fixes the rights of the creditors as they exist at that moment. The same rule is enforced when the debtor makes a surrender of his property to his creditors. Civ. Code. No delivery had been made when that death occurred; none after was possible. Rev. Civ. Code, arts. 3133, 3152, 3162, 3182, 3183, 3185; *Buard v. Lemee*, 12 Rob. (La.) 243; *Boyce v. Escoffie*, 2 La. Ann. 872; *Slidell v. Pritchard*, 5 Rob. (La.) 101; *Orr v. Thomas*, 3 La. Ann. 582. See the cases collected in 1 Hen. Dig. p. 636, No. 7; 2 Hen. Dig. p. 1504, No. 1. The creditor's case lacks the life of the pledge in a controversy with creditors, i. e. delivery.

In a commercial community, especially, it is of importance the law of pledge should be clearly understood, and that requisites of common acceptance should not be made uncertain. The creditor's case exacts, we think, that the tests of our law shall be displaced. The case may receive appropriate illustration by supposing that precisely such a pledge as is claimed here for Mrs. Tassin was proposed to any bank or business man. The proposition would be: The execution of the borrower's note, with securities attached; the note and securities placed in a package marked with the lender's name; the package placed in the debtor's bank box; the box deposited in bank by the debtor; his clerk instructed to deliver the package on the call of the creditor; and the creditor notified when all this is done; and of the instructions given the clerk. Does any one suppose that a dollar could be obtained on any such so-called pledge of securities to be kept in the debtor's bank box, supplemented by his directions to his clerk for delivery to the creditor? Would any one suppose that, unless that delivery was obtained, there would be any pledge, as against other creditors of the debtor. On the contrary, the prompt answer, at any

bank, to any such proposition, would be that putting securities in the debtor's bank box, with all the formalities and instructions indicated, was neither delivery to the creditor, nor to a third person to hold for him, and hence there was no pledge. If a pledge, dependent, as it is, on delivery to the creditor, or the third person to hold for him, can be accomplished in the mode we are asked to recognize in this case, i. e. of securities never out of the debtor's bank box from the time he placed them in it until his executor took charge of them, there would be no limit to the pledges the debtor might make of the same property. To each lender the debtor might tender the security of his own bank box, with directions to his clerk of delivery to the creditors. The delivery obtained by any of these, relying on this bank-box pledge, would demonstrate that all the others had no pledge. This theory that pledges can be made without the complete dispossession of the debtor, and that the pledge may be consummated by marking the creditor's name on the packages of securities in the debtor's bank box, supplemented by his unexecuted order for delivery, given to his clerk and communicated to the creditor, finds its answer in our Code, in the text-books, and adjudicated cases. That answer is: The pledge requires possession in the creditor. Without that possession the pledge is inchoate or executory, only, as between the debtor and the asserted pledge creditors, but gives no right whatever as against other creditors. Boilleux thus puts it: "Une apprehension manuelle est de l'essence du contrat de gage; on conçoit que le législateur ait dû subordonner les droits du créancier à cette condition, puisqu'il ne s'agit pas d'un privilège proprement dit, c'est-à-dire d'un droit attaché à la qualité de la créance; mais d'une préférence fondée sur la possession; si le débiteur ne se dessaisait pas le gage ne serait pas qu'une source de fraudes, rien ne l'empêcherait pas de conférer successivement à plusieurs personnes des droits sur la chose." 7 Boilleux, p. 129. This commentator on the Napoleon Code is felicitous in his development of the policy to guard against fraud that requires the complete dispossession of the debtor of the pledged property, but all the text-books insist on that dispossession. See, in addition to the authorities cited, Story, Bailm. § 299; Casey v. Cavaroc, 96 U. S. 487; Story, Ag. § 367 et seq.

Adhering, as we think, to the text and spirit of the Code, it is our conclusion the pledge claimed for Mrs. Tassin was never perfected. There was neither delivery to her, or possession for her in a third person. The bonds and securities claimed as pledged to her, never delivered, but in the debtor's possession at his death, are to be deemed the common pledge of all his creditors. Rev. Civ. Code, art. 3183. It is therefore ordered, adjudged, and decreed that our former judg-

ment be avoided and set aside; and it is now ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

(July 6, 1894.)

WATKINS, J. (dissenting). With respect to the claim of the opponent Mrs. Tassin, the question is whether the possession of De Jaham was such that the privilege had struck the collaterals that were attached to the note of Pierre Lanaux so effectually as to have consecrated their proceeds to its payment, had said collaterals been seized and sold by any other creditor of Lanaux. The contention of Mrs. Tassin's counsel is: That at the request of Pierre Lanaux it was agreed between him and Mrs. Tassin that she should loan Lanaux the sum of \$40,000 out of her funds then in his hands, on his demand note, to be secured by a pledge of Louisiana state consols and New Orleans Insurance Association stock, as collateral security. That it was further agreed between said parties that the pledge was to be arranged in the following manner, namely: The note, together with the securities, were to be placed in the possession of George De Jaham, who was to put them in a bank box, which was to be placed on deposit by De Jaham in an iron safe of the New Orleans Insurance Association, at the time in the branch depository of the State National Bank, and in the custody and under the control of the secretary of the insurance association, who alone possessed the combination of the vault and safe. That the secretary of the insurance association was instructed to deliver the box containing the securities to De Jaham, on his demand; the latter having instructions from Pierre Lanaux to deliver the note and pledged securities to Mrs. Tassin, on her demand. That on the 3d of August, 1892, the note and act of pledge were executed, and they, together with the accompanying securities, were placed in the box, and the box was placed in the safe of the insurance association, where it remained uninterruptedly until after Lanaux's death. That on the 7th of August following the date of the selection of the securities, and in pursuance of the previous agreement of Mrs. Tassin and Pierre Lanaux, and by direction of Pierre Lanaux, De Jaham visited Mrs. Tassin, at her plantation, in the parish of St. John, and explained to her all that he had done,—describing the note which he had executed for Lanaux to her order, with the designated securities attached,—and that Mrs. Tassin expressed herself satisfied that he had carried out the agreement, and approved of what he had done. That, immediately after the death of Pierre Lanaux, Mrs. Tassin called on De Jaham, and, in person, demanded the note and securities; but he declined because, in his opinion, the death of Lanaux had terminated his authority in the premises.

The facts bearing on the foregoing propo-

sitions are detailed substantially by two or three of the witnesses, and they may be fairly summarized as follows, viz.: Mrs. Tassin states that she had three separate and distinct interviews with Pierre Lanaux on the subject of her business, then in his hands, viz. on the 11th of June, 1892, on the 21st and again on the 25th of July, 1892. In the first interview she gave him instructions to invest for her, in state bonds, the balance of \$45,017.26 then remaining in his hands to her credit; in the second, she agreed to loan him \$40,000 on his demand note, secured by a pledge of state bonds on the par value of \$35,000, and in stock of the New Orleans Insurance Association sufficient in amount to cover the balance of \$5,000; in the third, there was a repetition of the second, the details thereof being reiterated. She states that Pierre Lanaux's proposition was to place his demand note for \$40,000, with the aforesaid securities attached, in the hands of George De Jaham, which he would instruct him to place in a bank box in the safe of the New Orleans Insurance Association, to which George Lanaux, secretary of the company, had exclusive access, and that at the same time he would instruct the secretary to hold the box subject to the order of De Jaham, who was to be authorized to deliver said note and securities on her demand. That in the last interview with Pierre Lanaux the latter inquired of her, to know if she perfectly understood all the instructions he had previously given her, and that she replied in the affirmative. Mr. George De Jaham makes the following statement, viz.: "Mr. Lanaux gave me instructions before leaving,—that is to say, a few days before, on the 2d of August, he told me to make a note for Mrs. Tassin; to place \$40,000 for Mrs. Tassin, or \$35,000, in Louisiana state bonds, and to complete the balance of the pledge with New Orleans Insurance Association stock." Again he states: "On the 3d of August, Mr. Lanaux told me that he had given instructions to Mr. George Lanaux to call upon me for a certain box, in which I was to place the pledges for Mrs. Tassin and [others]. * * * Mr. Pierre Lanaux called at the office [on] the 3d, at about 2 p. m. He asked me if I had executed his orders. I told him, 'Yes.' I went to the bank, and got the box. I brought it into the office, opened it in his presence, exhibiting to him the notes for all these different parties, made packages before him, and replaced them in the box. That was on the 3d of August." Again he says: "Mr. Lanaux's instructions were to deliver to the parties whose names were on those packages, at their request." He states that on the 4th of August, at about 11 or 12 o'clock m., he telephoned George Lanaux, secretary of the insurance association, that he was ready to deliver to him the box, and he came and met him, and that they went together, and placed the box in his safe, in the vault of the insurance association. He further states that he

retained the key to the bank box, which continuously remained in the safe until after the death of Pierre Lanaux, and was then delivered to him by George Lanaux, and he opened it in his presence. He was asked the question whether he would have delivered the packages to the parties named, if they had demanded them; and his answer was that he would, as Mr. Lanaux had instructed him to deliver the packages to the parties named on the back of the different envelopes, upon their demand. He concludes his answer by making this statement: "His instructions were to put them in the box, as stated yesterday, subject to their demand." This witness further states that he went to "Mrs. Tassin's house on the 7th of August, 1892, * * * and told [her] that Mr. Lanaux had placed, i. e. invested for her, \$40,000, on his note, secured by \$35,000 of Louisiana fours, and 520 shares of New Orleans Insurance Association, as he had promised her. Mr. Lanaux had told me to go there. Q. Did he instruct you to go there and inform her? A. Yes. Q. After you related to her (Mrs. Tassin) what occurred on the 3d day of August, did she say anything? A. Well, she said it was all right, according to what Mr. Lanaux had promised her." The witness again states that, after Mr. Lanaux's death, Mrs. Tassin called on him for the note and the securities, but he declined to deliver them, because, in his opinion, his authority from Pierre Lanaux ceased at his death. Counsel for the executor said, interrogatively: "And therefore you knew that when he died you would have no power over it, for the reason that it (the box) must be opened in his estate?" But his answer was: "No, I did not think it belonged, even after his death, to his estate. Q. The instructions of Mr. Pierre Lanaux were up to the time of his death? A. He did not specify up to the time of his death. The words were: 'You will deliver these packages to the parties whose names are on them, on their demand.' These were the only words he spoke to me in reference to these packages." The witness then repeats that the instruments or pledges were thus made, and placed in a bank box, and the parties were duly notified of the fact of the pledges having been made; and their accounts current were duly credited with the proper amounts, corresponding with the amounts of the secured notes. Mr. George Lanaux states that on the 2d or 3d of August, 1892, Pierre Lanaux "crossed over from the State National Bank to the office of the New Orleans Insurance Association; came to [his] office, and said, 'George, can you put a bank box in the iron safe of your company?'" To which question the witness replied: "It depends on the size of the box. Our iron safe is pretty full." "Lanaux said: 'Try and put the box in the safe. George De Jaham will give you the box.' That was all P. Lanaux said to me in relation to the box. That was in the morning, between 10 and 11 o'clock. About

2 o'clock that same day, I telephoned to De Jaham, * * * asking him if P. Lanaux told him about a bank box which I was to put in the safe of the New Orleans Insurance Association. He said, 'Yes;' but he was not ready to put the box in the safe, but would telephone me. * * * The following day, De Jaham telephoned that he was ready to put the box in the safe of the company. I answered, to wait for me at Lanaux's office; that I was coming. Immediately, I left my office, and proceeded to Pierre Lanaux's office, on Conti [street], and, together, accompanied by De Jaham, took the bank box from the desk in P. Lanaux's office, and went to the branch depository of the State National Bank, corner of Royal and Conti streets, and, having assistance of employes of the bank, we went into the vault where our safe is. I opened the safe, and, after having moved certain securities from one shelf to another, we succeeded in putting in the bank box. * * * There is no key to the safe. There is a combination. I had the combination. I was the only person who had the combination." On being asked if he knew anything of the contents of the box, he said he did not. He further states: "On the 6th of September I delivered the box to George De Jaham, who called for it. I had received it from George De Jaham. * * * He returned it to me in the course of five minutes." This witness again says: "I surrendered the box to De Jaham, having received it from him. I did not know whose agent he was, or considered himself to be. That I cannot answer. De Jaham will answer that. You cannot expect me to answer for De Jaham." Mr. Denis Lanaux states that the first time he "saw this tin box was on the 6th of September, * * * with De Jaham and George Lanaux. I had been informed by De Jaham that he had a box, which box was in the safe of the New Orleans Insurance Association, which was in the vault of the branch depository of the State National Bank,"—informing witness of the contents. He said that "George Lanaux opened the vault, and De Jaham opened the bank box. We found packages,—one marked 'Property of Mrs. Tassin,' etc. He again said, "De Jaham told me he had the bank box," and, being asked when he was so informed by De Jaham, replied that "it was on the 4th or 5th of September, * * * two or three days before Lanaux died."

On this evidence, there can be no doubt of the following facts being fully established, viz: (1) That there was an agreement between Pierre Lanaux and Mrs. Tassin that certain specified collaterals were to be attached to his demand note for \$40,000 in her favor, as security therefor. (2) That the note was accordingly executed, and the aforesaid collaterals were thereto attached, and that same were placed in an envelope, indorsed, "Property of Mrs. F. E. Tassin," and that this envelope was deposited in a bank box, that was locked, and deposited in a safe

in the vault of the New Orleans Insurance Association. (3) That De Jaham was proposed by Pierre Lanaux as the person who was to carry the agreement between himself and Mrs. Tassin into effect, and that Mrs. Tassin was so informed, and unequivocally accepted the proposition. (4) That Pierre Lanaux gave De Jaham instructions in exact conformity with the aforesaid agreement; that, in pursuance of said instructions, De Jaham accepted the trust, and made and executed in favor of Mrs. Tassin a demand note for \$40,000, and signed per pro Lanaux, and to that note attached the specified collaterals, and placed them in a bank box, and locked the box, and deposited it in the iron safe of the New Orleans Insurance Association, retaining the key in his possession. (5) That, in pursuance of the instruction of Pierre Lanaux, De Jaham visited Mrs. Tassin, at her plantation, in the parish of St. John, for the express purpose of reporting to her, carefully and succinctly, all he had done, as Mr. Lanaux had promised her he would, and which, she acknowledged to De Jaham, had been done according to their agreement. (6) That De Jaham, assisted by George Lanaux, secretary of the insurance association, and other bank employes, placed the bank box containing the securities specified in the safe of the insurance association, in the vault of the company; De Jaham retaining the key of the box, and George Lanaux keeping the combination of the safe. (7) That the box thus remained on deposit, and was not touched by any one, until after the death of Lanaux, when George Lanaux opened the safe, and permitted De Jaham to remove the bank box. (8) That on the 7th of September, 1892,—the next day after the death of Pierre Lanaux,—Mrs. Tassin called upon De Jaham for the delivery to her of the note and the pledged securities; but her request was declined, on account of Pierre Lanaux's death, De Jaham explaining that she would receive them in a few days. (9) That, on the following day, De Jaham, accompanied by Denis Lanaux, visited the branch depository of the State National Bank, and called upon George Lanaux, secretary of the New Orleans Insurance Association, for the delivery of the bank box; that the secretary at once opened the vault and safe of the insurance association, and delivered the bank box to De Jaham; and that De Jaham produced the key, opened the box, and he and Denis Lanaux examined the packages therein deposited, whereupon the bank box, with the pledged securities, was returned to the custody of the insurance association.

Recurring to the query propounded, it appears that, in the light of the evidence detailed, it must receive an affirmative reply,—that the possession of De Jaham was such that Mrs. Tassin's privilege had so effectually struck the collaterals that she would have been entitled to the proceeds if any other creditor of Lanaux had seized and sent them

to sale. Or, in other words, Pierre Lanaux absolutely lost or discontinued control over the pledged collaterals from the moment the bank box containing them had been, by De Jaham, deposited in the iron safe of the New Orleans Insurance Association. After that date the custody of De Jaham was exclusively for the account of Mrs. Tassin, to whom he was directed by Pierre Lanaux to deliver upon her demand. With Pierre Lanaux's knowledge, and by his direction, the collaterals indicated by him, and agreed upon by him and Mrs. Tassin, were segregated from his other assets, were attached to his demand note in her favor, and placed in an envelope, and marked, "Property of Mrs. F. E. Tassin," and by De Jaham deposited in a bank box, of which he possessed the key. With the assistance of the secretary of the insurance association, and others of its employés, the bank box containing the pledged securities was removed from the desk of Pierre Lanaux, and deposited in an iron safe in the vault of the insurance association, of which its secretary alone possessed the combination, thus completely severing Pierre Lanaux's control and dominion over the box and its contents. And when De Jaham called on Mrs. Tassin, and informed her of all that had been done, "as he [Pierre Lanaux] had promised her," and Mrs. Tassin expressed her approbation of the acts he had performed, "as Mr. Lanaux had promised her," the vinculum of the contract was completed, and henceforth De Jaham was exclusively her agent. That De Jaham so understood the position is fully attested by his statements, to the effect (1) that Mr. Lanaux's instructions to him were for him to deliver the pledged collaterals to the parties whose names were indorsed on the respective packages, at their request; (2) that the instructions of Pierre Lanaux were not up to the time of his death, but that he was to deliver upon the demand of the pledgees; (3) that he (De Jaham) informed Mr. Denis Lanaux, two or three days prior to the death of Pierre Lanaux, that he held a box in the safe of the New Orleans Insurance Association, containing pledged securities; (4) that, immediately after the death of Pierre Lanaux, De Jaham visited the vault of the insurance association in company with Denis Lanaux and the secretary of the insurance company, opened the vault and the safe, and delivered the box containing the securities into the hands of De Jaham, and he unlocked it in the presence of the secretary and Denis Lanaux, and thereupon he and Denis Lanaux examined the securities that were found in the box, and, among the number, the package indorsed, "Property of Mrs. F. E. Tassin;" (5) that after their examination was completed the packages were returned to their places, Mr. De Jaham locked the box, and returned it to the custody of the secretary of the insurance association, and he, in turn, placed the box in the iron safe, and closed it, as well as the

vault, he alone possessing the combinations. What more could have been done, or what additional formality could have been observed, to have perfected the delivery of pledged collaterals to a third person agreed upon by the parties? The text of the law is, "It is essential to the contract of pledge that the creditor be put in possession of the thing given him in pledge," etc. Rev. Civ. Code, art. 3152. But there is an express qualification placed upon this article, in these words, viz.: "In no case does this privilege [Rev. Civ. Code, art. 3157] subsist on the pledge, except when the thing pledged, if it be a corporeal movable, or the evidence of a credit, if it be a note or other instrument under private signature, has been actually put and remained in the possession of the debtor, or of a third person agreed upon by the parties." Id. art. 3162. Was not De Jaham the third person agreed upon by the parties? Was not his selection duly notified to him? Did he not carry out his instructions to the letter, in the preparation of the note and pledge, and in giving to Mrs. Tassin information of his having performed all the acts that Pierre Lanaux had promised her should be performed? Did not Mrs. Tassin specifically approve and accept same, and subsequently call on De Jaham for the note and pledged collaterals, in keeping with Lanaux's directions to deliver to her order? And, finally, did not De Jaham declare to Denis Lanaux, before Pierre Lanaux's death, that he held possession of the pledged collaterals, and, after Lanaux's death, did not the secretary of the insurance association deliver them to him? And can it be doubted, in view of the act of the secretary in surrendering the actual possession of well-nigh \$150,000 of state bonds into the power of De Jaham, two or three days after the death of Pierre Lanaux, that De Jaham had a right of custody and control, entirely independent of Lanaux? There can be no other solution of the question. What is the answer to the foregoing proposition? That of the district judge was, as appears from his reasons for judgment, that the instructions of Lanaux to De Jaham "were those of an employer to his clerk;" that Lanaux "said nothing about the bank box, or of De Jaham's holding it, or the securities it contained, as the agent for any one, or as a party agreed upon, with whom the box and securities were to be deposited, nor did he, at the time, instruct De Jaham to notify the pledgees that the securities had been placed in the box, subject to their demand. But De Jaham testifies that he did so, at some time not mentioned in the testimony."

It is evident that the judge *a quo* was under a misapprehension of the facts adduced in evidence on all of the foregoing propositions. Pierre Lanaux being dead, his lips are sealed, and cannot speak, but De Jaham's testimony is clear and unmistakable. He says (using his own words): "His instructions were to put it in the box, as I stated

yesterday, subject to their demand." Again: "He did not specify, up to the time of his death. His words were, 'You will deliver these packages to the parties whose names are on them, on their demand.'" Again: "I went to Mrs. Tassin's house on the 7th of August, 1892, * * * and told her that Mr. Lanaux had placed—invested for her—\$40,000, on his note, secured by \$35,000 of Louisiana fours, and 520 shares of the New Orleans Insurance Association, as he had promised her. Mr. Lanaux had told me to go. Q. Did he instruct you to go there and inform her? A. Yes. Q. After you related to her [Mrs. Tassin] what occurred on the 3d of August, did she say anything? A. Well, she said that it was all right, according to what Mr. Lanaux had promised her." From the foregoing it is perfectly evident that De Jaham had been made acquainted with "what Mr. Lanaux had promised Mrs. Tassin," and that one of the things he had promised her was that De Jaham was to deliver the securities to her, on her demand. It is equally evident that he did inform Mrs. Tassin that he had deposited Lanaux's note and the securities he had specified in their previous agreement, which he would deliver on her demand, and that she expressed herself satisfied that he had done all that Lanaux had promised her. It is likewise evident that the dates, places, and circumstances are all precisely detailed, with perfect accuracy.

That De Jaham was at the time the clerk of Pierre Lanaux is a matter of no consequence. The following queries have been propounded, the trend of which is to show that De Jaham acted in the capacity of Lanaux's clerk throughout all these transactions, and that consequently the bonds were at all times in Lanaux's possession, being in his bank box. The two must be taken together, as one is but the counterpart of the other: "(1) Can this court hold, as a proper interpretation of the law of pledge, that a debtor putting bonds in a package marked with the debtor's name, instructing his clerk to deliver,—the creditor apprised in advance that instructions will be given, and notified afterwards by the clerk,—consummates the pledge, although the instructions were not fulfilled, and the bonds always remained in the debtor's box? (2) Would any bank take such a pledge, i. e. lend money on the debtor's bonds, in his bank box, and on his direction to his clerk to deliver, or would the bank have any pledge unless the clerk delivered?" Both of these questions may be answered in the negative without in any manner affecting the claim of Mrs. Tassin.

If it be conceded that De Jaham was acting as Lanaux's clerk, in the transaction with Mrs. Tassin, and that the collaterals remained in Lanaux's custody all the while, of course there was no pledge. But De Jaham was the third person agreed upon between Pierre Lanaux and Mrs. Tassin to hold the collaterals for the latter, and, though the box

may have been the property of Pierre Lanaux, it was removed from his possession before the collaterals were placed in it; and, when the collaterals were deposited in the box, De Jaham locked it, and thereafter retained the key. Then De Jaham, assisted by the secretary and his employes, put the box in the safe of the insurance association, to which the secretary alone possessed the combination. No one had access to the box, but De Jaham; and the secretary gave him access to it after the death of Pierre Lanaux, he being accompanied by George Lanaux. And while it is true that De Jaham was the clerk of Pierre Lanaux, within the scope of the latter's business, he was at the same time the third person agreed upon by him and Mrs. Tassin to hold the securities for the latter. There is no incompatibility between the two positions. This was distinctly held in *Weems v. Delta Moss Co.*, 33 La. Ann. 974; this court declaring that "the objection that the two custodians of the property pledged were employes of the company has no force, and cannot destroy the effect of delivery to Reichard." Consequently, this is not the case supposed, of collaterals being in a debtor's bank box, who had given his clerk instructions to deliver, which instructions he had not fulfilled; but it proceeds on the theory that De Jaham was the third person agreed upon by the parties, and that he had possession, with instructions to deliver to Mrs. Tassin on her demand, within the plain and evident meaning of the Code. But a further proof of Pierre Lanaux's lack of possession and control of the collaterals is furnished by the procuration that was annexed thereto, authorizing the pledgees (not De Jaham) to sell the collaterals. Such a mandate to the pledgee is an adjunct of the pledge, and inseparable from it. Such a mandate, in its nature, is irrevocable. *Journal du Palais*, 12 and 19, of 1827. And in *Renshaw v. His Creditors*, 40 La. Ann. 37, 3 South. 403, this court said: "The same principle applies in every case where the mandate is granted as a condition of the contract, or as a means of executing it. In such case the mandate, forming an element of a synallagmatic contract, is impressed with the qualities of such a contract, and is irrevocable. *Journal du Palais*, 7th July, 1837." And the court further observes: "It is plain that the powers of attorney, here involved, belonged to the class which has been described, forming important adjuncts to the contracts of pledge, themselves, and stipulated, in the interest of the mandatories, that the mandator had no power to revoke them, and hence they are equally irrevocable," etc. *Renshaw v. His Creditors*, 40 La. Ann. 40, 3 South. 403. After its execution, Pierre Lanaux had no more power to revoke this mandate to the pledgee, to sell, than he had to revoke the note he had executed. When executed, and delivered into the hands of the depositary agreed upon between himself and Mrs.

Tassin, the mandate became irrevocable, in so far as he was concerned.

The only question for consideration is whether the agreement between pledgor and pledgee, and the possession of the third person agreed upon, was binding on Lanaux's creditors, or, in other words, whether Mrs. Tassin's privilege could be enforced on the proceeds of the securities pledged, in case they had seized and sold them, as they evidently had the right to do. *Augé v. Variol*, 31 La. Ann. 865. If the pledge in favor of Mrs. Tassin was in keeping with the Code, it was evidently binding on the creditors of Lanaux; and, as the Code authorized that a contract of pledge may be effected by delivery of possession of the thing pledged to a third person agreed upon by the parties, the only question in this case is whether De Jaham had an effectual possession of the bonds. The only figure that the secretary of the insurance association cuts in the transaction is that, being the custodian of the company's vault where the bank box was deposited, his custody proved the possession of De Jaham, and disproved the possession of Pierre Lanaux. If so, the Code declares that the privilege of the pledgee does subsist on the thing given in pledge (1) when "it has been actually put and remains in the possession of the creditor;" (2) or when "it has been put and remains in the possession of a third person agreed upon between the parties." Rev. Civ. Code, 3162. The latter character of pledge has been frequently and recently recognized and enforced by this court, on evidence far less clear and cogent than that which is afforded by this record. In *Conger v. City of New Orleans*, 32 La. Ann. 1250, a case is presented of a demand for 23-year bonds of the city of New Orleans, which the city had pledged, retaining the bonds in her own possession,—she being the debtor,—and this court said: "Possession, though essential to the validity of the pledge, need not be always in the creditor. It is sufficient that the thing pledged be in one occupying, ad hoc, the position of a trustee. The debtor himself may in some cases be considered as such trustee, and be given possession of the thing by him pledged, provided his tenure be precarious, and clearly for the account of the creditor. The Louisiana doctrine is in perfect accord with the common, Roman, and French laws. See Rev. Civ. Code, 3162; Code Nap. 2076, and various cited authorities,—particularly, Pothier, Pandects; Bell's Comm.; Troplong, Nantissement; Dalloz, Répertoire; and Duranton. The authority of the Conger Case has been followed and approved by this court in many subsequent and well-considered cases. In *Weems v. Moss Co.*, 33 La. Ann. 973, a case is stated of a pledge having been made of the building and factory of the company, and of its various movable effects, enumerated in the act of pledge, which was entered into between the president of the company

and the creditor, appointing one of the company's employes as custodian; and that pledge was maintained against the creditors of the company, after it became insolvent, on the authority of the Conger Case. In *Jacquet v. His Creditors*, 38 La. Ann. 863, a case is stated of a pledge having been executed of certain machinery used for the manufacture of tobacco, consisting of boilers, engines, cutters, etc., which was agreed to by the parties, who selected a third person as custodian,—the act of pledge stipulating a right of sale in the pledgee. Same was maintained against the creditors of the partnership after the surrender of the pledgors, on the authority of the Conger and Jacquet Cases. In *Woodward v. Railway Co.*, 39 La. Ann. 566, 2 South. 413, a controversy is stated between the plaintiff, asserting a privilege resulting from a pledge of certain iron rails and other appurtenances used in the construction of a railroad, and which had been secured by an act of pledge of the railroad and all of its appurtenances, by placing same in the custody of a third person named; the plaintiff's privilege being resisted by an intervener claiming a privilege upon certain lumber he had sold the company for the purpose of building bridges, etc. The demand of the intervener was rejected, and that of the plaintiff was sustained; his privilege as pledgee of the railroad, in its entirety, being sustained, as upon personal property, on the authority of the Conger, Weems, and Jacquet Cases. In *Levy v. Ford*, 41 La. Ann. 873, 6 South. 671, a case is stated of a pledge of a mortgage note for \$7,000, for the security of two different claims of two different creditors; a third person holding possession as the mutual mandatory of the pledgor and the two pledgees, they each having a limited interest in the pledged collateral. This pledge was maintained as against a competing mortgage creditor of the pledgor. *Peters v. Guano Co.*, 42 La. Ann. 690, 7 South. 790, presents the case of the agents of a company engaged in the manufacture of guano giving in pledge, to two lenders of money in Boston, on a cargo of guano, a bill of lading for the goods in transit to the consignee thereof at New Orleans, one of the pledgees holding for the two. This court not only maintained the pledge with respect to the people in Boston, but held, also, that it extended to the consignees of the agents in New Orleans, as well as to the New Orleans bank, to whom he assigned it for another and independent loan, all without the specific knowledge of the guano company, the agent's authority being purely derivative. On the authority of the foregoing well-considered cases, interpreting the provision of the Code which declares that a privilege subsists on the thing given in pledge "if it has been put and remained in the hands of a third person agreed upon" (Rev. Civ. Code, 3162), the jurisprudence of this court may be considered thoroughly settled as to the question that is controverted

in this case, not only with regard to the parties, inter se, but with regard to creditors, privileged as well as ordinary, even in insolvencies and successions.

As opposed to the foregoing decisions, the opposing creditors cite and rely on *Casey v. Cavaroc*, 96 U. S. 487,—which is a Louisiana case, and is predicated on Louisiana decisions and precepts of the civil law,—as stating a different rule. In that decision a case is stated of a New Orleans bank offering to make a pledge of collaterals as security to the Société de Crédit Mobilier, of Paris, France, for proposed acceptances; the bonds and notes to be placed on deposit with a third person named and agreed upon between the bank and the society, said third person becoming guarantor of the bank. The question raised in that case was whether "there was such a delivery and retention of possession of the collateral securities as to constitute a valid pledge by the law of Louisiana;" and, making answer to that query, the court said: "Clearly, they were never out of the possession of the officers of the bank, and were never out of the bank, for a single moment, but were always subject to its disposal, in any manner whatever, whether by collection, renewal, substitution, or exchange; and collections, when made, were for the account of the bank." In support of this opinion the court refers to only two decisions of this court as bearing on the question at issue, and those decisions were rendered in *Geddes v. Bennett*, 6 La. Ann. 516, and *Succession of De Meza*, 26 La. Ann. 35. In those cases the pledges were not sustained. In the former a case is stated of certain barrels of whisky being the object of the pledge, the creditor permitting the pledgor to remove them to his own premises, on his simple receipt,—he subsequently making sale of them to another. In a suit of the pledgee against the purchaser, the sale was maintained. That case has not the least applicability, in my conception, to the *Cavaroc* Case, nor to the instant one, for the reason that it was not the case of a thing being given in pledge by placing it in the hands of a third person agreed on. In the latter case, certain creditors of the deceased, having made advances on the faith of an insurance policy, which he had left in the hands of his bookkeeper, with instructions to deliver, the right of pledge was denied on the ground that the creditors did not have the possession requisite to constitute a pledge; this court holding "that the policy was never beyond the control of De Meza, and that Myers & Levy [creditors] never had the requisite possession thereof. The bookkeeper never held the policy as agent or trustee for Myers & Levy. Although informed of his employer's intention in regard to one of the policies, he was never intrusted to deliver to Myers & Levy, or any one else. There was therefore no delivery of the policy to Myers & Levy, although the deceased intended to do so. Consequently, they never

held it as a pledge, as collateral security for their accommodation indorsements." (Our italics.) It is evident, upon simple perusal of that paragraph of the opinion, that it was a case of alleged possession, by the creditor, of the collaterals, and not that of a third person agreed upon by the creditor and debtor. The two cases are exactly parallel, and, in my opinion, not in line with the *Cavaroc* Case. In that case the court made an extensive examination and collation of cases, and, in its summary, gives a very clear and comprehensive definition of the character of possession that is necessary to complete a pledge in the hands of a third person agreed on. "The difference," say the court, "ordinarily recognized between a mortgage [i. e. at common law] and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the essence of a pledge (Pothier, Nantissement); and, if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual. It may be constructive, as where the keys of a warehouse containing the goods pledged are delivered, or a bill of lading is assigned. In such case the act done will be considered as a token standing for the actual delivery of the goods. It places the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. In such case there is a union of two distinct forms of security,—the pledge and mortgage; mortgage by virtue of the title, and a pledge by virtue of the possession. This advantage exists when notes and bills are transferred to a creditor by way of collateral security. The possession gives them the character of a pledge. The indorsement, if payable to order, and their delivery, if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt*, 5 Denio, 269, and *Clark v. Iselin*, 21 Wall. 360. Hence, the actual possession of the securities by the creditor was a matter of less importance in those cases." So, in the instant case, the collaterals being of the class of commercial paper that is payable to bearer, and which consequently passes a complete title by mere delivery, De Jaham had title as well as possession,—his possession being evidenced by his possession of the key to the box in which the securities were kept, and to which no one else had access, and upon which the opponents acquired no right during Pierre Lanaux's lifetime. But, even if it is considered doubtful whether De Jaham held possession, independently of Lanaux, for the account of Mrs. Tassin, the court, in the *Cavaroc* Case, cited various cases in which precedents are given of privileges having been recognized, as against creditors, even when the pledgor retained precarious possession of the thing pledged,—as intimated in

the Conger Case. A case in point is that of *Clark v. Iselin*, 21 Wall. 360, in which the court held that the pledge was not vitiated by the pledgee returning the collaterals pledged, to the pledgor, for collection; also, the case of *White v. Platt*, 5 Denio, 269, to same effect,—the court holding that in such case the pledgor acts as the servant or agent of the pledgee, and the character of the security is not changed. A strong case of the kind is cited from the Massachusetts court (*Macomber v. Parker*, 14 Pick. 497), of a pledge having been maintained through the precarious possession of the pledgor. The pledgor was the proprietor of a brickyard, and the pledgee advanced the money requisite for the manufacture of bricks; the contract being that the bricks, as fast as made, should be pledged as security for the advances thus made, but the pledgor was to retain the bricks in his charge, and sell them at retail, and deposit the proceeds in bank, to the credit of the pledgees. Before sale, the bricks in the yard of the pledgor were attached for a debt; but the pledge was maintained, the court employing this language, viz: "To say that the limited authority to sell the bricks by retail, in small sums, on account of the plaintiffs, was a waiver of their possession of the residue that remained in the kilns in their yard, would be clearly against the intent and meaning of the parties, unreasonable, and unwarranted by the evidence. The special authority given by the plaintiffs to the [brickmaker] was to clothe him with the character of an agent to a limited extent only, and no remission to him, in his character of pledgor, of the plaintiffs' right to retain the bricks according to agreement." The creditor's attachment was dissolved, and the pledge maintained. An example of this kind is furnished by *Trop-Long*, in treating of article 2076 of the Code Napoleon,—of which article 3162 of our Code is but a repetition,—of a merchant in Bremen having pledged 60,000 bottles of Burgundy wine to a merchant of Baden, as security for a debt; the wine having been delivered to an agent of the pledgee, it having been agreed that the pledgor should give it necessary attention and care. It so happened that the agent of the pledgee occasionally left the key of the vault in the possession of the pledgor, and on one occasion the latter removed some of the bottles of wine to his own premises; and subsequently to his surrender in insolvency the syndic insisted that the pledge was null and void on that account,—the debtor and pledgor not having been dispossessed of the wine. But the validity of the pledge was maintained, as against the creditors of the pledgor in insolvency. *Trop-Long*, *Nantissement*, No. 311. A like interpretation is given of the Code Napoleon by other French commentators. 32 *Dalloz*, *Répertoire*, p. 455; 18 *Duranton*, No. 525 et seq. The court, in the *Cavaroc Case*, citing two leading state decisions, express the further

opinion on this question, and say: "So, when the debtor is employed in the creditor's service, his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession of the debtor. This is in accordance with the common and the civil law. *Reeves v. Capper*, 5 Bing. (N. C.) 136, was a case of this kind. A sea captain pledged his chronometer for a debt. He was afterwards employed by the pledgee as master of one of his ships, and the chronometer was placed in his charge, to be used on the voyage. It was held that the pledge was not lost. He recovered the chronometer, as against a person to whom the master had pledged it a second time. In *Hayes v. Riddle*, 1 Sandf. 248, the plaintiff delivered to the defendant, at his request, a convertible bond of the New York & Erie Railroad Company, which had been pledged by the latter to the former, in order to get it exchanged for stock of the same company, which was returned, and substituted for the bond in pledge. The defendant never returned either the bond or the stock. The plaintiff brought action in trover against him for the bond, and recovered its value, being less than the debt for which it was pledged. Judge Story is in perfect accord with the views entertained by the supreme court, and, in the course of an elaborate discussion of the question, says: "As possession is necessary to complete the title by pledge, so, by the common law, the positive loss or delivering back of the possession of the thing, with the consent of the pledgee, terminates his title. However, if the thing is delivered back to its owner for a temporary purpose only, and it is agreed to be redelivered by him, the pledgee may recover it against the owner, if he refuses to restore it, after the purpose is fulfilled. So, if it be delivered back to the owner in a new character, as, for example, as special bailee or agent. In such a case the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons, for under such circumstances the possession is perfectly consistent with the existence of the original rights of the pledgee." *Story*, *Bailm.* § 299, citing various authorities.

In consideration of the authorities I have cited, I think it can be safely affirmed that the pledge in favor of Mrs. Tassin was good and valid—First, because the bonds were held by a third person agreed upon, with instructions to deliver on demand of the pledgee; second, because they were deposited in a vault over which the debtor had no control, and in a bank box, of which the third person agreed upon had the key; third, because the pledgor had executed a power of attorney authorizing the pledgee to sell the thing pledged; fourth, because the debtor had credited his books with the amount of the pledged collaterals, and also the creditor's account; fifth, because the third person claimed possession just before the pledg-

or's death, and was allowed to have access to the pledged collaterals after his death, the safe and vault being voluntarily opened by the secretary of the insurance association, and the box containing the securities unlocked by the third party in the presence of others and the secretary. And finally, if it be considered that the bonds were, after their deposit, in any manner, in the possession or under the control of Pierre Lanaux, through De Jaham, it was only a precarious possession, for the account of Mrs. Tassin, and which cannot be successfully opposed by the creditors of Lanaux, as against Mrs. Tassin. As the case herein presented justifies and establishes the sufficiency and completeness of Mrs. Tassin's pledge, our original opinion should, to that extent, be maintained; but as the proof fails, in my opinion, to show that the Hymels participated in the agreement selecting De Jaham as a third person to take and hold the collaterals specified, this contract of pledge, as to them, is lacking a vital element to give it force and efficacy, as to third persons and creditors of Pierre Lanaux, though it was perfectly good and valid as between the parties. The Code requires that there must be an actual delivery to the creditor or pledgee of the thing pledged. This is an essential to the completion of the pledge. It is the test of its efficacy. But the Code states, as an exception to this general rule, that if the thing be placed and remain in the hands of a third person, who is agreed upon by the parties, the privilege of the pledgee attaches to the thing pledged; and, having failed to participate in the agreement selecting De Jaham as custodian of the assets placed for the several accounts of the Hymels, their pledges were incomplete, and they acquired no lien or privilege on said assets. And in this respect the opposition of creditors must be maintained, and to that extent our former opinion and decree should be amended; and, as thus amended, affirmed.

McENERY, J., concurs in this opinion with respect to the claim of Mrs. Tassin, but dissents from the views expressed as to other parties, maintaining the correctness of the original opinion of the court, in its entirety.

(102 Ala. 25)

STATE ex rel. MARTIN, Atty. Gen., v. TALLY, Judge.

(Supreme Court of Alabama. Aug. 9, 1894.)

CIRCUIT JUDGE — COMPLICITY IN MURDER — IMPEACHMENT — POWER OF SUPREME COURT — TAKING EVIDENCE AWAY FROM SEAT OF GOVERNMENT — REASONABLE DOUBT — EVIDENCE — SUFFICIENCY.

1. Though the supreme court must be held at the seat of government, except that if it shall become dangerous it may adjourn to a different place (Const. art. 6, § 3), in proceedings to impeach a circuit judge in the supreme court the judges of such court may, to subserve the convenience of witnesses, and in pursuance of an agreement between the state and respondent,

take the evidence and hear the arguments of counsel at a place other than the seat of government.

2. An information in impeachment proceedings of a circuit judge charged respondent (1) with willful neglect of duty while in office, in that, knowing the intent of four persons named to take the life of one R., and having opportunity to intervene, in his official capacity, to prevent the execution of such intent, he willfully failed and neglected to do so; and (2) with complicity in the murder of R. by such persons. *Held*, that it was competent to show the abstract fact that the grievance such persons had against R. was that he had seduced the sister of respondent's wife and of three of such persons.

3. But other evidence on such subject, including letters from R. to such sister, was irrelevant and immaterial, it appearing that both respondent and such persons had full knowledge of such seduction long before the killing of R.

4. On such impeachment trial, it was not competent for respondent to testify as to the purpose and intention which actuated him in sending a certain telegram to one H., nor for H. to testify that on receiving such telegram, and one from a kinsman of R., on the morning of the killing, he "went down to the hotel to see if R. was there,—to see if he had come there; went down to advise with him, and to see what the trouble was, and also to deliver the message."

5. Where a person talks with an attorney, with a view to retaining him, the conversation is privileged, though the relation of attorney and client is never established between them.

6. On impeachment, the guilt of respondent must be established by the evidence beyond a reasonable doubt.

7. On such trial, it appeared that R., respondent, his brothers-in-law, S., J. S., and W., and their cousin, J., all lived in the town of S.; that, on account of fear of being killed by J. and his cousins, R. left such town at 6 o'clock a. m. on February 4, in a closed hack, with three other persons, all armed, to go to a railroad station 18 miles distant, where R. intended to take a train; that such three cousins learned of R.'s flight, and armed themselves, and started in pursuit, on horseback; that they came near R.'s hack, some distance from the station, where S. and J. S. left their horses, and ran along the railroad track to the depot, while the other two followed the hack, also on foot; that they concealed themselves, and soon after R. alighted from the hack he was shot by them. There was evidence that J. S. lived with respondent; that two days before the killing a witness suggested to the latter that such persons were "on the warpath" for R., but he said he guessed not, as R. would leave the town; that, the day before the shooting, respondent and S. consulted for half an hour in regard to the relations of R. with S.'s sister, but respondent and S. testified that the conversation related to the best means of learning where such sister was, and getting her home, and their determination to do no violence to R., and to allow him to leave; that, soon after R. left, J. and J. S. were on the street, near respondent's barn; that S. was then on horseback, and talking to respondent, near the barn-lot fence, but remained there only a minute, when he followed the other two in the direction of such railroad station; that W. was seen going in the same direction; that respondent was seen at his front gate twice during the morning, looking in the direction W. had gone; that W. rode a horse procured by respondent's son at a livery, for the use of which respondent paid after he was charged with complicity in the murder; that J. S. left respondent's house, where he had slept, went down town, armed and mounted himself, came back, and hitched his horse in front of the house, stood his gun against the front gate, went to the dining room, and ate something, and then rode away

and joined the others; that R.'s flight and the pursuit were soon known and talked about by everybody in the town; that respondent went to the depot and telegraph office, where he remained most of the morning; that a witness there suggested to him that a hack and physician ought to be sent after the parties who had gone, and he said his folks could take care of themselves; that it was also suggested that a telegram ought to be sent to have them all arrested; that he made no reply, but said he was waiting to see if anybody sent a telegram; that a kinsman of R. went to the telegraph office, and sent a message to R., saying: "Four men on horseback following. Look out;" that he was followed by respondent, who immediately wrote a message himself, addressed to the operator at such railroad station (a friend of respondent); that he then advised with a witness as to preventing the operator from sending the message to R. by putting him out of the office; that he was dissuaded from doing so, and gave the operator the message he had written, as follows: "Do not let the party warned get away;" that he said to the operator, "This message has something to do with that one just received," and he wanted it sent; that soon afterwards he told the operator to add to the message, "Say nothing;" that it was sent just after the one to R.; that afterwards he abstracted the telegram from the files, and, on the preliminary hearing of the parties for the murder of R., testified that "it was not about this matter. It was to a friend, about another matter; nothing concerning this case;" and that about 11 o'clock respondent received from S. a message saying, "R. dead. None of us hurt." Respondent testified that he knew of the relations between R. and his sister-in-law; that on January 6th he and S. consulted as to what was best to be done, S.'s brother D. being present; that S.'s plan was to get his sister home, and let R. leave, and make the best of it; that respondent concurred in such course; that D. spoke of killing R., when respondent said, "D., that won't do. This is the best management;" and that this was the only time any member of the family ever said anything in his hearing about killing R. Respondent was corroborated by the testimony of S. The evidence was that respondent's wife, at the instance of W., ordered the horse he rode, and sent her son for it; that she was in the habit of doing this; that it was charged to respondent, as was the custom, and he paid for it in the usual course; that he did not see W. at all, and did not know the horse had been ordered until after W. had gone; that on that morning he did not get up until some time after his wife and J. S.; that he did not see J. S. at the house at all, nor his horse and gun at the front gate; that he went to the back yard, and saw S., J., and J. S. riding away; that he called to S., and he rode to where respondent was, near the fence; that he twice asked S. where he was going, and both times he replied, "Up the road," and said he was in a hurry, and rode away. As to this interview, respondent was corroborated by S., and as to the circumstances and brevity of it, by a disinterested witness. Respondent also testified that he did not see his wife until after her brothers had gone, when she told him of R.'s flight, and the pursuit by the brothers, which was his first knowledge of it. *Held*, that the evidence does not show beyond a reasonable doubt that respondent knew of the purpose of his brothers-in-law and their cousin to pursue and kill R. before they started in such pursuit, and that he was not guilty of willful neglect of duty, as charged on the first count of the information.

8. Nor does such evidence show that respondent was informed of the intention and purpose of such persons to unlawfully take the life of R., and held communications with them touching such purpose, and knew of their pursuit of R., and had such knowledge when they

were preparing therefor, and at the time they set out in such pursuit, and was therefore guilty while in office of an offense involving moral turpitude, to wit, the offense of murder, as charged in the first specification of the second count of the information.

9. But such evidence shows that respondent, knowing the intention of his brothers-in-law and their cousin to take the life of R., and, after they had gone in pursuit of him, did acts (*viz.* watch at S.) to prevent warnings of danger being sent to R., and sent a telegram to the operator at the railroad station to which R. had gone, intended to further their design, and aid them in the taking of R.'s life, under circumstances which rendered them guilty of murder. Head, J., dissenting.

10. Under Code, § 3704, providing that all persons concerned in the commission of a felony, whether they directly commit the act, or aid or abet in its commission, though not present, must be indicted, tried, and punished as principals, it is essential to the guilt of respondent, as charged in the information, that such acts should have contributed to the effectuation of the design to kill R.

11. It is not essential that the assistance given by respondent contributed to the criminal result; but it is sufficient if it facilitated a result that would have transpired without it, or if the aid merely rendered it easier to accomplish the end intended by the actual perpetrators and respondent, though in all human probability the end would have been attained without it.

12. It appeared that the telegram to R. from his kinsmen was received by the operator five or ten minutes before the arrival of R.; that the message from respondent to such operator was received by him immediately afterwards; that the operator appreciated the urgency of the case, and at first intended doing his duty, by delivering R.'s message to him at the earliest practicable moment; that the operator went to the hotel, about 70 yards away, with the message, in quest of R., without waiting to copy it; that, not finding R., he returned to the door of the telegraph office,—upstairs, in the depot,—and from there saw R.'s hack approach, and stop 35 yards distant; that he supposed R. was in it; that, instead of delivering the message to R., the operator, who was mayor of the town, sent a man in search of the marshal, whose whereabouts were then unknown to him, and beckoned respondent's brother, who was near the hack, to come to him; that he then went into the telegraph office, as he claimed, to copy R.'s message for delivery to him; that if the operator had gone out to the road on which the hack was approaching, not more than 100 feet away, he would have informed R. of the contents of the message before R. alighted; that all the murderers were then dismounted, and away from their horses, and none were in front of R.'s hack; and that R. was not hit by the first shot fired. *Held*, that the delay in delivering the message to R. was caused by respondent's telegram to the operator, and respondent aided and abetted the murder of R., as alleged in the second specification of the second count of the information, and is guilty as charged therein, and that he is guilty of murder as charged in such second count. Head, J., dissenting.

Impeachment proceeding against John B. Tally, judge of the ninth judicial circuit of Alabama, commenced by an information filed on the part of the state by the attorney general, founded upon the report of the grand jury of Jackson county. Judgment finding respondent guilty, and deposing him from office.

Wm. L. Martin, Atty. Gen., and R. W. Walker, for the State. Wm. Richardson, D.

D. Shelby, Lusk S. Bill, George O. Hunt, and Amos Goodhue, for respondent.

MCLELLAN, J. The evidence was taken ore tenus in this case. There were many witnesses. Much difficulty and delay in securing their attendance at Montgomery were apprehended. To facilitate the hearing of the case, and to subserve the convenience and necessities of the witnesses, the judges of this court, at the request and in accordance with the agreement of the respondent and the state, consented to take the evidence and hear the arguments of counsel in the cause at Huntsville, near the scene of the acts and omissions laid against the respondent in the information; and the evidence was there taken, and the arguments were there heard. This, we were and are of opinion, we might well do at the request and in accordance with the agreement referred to, in view of the control which the statute gives respondents in such cases over the manner of taking testimony. But we were not unmindful of section 3, art. 6, of the constitution, which is in this language: "The supreme court shall be held at the seat of government, but if that shall become dangerous from any cause, it may adjourn to a different place." And we were careful, while sitting at Huntsville as individual members of the court, and not as the court itself, to avoid the attempted exercise of all judicial power. Hence it is that we made no rulings as to the admissibility of testimony except of a tentative and advisory nature, and hence it is also that much incompetent testimony was received, subject to objections noted at the time and is now to be stricken out and excluded, either expressly or by tacitly disregarding it in reaching the conclusions we shall announce. This course, under the circumstances, the triors of the facts and the judges of the competency of proposed testimony being the same, and under a necessity, for the most part, to know what the offered testimony is before passing upon its admissibility, whether the ruling is to be presently or subsequently made, involved no prejudice to either party, and, we believe, facilitated the hearing in this instance.

Briefly stated, the information in this case contains two charges against John B. Tally, as judge of the ninth judicial circuit. The first is willful neglect of duty while in office, in that, knowing the intent of Robert, John, James, and Walter Skelton to take the life of R. C. Ross, and having the opportunity to intervene in his official capacity, to prevent the execution of that intent, he willfully failed and neglected to do so. The second count charges complicity on the part of Tally in the murder of Ross by the hands of said Skeltons. Tally was a brother-in-law to all of the Skeltons named, except John, having married their sister, who was a cousin to John. The grievance they had against Ross lay in the fact that the latter had se-

duced, or been criminally intimate with, a sister of three of them and of Mrs. Tally. This abstract fact was, in our opinion, competent evidence in this case against Tally, as tending to connect him with the motive which actuated the Skeltons to the killing of Ross, and the fact appears in this case by evidence to which no objection was interposed. Much evidence on this subject, including several letters written by Ross to Miss Skelton, was offered by the respondent, objected to by the state, and received subject to the objection because of the circumstances, to which we have adverted, under which the evidence was taken. All this must now yield to the objection noted at the time, and be excluded from the case. It was proved that both the Skeltons and Tally had full knowledge of the liaison between Ross and Miss Skelton—had had possession of and read all the implicative letters from him to her—long before the killing of Ross. Had they, immediately upon the receipt of these letters and upon coming, in this or other way, to a knowledge of Ross' misconduct towards her, been moved, by the tumult of passion which the law holds such intelligence sufficient to provoke and engender, to take the life of Ross, and had taken his life while under the actual dominion of this overmastering passion, before cooling time had elapsed, all this evidence would have been competent, as negating the premeditation and malice which are essential elements of murder, and thereby reducing the grade of their offense to manslaughter. But the amplest cooling time had elapsed. If their passion continued, it was without justification of law. And whether, as a matter of fact, life was taken in a passion so continuing, or not, the offense of the Skeltons and of Tally, if he participated in the homicide, was and could be in no wise, and to no extent or degree, justified, mitigated, or extenuated by the fact of Ross' relation with their sister; and they are each and all guilty or not of murder as the other and only evidence in the case wholly apart from and exclusive of the relations of Ross and Miss Skelton may or may not satisfy, beyond a reasonable doubt, minds charged with the investigation that they killed, or participated in the killing of, Ross under circumstances that would have imported murder had the perpetrators been wholly without grievance, real or fancied, against him. All this testimony is therefore entirely irrelevant and immaterial to any issue that can possibly exist in this case, and it is excluded. *Hooks v. State* (Ala.) 13 South. 767; *McNeill v. State* (Ala.) 15 South. 352.

It has been many times decided by this court, and may now be considered the settled rule with us, though most of the adjudged cases in other jurisdictions hold the contrary, that a witness cannot depose to his uncommunicated intention. And upon this rule the testimony of the respondent as to the purpose and intention which actuated

him in the sending of a certain telegram, and of the witness Huddleston that, upon receiving certain telegrams from E. H. Ross and the respondent on the morning of February 4, 1894, he "went down to the hotel to see if Mr. Ross was there,—to see if he had come there; went down to advise with him, and to see what the trouble was, and also to deliver the message,"—must now be stricken out. *Wheless v. Rhodes*, 70 Ala. 419; *Whizenant v. State*, 71 Ala. 383; *Stewart v. State*, 78 Ala. 436; *Fonville v. State*, 91 Ala. 39, 8 South. 688; *Baldwin v. Walker*, 91 Ala. 428, 8 South. 364; *Railroad Co. v. Davis*, 91 Ala. 615, 8 South. 349; *Lewis v. State*, 96 Ala. 6, 11 South. 259.

The conversation between the respondent and Mr. J. E. Brown, after and on the day of the homicide, was in the nature of privileged communications between attorney and client, for, though that relation was never established between those parties, what was then said by the respondent was with a view to the retainer of Mr. Brown, and is within the protection of the rule. That conversation and the circumstances under which it was had must now be excluded. *Hawes v. State*, 88 Ala. 37, 68, 7 South. 302.

Without discussing at present other objections to testimony which may be ruled upon in the course of this opinion, we will proceed to state and consider the evidence with reference to the guilt or innocence of the respondent of the charges brought against him by the information; premising that we recognize the rule of conviction beyond a reasonable doubt as applicable to this case, and that our minds must be convinced to that degree of the guilt of the respondent before we can adjudge him guilty as charged.

Among the facts which the evidence establishes without conflict, direct or inferential, in this case, are the following: About January 6, 1894, Ross left his house in Scottsboro surreptitiously under and because of an apprehension that his life was in imminent peril at the hands of the Skeltons. He remained away from Scottsboro under this apprehension until Tuesday night, January 30th, when he returned on account of the illness of his wife. From that time until Sunday, February 4th, he remained in Scottsboro, secluded in his house. About 6 o'clock on that Sunday morning, just as the train passed Scottsboro going to Stevenson, and beyond there to Chattanooga, Ross left Scottsboro, in a hack, for Stevenson, 18 miles distant, intending to catch a train there on another road, and go on to Chattanooga. With him were his brother-in-law, Bloodwood, a negro man. John Calloway, and the driver, one Hammons. All of the party were armed. Ross had a gun and a pistol, Bloodwood had a gun, and Calloway and Hammons each had a pistol. They arrived in Stevenson about 10:45 that morning, and driving to a point in a public road or street midway between an hotel and the passenger station of

the two railroads that connect, or rather unite, there, and 30 or 40 yards from each, all the party alighted from the vehicle, except the driver, and took out their arms and baggage, the latter consisting of three valises. A person, William Tally, passing at the time from the hotel to the station, walked around the hack, which had stopped immediately in front of him, and met, shook hands, and passed the usual salutations with Ross, who had gotten out on the side next the station. Tally then turned away, and started on towards the station. Just at this juncture a shot was fired at Bloodwood from behind the depot platform. This was followed by another from the same place, and then by other shots from two guns behind the platform, and from a pile of telegraph poles a little way down the road, in the direction from which the hack had come. Some one or more of these succeeding shots took effect in Ross' legs, and he fell. Bloodwood was also wounded, and ran away. The team ran away with Hammons. Calloway does not appear to have been hit, but in some way he fell with and under Ross. They both arose almost immediately. The negro, Calloway, ran away. Ross managed to get to the side of a small oil house, a short distance beyond where the hack had stopped, and took a position affording some shelter from persons behind the platform and telegraph poles. While standing there with his gun in his hand, and looking in the direction of the telegraph poles, a man came to the corner of the house behind him, and shot him with a Winchester rifle through the head from back to front. He fell in the throes of death, and died. Then another man came up from behind the platform, and, approaching closely, also shot him through the head with a Winchester rifle. The man who fired the first and two or three other shots from behind the platform was Robert Skelton. The man who fired the other shots from that position was James Skelton. The man who fired from the telegraph poles was Walter Skelton. John Skelton it was who reached the corner of the oil house behind Ross, shot him in the back of the head, and killed him. And it was Robert who came up after he was dead, and again shot him in the head. Some of the Skeltons were seen about the station in Scottsboro when the east-bound train passed that morning, just at the time Ross started overland to Stevenson. Soon after that they heard of Ross' flight, and, as soon as they could get together, arm and mount themselves they started in pursuit on horseback. They were fearful that Ross would turn off the Stevenson road, and go across the Tennessee river, as he had done on the occasion of his previous flight; and hence, they were afraid to take any short cuts, by resorting to which they could have—as Ross continued in the Stevenson road—overtaken him much sooner than they did; but, in their uncertainty as to his destination,

they thought it best to follow the tracks of his vehicle. Doing so, they came in sight and within a little distance of the hack as it was crossing a creek a mile from Stevenson. The hack was a close one, and its occupants did not see them. A railroad crosses the creek at this point along the side of the public road. They could have attacked the Ross party at this point, and Walter Skelton testifies that he then said to his companions, "Let's surround them, and demand of him where Annie is;" but that they said, "No; that would probably bring on a fight, and some one of us get killed." Instead of this, Robert and James dismounted, left their horses, and ran along the railway track to Stevenson, where they arrived and took positions behind the platform almost immediately after the Ross party had arrived and stopped. Walter and John Skelton kept in the road behind the hack, and 50 or 60 yards distant from it. They, too, were afoot at this time. Walter stopped at the pile of telegraph poles, which he seemed to have reached about the time the hack stopped, and before any one alighted from it. John, in some way, got beyond the hack, and finally to the oil house, without, so far as the evidence discloses, being seen by anybody until just before he shot and killed Ross. After the killing of Ross, Robert Skelton sent a telegram to the respondent, at Scottsboro, informing him that Ross was dead, and that none of the Skeltons were hurt; and they all surrendered themselves to Huddleston, who was mayor of Stevenson, and were taken back to Scottsboro, and confined in jail. Subsequently bail was allowed them, and was given by Robert and James. John and Walter were unable to give bail, and the former escaped, and is still at large. After this Walter also gave bail. All these facts are undisputed.

The evidence offered in justification or mitigation of the homicide, except the facts and circumstances of Ross' relations with Miss Annie Skelton, which we have excluded, is that of Robert Skelton, as follows: "About the time that I got to the depot, between the depot and the hotel, Mr. Ross was at the buggy, speaking with Bill Tally. I walked up and saw that. In a little while, I don't know how long, Mr. Bloodwood drew his gun up at me. I dodged down, and then fired at Bloodwood." And of Walter Skelton: "I was, I suppose, fifty or sixty yards behind the hack when it stopped, and I was watching to see who got out. I saw Mr. Ross get out, talking to some one. Then I saw Mr. Bloodwood get out; and in a few minutes I saw him raise his gun across the hack, then take it down, and about the instant I heard a gun pop." The gun which Walter heard "pop" was that of Robert Skelton. Walter and James then joined in, and Robert continued the fusillade. That Bloodwood did not shoot there is no reasonable doubt. That Ross or any other of his party fired a shot is not

pretended. That Bloodwood snapped his gun in an effort to shoot there is some evidence,—enough, we will conclude, to engender a reasonable doubt as to whether he did or not. But the conclusion that he attempted to shoot at Robert Skelton will not afford any justification or excuse to the Skeltons or the respondent. They were in no danger from Bloodwood's gun. If they were in danger, a safe avenue of retreat was open to each of them. Had there been danger, and had the opportunity of retreat been wanting, they yet could not invoke the doctrine of self-defense, because their danger resulted from their own wrongful and unlawful aggression. They were there to kill. It was Ross and Bloodwood, and not they, who were on the defensive. This conclusion cannot be escaped, even from their own standpoint. They say they pursued Ross to prevent his going to their sister, and continuing criminal relations with her. How were they to do this? How could they do it but in the effective way they did do it,—by stopping Ross at once and forever in his tracks? That they contemplated this means, conceding their purpose was to prevent the coming together of Ross and Miss Skelton, is beyond all question. It is shown by their conversation at the creek, when they said Ross would fight, and some of them would be killed, if they approached him with reference to Miss Skelton; and they then desisted only because the place and surroundings were not opportune. It is shown by the disposition they made of themselves around, but concealed from, Ross, at Stevenson, and the instantaneous fire they opened on him as soon as they were in their places of ambush, when, had their purposes been less deadly, had any sort of parley with Ross been desired, either for the purpose of diverting him from their sister, or of ascertaining from him her whereabouts, pacific means to that end were at hand, in the person of William Tally, who had just spoken to Ross, and was then coming directly towards the place of concealment of two of them, one of whom began the onslaught, and in the person of several other men then in and about the depot. Their purpose was to kill. Its wickedness was unrelieved by aught of legal justification or excuse. They did kill, and their act was without any justification, mitigation, or extenuation which the law knows, or courts can allow to be looked to. It was murder.

What connection had the respondent with that murder? Was he, knowing the deadly intent of the Skeltons and their pursuit, bent upon its execution, willfully neglectful of his duty, as a magistrate, in not exercising the power of the law had clothed him with to stay their hands? Or did he himself participate in the deed, by commanding, directing, counseling, or encouraging the Skeltons to its execution, or by aiding and abetting them in its commission? The evidence for

the prosecution on these issues will be briefly stated: As has been seen, Judge Tally was the brother-in-law of Robert, James, and Walter Skelton, and of Miss Annie Skelton, the wronged girl. It may be supposed, therefore, that he shared with the Skeltons—in some degree, at least—the shame and mortification which had come upon them through Ross, and that the grievance against Ross was common to them all. It was shown that he knew all the facts known to the Skeltons, and came to his knowledge of them soon after they did. They all lived in the same town, with the intimacy usually incident to their relations. James Skelton lived with Judge Tally. On Friday before the Sunday of the homicide, Judge Tally returned to Scottsboro from Ft. Payne, where he had been holding court, by way of Chattanooga, Tenn., and over the Memphis and Charleston Railroad. On the train was Mr. Gregory, a lawyer of Scottsboro, who engaged Judge Tally in conversation. The latter spoke of some interesting murder cases that he had been trying at Ft. Payne; and, in this connection, Gregory remarked to him that he thought they would have one or more killings in Scottsboro in a very short time. "The judge [to quote the witness] asked me why, and I told him that Ross had come back, and that the Skelton boys were on the war path, or some such thing. I don't remember just what it was. The judge said he guessed not; that he supposed Ross would leave, or would not stay there, or something of that kind; and I told him I supposed so." On Saturday afternoon, Judge Tally was in consultation with Robert Skelton, the eldest of the brothers, for something like a half hour, in the latter's office. It is admitted by Judge Tally that this conversation had relation to Ross and Miss Skelton, and the scandal connected with them. Tally stayed at home that night. James Skelton also slept there. The next morning Tally's 15 year old son went to a livery stable and got a horse, the hire of which was charged to, and subsequently paid by, Judge Tally. This horse was gotten for the purpose of being ridden, and was ridden, by Walter Skelton, in pursuit of Ross. One witness testified that quite early on that Sunday morning, before the Skeltons had assembled to go in pursuit of Ross, he saw a man whom he took to be Judge Tally passing a street some distance from Judge Tally's house, going in the direction of John Skelton's; but he was by no means sure that the man he saw was Judge Tally. J. D. Snodgrass, a witness for the state, testified that he saw three of the Skeltons (Robert, John, and James) leaving Scottsboro that Sunday morning. When he first saw them, John and James were going along a side street, upon which Judge Tally's barn and barn lot were situated; that the two last named had gotten beyond Tally's premises, and were about turning out of this

street, which ran north and south, into a street running east and west, and passed in front of Judge Tally's residence. This residence was the second from the corner at the intersection of these streets. At this time Robert Skelton was on horseback near Tally's barn-lot fence, talking with Tally. He remained there only a very short time (the witness said probably a minute) after Snodgrass saw them. Tally was either inside his lot or in the street near his lot, and on foot. At the end of this short time, Robert rode on, following John and James, turned east on the street mentioned, and passed by Snodgrass' house, which fronted on that street, going in the direction of Stevenson. He then observed that each of them had a gun. Another witness before this saw Walter Skelton following the Stevenson road on foot. This witness, coming on down this street in front of Judge Tally's house, saw Tally standing at his front gate, looking in the direction Walter Skelton was proceeding. Tally turned before he reached him, and went into his house. Young Tally carried the horse, which he had gotten from the livery stable, to Walter, on the road. Another witness passed down this street, after they had all gone towards Stevenson, and he also saw Tally at his gate, looking in that direction. Tally again turned and went into his house, before this witness reached him. It was also in evidence that James Skelton left Tally's house that morning before breakfast, went down town, armed and mounted himself, came back to Tally's, hitched his horse in front of the house, set his gun against the front gate, went into the dining room to get something to eat before starting, then went out, remounted, and joined Robert and John at the corner where these three were seen by Snodgrass. The flight of Ross and the pursuit of the Skeltons at once became generally known in the town of Scottsboro, and was well nigh the sole topic of conversation that Sunday morning. Everybody knew it. Everybody talked only about it. Everybody was impressed with the probability of a terrible tragedy to be enacted on the road to Stevenson, or at the latter point. The respondent was soon abroad. He went to the depot, where the telegraph office was. He remained about there most of that morning. About nine o'clock that morning Dr. Rorex saw him there, and this, in the language of the witness, passed between them: "I said to Judge Tally that I thought we had better send a hack and a physician to their assistance up the road [referring to the Ross and Skelton parties then on the road to Stevenson]; that these parties might get hurt, and they might need assistance. Judge Tally replied that his folks or friends could take care of themselves. I also said to him that I reckoned we ought to send a telegram to Stevenson and have all of them arrested, to which he made no reply. * * *

He said that he was waiting to see if any-

body sent a telegram—or words to that effect; waiting or watching, to see if anybody sent a telegram." And he did wait and watch. He was seen there by Judge Bridges just before the passenger train, going west at 10:17, passed. He was seen there after it passed. E. H. Ross, a kinsman of the Ross who had fled, and was being pursued, meeting the telegraph operator, Whitner, at the passenger station, walked with him down to the freight depot, where the telegraph office was. Judge Tally followed them. They went into the telegraph office, and so did he. Ross was sitting at a table, writing a message. It was addressed to R. C. Ross, Stevenson, Ala. Its contents were: "Four men on horseback with guns following. Look out." Ross handed it to the operator to be sent. Tally either saw this message, or in some way accurately divined its contents. He called for paper, and immediately wrote a message himself. Judge Bridges was still in the office. At this juncture, Tally spoke to him, took him into a corner of the room, and, calling him by his given name, said: "What do you reckon that fellow [the operator] would think if I told him I should put him out of that office before he should send that message?" referring to the message, quoted above, which E. H. Ross had just given the operator. Judge Bridges replied: "Judge, I wouldn't do that. That might cause you very serious trouble, and, besides that, might cause the young man to lose his position with the company he is working for." Judge Tally then remarked: "I don't want him to send the message he has, and I am going to send this one." He then showed Judge Bridges a message addressed to William Huddleston, containing these words: "Do not let the party warned get away." This message was signed by Tally. The respondent then handed this telegram to the operator, remarking to him, "This message has something to do with that one you just received;" said he wanted it sent, and paid for it. He then started towards the door, but turned to the operator, and said: "Just add to that message, 'say nothing.'" Tally left the office. This message was sent just after that of E. H. Ross to R. C. Ross. The original of it was placed on a file in the office at Scottsboro. Two days after, a search was made for it, and it could not be found, and has never been found. The one man in the world most interested in its destruction—the respondent in this case—in the meantime had had an opportunity to abstract it, he having had access to this file, and gone through the messages on it, for the purpose, he said then, and says now, of finding the address of a person to whom he had sent a message some days before. And on the preliminary examination of the Skeltons before the probate judge of Jackson county, for the murder of Ross, Judge Tally was called and examined as a witness for them, and before a copy

of this message was produced by the operator, and hence at a time when Judge Tally was not aware that a copy was in existence, this question was put to him: "You didn't send any dispatch that morning to Stevenson?" And his answer was: "Yes, sir, I sent one, but not about this matter. It was to a friend about another matter; nothing concerning this case." And this friend was Mr. Huddleston. He further testified, on that trial, that he did not know Ed Ross, did not see him going to the telegraph office that morning, and did not know whether Ed Ross was in the telegraph office while he was, on that occasion, or not. These telegrams of Ed Ross and Tally were sent about 10:25 a. m. Tally then, his watch to prevent the sending or delivery of a telegram to R. C. Ross being over, went home. Soon after 11 o'clock, the message before referred to came from Stevenson to Scottsboro, addressed to Judge Tally, and signed by Robert Skelton. It ran: "Ross dead. None of us hurt." This was taken to Judge Tally's house, and there delivered to him, and he thereupon went to see Mr. Brown, and had the conversation which we have excluded.

The foregoing is substantially the case made by the evidence adduced by the state against the respondent, leaving out of view, for the moment, the evidence touching the effect which his message to Huddleston had upon the occurrences at Stevenson.

Next we undertake a summary of the evidence for the defense. Judge Tally himself, and Robert, James, and Walter Skelton, were among the witnesses examined. The respondent admitted having a conversation on the train with Mr. Gregory, but he did not recall that Gregory said anything about the Skeltons being on the warpath. He says he knew of the relations between Ross and Miss Skelton soon after the Skeltons were informed of them, and read the letters from him to her soon after they came to their possession; that he and Robert Skelton, at the time the latter showed him the letters, on January 6, 1894, held a consultation as to what was best to be done in the matter. This is his account of what occurred, and was said, at that time, in Robert Skelton's office: "I asked Bob Skelton if he had such communications as it was reported he had; letters said to have been written by Mr. Ross to Annie. I asked him if he would let me see the letters. He said he would, and got them and showed them to me, and I read them there in his office. He and his brother David Skelton and myself were the only persons present. During the time I was reading the letters, we were speaking about the contents, and discussing them, and he told me, after I had read the letters,—possibly during the time I was reading them,—he gave me his ideas as to managing the trouble. He told me about his plans to get Annie home, and to let Mr. Ross leave, and make the best of it,—let it die out, and make

the best of it. I told him that was decidedly the best thing to do. It was best for him, and would possibly save the publication generally of the scandal, and might possibly save her mother's life. Annie's mother was paralyzed and helpless, and I suggested that exposure might possibly cost her her mother's life. Dave Skelton was sitting by, and observing our conversation, and would occasionally have something to say; and he spoke of doing violence,—spoke of killing him. I simply turned to him and said: 'Dave, that won't do. This is the best management.' I desire to say just here that this is the only time that any member of the Skelton family ever said anything, in my hearing, about killing Ross. Not long after that he left, and I heard no further conversation about any violence." The respondent gives the following account of the conference he had with Robert Skelton on Saturday afternoon preceding the homicide: "I think I was on the street, and Bob called me into his office, * * * and we engaged in conversation. I think that the first thing Bob mentioned to me was that he was thinking as to how he should find out where Annie was. He said he had been thinking about trying to get some one to go to Mr. Ross, and induce him, or ask him, to tell us where Annie was. I suggested to him the propriety of interviewing Mr. Brown about that, and gave him reasons why I suggested Mr. Brown." These reasons, as given at the time by the witness, he then repeats; and goes on to mention one or two other persons whose availability in getting this information was discussed, and says that after this he left Bob's office, having been there, he supposes, 15 or 20 minutes. In all this, Judge Tally is corroborated by the evidence of Robert Skelton, and, in respect of their determination to do no violence to Ross, but to get the girl home, and allow him to leave Scottsboro, he is further corroborated by the declaration, proved by Mr. Gregory, in substance, that no violence would be done to Ross, as he would leave Scottsboro. He denies having passed up the street when the witness Miller says he thought he saw him, at an early hour Sunday morning, and no importance can be attached to the evidence of that witness, because, in the first place, his glance at the man was casual and hasty, and he was himself not at all certain that it was Judge Tally he saw. In the next place, even on the theory of the prosecution, there was no reasonable occasion for Judge Tally's being at that place at that time, and, finally, the fact is denied on oath by the respondent. So that testimony may stand out of the case. In respect of the horse which Judge Tally's son procured at the livery stable, which was charged to and paid for by the respondent, and which Walter Skelton rode in pursuit of Ross, the testimony is that Mrs. Tally, at the instance of Walter Skelton, ordered this horse, and sent her son for it; that she was

in the habit of doing this; that it was charged to Judge Tally, as was the custom; and that he, conceiving himself under a moral and legal obligation to do so, because the horse had been supplied to Mrs. Tally, paid the bill, and this, in the usual course, after the point now made on those facts had been suggested to him. The respondent admits on the stand that he saw and had a few words with Robert Skelton when the Skeltons were leaving Scottsboro Sunday morning, as testified to by Mr. Snodgrass, and this is his account of the interview: "When I first got up, I went down stairs and stepped out to the front gate just a minute. The only person I saw was Bob Skelton riding up the street towards the railroad [a street running north and south, and not in the direction of Stevenson]. Bob was crossing the street going northwest [the direction in which John Skelton lived]. I walked back through the hall of my house, and went down into the garden, to the closet, and was there some time; I don't remember how long; some little time, however. After I came out of the closet, and while I was in the garden, I saw Bob and John Skelton riding away, going east, on the street parallel with the railroad [and which ran back of Judge Tally's residence]. I stayed there, and observed them, and saw them after they had passed the barn of Mr. Harris on the corner. I saw them coming on the street south, passing my barn; along the street that runs in front of my barn. When I saw them going in that direction, I walked through my barn lot to the fence, and saw them at the corner [the intersection of this south and north street, passing Tally's barn, with the east and west street, upon which his residence fronts]. About that time Jim Skelton joined them. I didn't notice where he came from. Then I called to Bob Skelton. He turned and rode back from where I saw them at the corner, * * * and I crossed the fence, and met him near the corner of my barn lot. He rode up within six or eight or ten feet, and I said to him: 'Bob, where are you going?' He said to me: 'Going up the road.' I asked him again: 'Where are you going?' And he answer: 'Up the road, and I am in a hurry.' He turned and rode off; went back the way he came when I called to him." Robert Skelton's testimony agrees with Judge Tally's fully as to this interview, only he added that he said, further, to Tally, that he was in a hurry, and did not want to talk. And they are both fully corroborated as to the circumstances under which this interview was had, its brevity, and how it was brought about, by Mr. Shelley, a wholly disinterested witness, who saw John and Robert Skelton as they rode along the east and west street back of Judge Tally's premises,—they passed the witness there; saw them turn south on the street in front of Judge Tally's barn; and proceed along that street beyond the point of the interview be-

tween Tally and Robert Skelton, then saw the latter riding back to where Tally was, sit there on his horse while the witness could have counted 15 or 20, then turn, rejoin the others, and ride out east. And there is nothing in this account of this interview which materially conflicts with that given by J. D. Snodgrass. James Skelton, as has been said, lived at Judge Tally's. He slept there the night before the homicide, and went thence, as we have seen, in pursuit of Ross. Judge Tally swears he did not see him that morning, except when he joined Robert and John at the corner, about the time of the conversation between Robert and himself. It is shown by the evidence of Mr. Proctor, who slept with James the night before, that the latter arose and left the room quite early that morning. It was also shown that he was down town at an early hour. Judge Tally must have arisen after James went down town. The testimony and all the circumstances concur in showing that when James came back to the house, mounted and armed, and went in to get "a piece of meat and bread," as he expressed it, leaving his gun and horse at or near the front gate, Judge Tally was either in his garden back of his house, or, more probably, in his barnyard, which was back of an adjoining house. From neither of these positions could he see the horse or gun at the front, or James in the house. Judge Tally also testifies that he did not see Walter Skelton at all that morning, or know of his son's going for a horse for him until the Skelton party had left Scottsboro. This is somewhat strange, in view of the facts that Walter Skelton came to his house that morning, talked with Mrs. Tally, and induced her to procure a horse for him to ride in pursuit of Ross, and that young Tally was sent from the house to the livery stable for the horse. But it reasonably appears from the evidence that all this happened before Judge Tally got up. It is shown that Mrs. Tally's cook was sick, and that she had to be up early to prepare breakfast, and did get up some time before Judge Tally. And the other testimony, and the surrounding circumstances, concur in showing that all that occurred at Judge Tally's house, with reference to this horse, occurred in the interval between the times Judge and Mrs. Tally arose.

The respondent further testifies that he did not see his wife, after she arose that morning, until he returned to the house from the barn lot, where he had the interview with Robert Skelton; that he returned thence to his house, saw his wife, and she then told him of the flight of Ross, which had been communicated to her by Walter Skelton, and of the pursuit of the Skeltons; and that he did not know, and had received no information, before this, that Ross had gone, and that the Skeltons were pursuing him. At this juncture, it is to be borne in mind, all the Skeltons had left Scottsboro. And this, with

proof of the respondent's good character, is the case of the defense, so far as the first count of the information is concerned. On the evidence for the state which we here set out, taken in connection with this evidence for the respondent, can it be said that Judge Tally, when he was in the presence of Robert, and in sight of John and James Skelton, that morning, knew of their intention to take the life of Ross, and that they were setting out to presently execute that intention, as is charged in the several specifications under the first count? We think not. There is no affirmative evidence, such as declarations and the like, on their part, might have afforded, that they themselves ever entertained the purpose to take life prior to that morning, except in the event Ross failed and refused to leave Scottsboro. And they might well have entertained such purpose without Tally's knowledge of it. It might well have been that, intending to kill Ross, the Skeltons would have concealed their design from Tally, on account of his official position, and notwithstanding his family relations with them. Again, there is no positive evidence, if they so intended prior to the day of the homicide, that Tally was ever informed or knew of their intention. True, it may be said that he knew Ross had to leave there, and, falling in this, the Skeltons would or intended to kill him; but, only knowing this, the fact that Ross had gone, which fact, according to the state's theory, he must have known when the Skeltons left Scottsboro, it would have been but natural for him to have concluded that, as the condition upon which Ross was to live had been met, the conditional purpose to take his life was abandoned. True it is, also, that he had, in some degree, the same motive to destroy Ross that moved the Skeltons to his destruction, in the sense that he, too, by reason of his marital relations, was a victim of the wrong that Ross had wrought upon them all; but this motive might have impelled the Skeltons to the extreme to which they went in purpose and deed, while he was restrained by that respect for law which his profession engenders, and by the environment of his high judicial position, from yielding in intent or action to the deadly impulse the wrong was conducive to. There is, we repeat, no affirmative evidence that Judge Tally knew, until after the Skeltons had gone, that they intended to take the life of Ross. There were circumstances proved which, unexplained, might have justified,—indeed, would have justified,—the inference that he did. But explanations have been made which are either affirmatively satisfactory, or cast such reasonable doubt on the conclusions to which, without the explanations, the circumstances would have led us, that we do not feel justified in adopting the conclusions. For instance, the hiring of the horse which Walter rode. As presented by the state, in all its boldness, that fact was most incriminating. But when taken in con-

nection with the facts that the horse was to serve an occasion which was born of the flight of Ross, while Tally slept, and was subserved by the procurement of the horse before he arose; that it was charged to him because ordered by his wife, and paid for by him, after the circumstances of the hiring and use of the animal had been used in the public mind to connect him with the tragedy, because, by the course of previous dealing between him and the liveryman, in respect of orders by his wife, he was under both a moral and a legal obligation to pay,—its probative force against him is utterly destroyed. The presence that morning at his house of Walter Skelton is a circumstance of suspicion, and would be of incrimination, but for the fact, which is shown by other evidence than Tally's, and against which nothing has been offered affording a contrary inference even, that Walter had come and gone before Tally got out of bed, in an upstairs room. Again, the naked fact that James came there after Tally had arisen, armed and mounted, has of course a natural tendency to show that Tally knew the purpose of such unwonted and warlike preparations on that day, when to ride about the country with guns is such an unusual thing. But according to the testimony, not only of Tally and Robert Skelton, but also of Mr. Shelley, a witness for the defense, and of Mr. Snodgrass, a witness for the state, the respondent was at that time in his barn lot, or next it, in the side street, from which point he could see neither James Skelton in the house, nor his gun standing against the front gate, nor his horse hitched in the street in front of the house and gate. The presence of Tally, with Robert Skelton, in the street near the former's barn, as the Skeltons were starting on their chase of Ross, standing alone and unqualified, might prove much against him. But the evidence of himself and Robert Skelton, taken with that of Mr. Shelley, a disinterested witness, satisfies us that that meeting was momentary, and wholly casual. Skelton had passed Tally, and was proceeding on his journey, when Tally hailed him, and had him come back. Clearly he had not come that way to see Tally. It is not pretended that they had met before on that morning, or had any communication after Ross' flight. Tally's being there is reasonably accounted for without connecting his presence in any way with this Ross matter. Skelton's passing there was reasonable without any reference to Tally; it was his route to his destination. They were together about long enough for the words they give to have passed between them. They were not together long enough, we should say, for such conversation as would naturally have passed had they been discussing the flight and pursuit of Ross, what the Skeltons intended to do, what Tally should do in the meantime at Scottsboro, and the like. The state's witness Mr. Snodgrass saw them there, and his evidence does not materially conflict with that

of Shelley as to the length of time they were together. We have already stated the conversation they had, as testified to by Tally and Skelton. Though they are to the last degree interested witnesses, there is nothing before us which would justify our reaching the conclusion, with the necessary conviction of mind, that aught was said, other than the words they have deposed to. Moreover, it does not appear,—but the contrary does appear, upon all the evidence we have, much of which is not tainted by interest,—that Tally had any information of Ross' flight when he was talking with Robert Skelton. It is clearly shown that James Skelton did not know it—indeed, it had not transpired—when he left the house. It came first to the knowledge of Walter, and it may well be supposed that he and James, and all of them, made their preparations with all possible expedition, losing no time to hunt up and inform Tally. Walter and James were at Tally's house after they knew of it, but there is no evidence that Tally saw either of them. Tally's own and Walter's evidence that they did not see each other, and proof of circumstances, demonstrate that he did not see James until he was riding away. It is said that Tally must be held to have known the intention of the Skeltons to pursue and kill Ross, from seeing Robert and John mounted and armed. How could he know this—how are we to be justified in holding that he knew this—when it is clearly shown that he did not know Ross had gone at all? And, had he known that, how could he justify a conclusion that they were going to pursue and slay him as he left Scottsboro, when, according to all the evidence we have as to Tally's knowledge of their intentions, they all wanted him to leave Scottsboro, and intended he should go in peace. Again, shall the inference of a murderous intent on Tally's part, or of his knowledge of such intent on the part of the Skeltons, be drawn from the mere fact that he was seen on two occasions talking with his brother-in-law in the latter's office for half an hour? Obviously not. Shall the fact that one of those occasions was the day before the killing of Ross lead us to say that Tally knew the Skeltons intended to kill Ross? Of course not. And even less, if possible, would such conclusions be justified when we consider that the only evidence of what passed in those conversations was to the effect, whatever else it may have imported, that Ross should not be killed if he did what he was manifestly trying to do when he was killed,—leave Scottsboro.

Some other minor circumstances, really of no probative force,—such as that Tally was seen at his front gate that morning, once before and once after the Skeltons had gone; that he saw Robert Skelton riding north on a street some distance from him, which fact he brought out himself; and the like,—were put in evidence. These we will not stop to discuss. Nor do we deem it

necessary to discuss in this connection—with reference to Tally's knowledge of the Skeltons' intent when he had the brief interview with Robert that morning—Judge Tally's conduct after the Skeltons had gone. That conduct is referable to the knowledge he then had—which had been first imparted to him by his wife, and which soon became the common knowledge of the town—that the Skeltons had gone in pursuit of Ross to kill him; and, in our opinion, what he did and said, after that time, will not serve to establish the scienter laid under the first count of the information. We conclude this part of the case by saying that we do not find that Judge Tally had any knowledge of the intention of the Skeltons to kill Ross before or at the time of their departure in pursuit of him; that, therefore, neither of the three specifications under the first count is proved, and we find him not guilty of the charge of wilful neglect of official duty presented by that count.

The second count of the information charges that "John B. Tally, judge of the ninth judicial circuit of the state of Alabama, unmindful of the duties of his said office, was, before the filing of said report of said grand jury, and while in such office, guilty of an offense involving moral turpitude, to wit, the offense of murder." There are three specifications under this charge. The averments, among others, of the first specification, following averments of Ross' flight, the Skeltons' pursuit, and the killing of Ross by them at Stevenson, with malice, etc., are "that said Tally was informed of the intention and purpose of the said Skeltons to unlawfully take the life of the said Ross, and said Tally held communications with said Skeltons touching their said purpose, and said Tally knew of the pursuit of said Ross by the said Skeltons, as aforesaid, and had such knowledge at the time said Skeltons were making ready to set out in pursuit of said Ross, and at the time they did set out in such pursuit." As we have already indicated, we are not convinced of the truth of these averments, and, as the other matters laid in this specification may be considered as well under the second and third specifications, we will direct our attention solely to them. The second specification charges that the Skeltons "unlawfully, and with malice aforethought, killed Robert O. Ross by shooting him with a gun," and "that the said John B. Tally, before the said felony and murder was committed, in manner and form aforesaid, on the day aforesaid, and in the county and state aforesaid, did aid or abet the said" Skeltons, naming them, "in the commission of the said felony and murder." And the third specification charges "that on Sunday, the 4th day of February, 1894, in the county of Jackson, state of Alabama, the said John B. Tally unlawfully, and with malice aforethought, killed Robert O. Ross by shooting him with a gun." These

charges of aiding or abetting murder, and of murder direct, which amount to the same thing under our statute (Code, § 3704), are, upon considerations to which we have already adverted, to be sustained, if at all, by evidence of the respondent's connection with the homicide after the Skeltons had left Scottsboro in pursuit of Ross, since we do not find any incriminating connection up to that point of time. Being without conviction that Tally knew of the Skeltons' intention to take Ross' life until after they had departed on their errand of death, and there being no evidence or pretense that between this time and the homicide any communication passed between them and Tally, we reach and declare the conclusion that the respondent did not command, direct, counsel, instigate, or encourage the Skeltons to take the life of Ross, and that, in whatever and all that was done by them and him, respectively, there was no understanding, preconcert, or conspiracy between them and him.

This narrows the issues to three inquiries—two of fact and one of law: First (a question of fact), did Judge Tally, on Sunday, February 4, 1894, knowing the intention of the Skeltons to take the life of Ross, and after they had gone in pursuit of him, do any act intended to further their design, and aid them in the taking of his life? If he did, then, second (a question of law), is it essential to his guilt that his act should have contributed to the effectuation of their design—to the death of Ross? And, if so, third (another inquiry of fact), did his act contribute to the death of Ross? There can be no reasonable doubt that Judge Tally knew, soon after the Skeltons had departed, that they had gone in pursuit of Ross, and that they intended to take his life. Within a few minutes, he was informed by his wife that Ross had fled, and that the four Skeltons were pursuing him. He had seen three of them mounted and heavily armed. He knew the fourth, even keener on the trail than these, had gone on before. He knew their grievance. The fact that they intended to wreak vengeance, in the way they did, upon overtaking Ross, was known to all men in Scottsboro, as soon as the flight and pursuit became known. It was in the minds and on the tongues of everybody there. Nothing else was thought or talked of. When Dr. Rorex, voicing the universal apprehension, suggested to him that aid be sent up the road to the dead and wounded, Judge Tally, taking in the full force of the implication that there would be a fight to the death, with the Skeltons as assailants, and not dissenting therefrom at all, said, with the ken of prophecy, as a reason why he would not be a party to the execution of this humane suggestion, that his folks (the Skeltons) would take care of themselves. How well they took care of themselves—with what exceeding care they conserved their own safety—is shown by the event, and the manner in which it was pro-

duced. To the other suggestion of Dr. Rorex—resulting from the universal knowledge that, unless something was done, an awful tragedy would be enacted—that “we telegraph to Stevenson, and have them all arrested,” and thus prevent the catastrophe, if perchance Ross should reach that point alive, Judge Tally made no direct response; but in the same connection he said, “I am waiting and watching here to see if anybody sends a telegram.” What he meant by this is most clearly demonstrated by his subsequent shadowing and following up Ed Ross, and his conversation with Judge Bridges about putting the operator out of the office before he should send Ed Ross’ message of warning to his kinsman, Robert O. Ross. This was the situation: Ross was in what he supposed to be secret flight from the Skeltons. He was unaware that his early departure had been seen by one of them. He did not know they were all in full pursuit to take his life. Under these circumstances, the pursuers had every advantage of the pursued. They could come upon him unawares. Being on horseback, while he was in a vehicle, coming up to him, they could well get beyond and waylay him. This they actually did. Having this tremendous advantage, accentuated by the fact that they were in no danger from Ross even if he saw them, unless he was forced to defend himself,—that his effort and intent were to get away, and not to kill,—Judge Tally might well feel satisfied with the posture of affairs; he might well feel assured that his folks would take care of themselves, as they did. All he wanted was that this situation, which portended the death of Ross and the safety of his folks, should not be changed. He would not agree that it should be changed so as to save Ross’ life, even though at the same time the safety of the Skeltons should be assured, as would have been the result had the authorities at Stevenson been fully advised, at the time Dr. Rorex suggested the sending of a telegram there, to arrest all parties. He was waiting and watching there to see that the situation was not changed by advice to Ross which would or might enable him to escape death at the hands of his folks. He waited long and watched faithfully, and his patience and vigil were rewarded. He saw Ed Ross going towards the telegraph office. He at once concluded Ross was going there to warn his kinsman, and give him a chance for his life. He followed. His purpose was to stop the message; not to let the warning even start on its journey. This he proposed to do by overawing the operator, a mere youth, or by brute force. Judge Bridges dissuaded him from this course, but he adopted another to destroy this one precarious chance of life which was being held out to Robert O. Ross. It would not do, Bridges advised him, to stop the warning by threatening or overpowering him,—the operator. The young man was a newcomer, and a stranger there, and a resort to moral suasion with

him was therefore unpromising and hazardous. Not so with the operator at the other end of the line. He was Judge Tally’s friend of long standing. He, through whose hands Ed Ross’ message of warning was intended to pass, could be approached, and to him Tally addressed himself. Saying to Judge Bridges that he (the Scottsboro operator) had a message which he (Tally) did not want sent, and which, under Judge Bridges’ advice, Tally had concluded not to stop by threat or force, he adopted another means of stopping it short of the person to whom it was addressed. He telegraphed his friend (the operator at Stevenson) not to let Ross get away. His language was, as first written, “Do not let party warned get away.” This he handed to the operator to be sent to Stevenson, saying, “This message has something to do with the one you have,” referring to Ed Ross’ message. What then passed through his mind we are left to conjecture; but upon further thought he added to the message these words, “Say nothing.” What was the full import of this completed message, looking at its terms and the circumstances under which it was sent? One thing is most clear from all circumstances and upon the words themselves and in the light of those circumstances: The message beyond all question would never have been sent but for the sending of Ed Ross’ message. It was manifestly and confessedly the offspring of a purpose to thwart the efforts of Ed Ross to warn his kinsman of the true situation. One element of this situation, which gave Judge Tally great satisfaction with it, was Robert Ross’ utter ignorance of the danger he was in. He scouted all suggestions to interfere at all so long as this element of the gravest peril to Ross and of assured safety to the Skeltons existed. It was to the end that this element of peril to the one and safety to the other party should not be eliminated that he had waited and watched all the morning, to see if anybody attempted to eliminate it by advising the hunted of the oncoming, in deadly purpose, of the hunters, and to prevent by threats or force, or in any other possible way, the sending of a telegram to advise Ross of this important factor in the posture of affairs with which he had to deal on the hazard of his life. At the last moment the idea of resorting to threats and force was abandoned as unwise. There was no other way to stop the telegram in the Scottsboro office. It was therefore to go, and the only other way to prevent its reaching Ross was to have it stopped at the Stevenson office. Tally, being dissuaded from the former course, adopted the latter. His purpose was the same throughout, but there was a change in the means he had contemplated for its effectuation. Whitner, the newcomer and stranger, could not be prevented or dissuaded from putting the message on the wire; but Huddleston, the lifelong friend, who was to take it off the wire, and whose duty it was to deliver it to Ross,

might be commanded or persuaded to omit its delivery,—when he had taken it from the wires, to “say nothing.” And in that event Ross would remain in ignorance of his danger; the situation, which gave Judge Tally so much satisfaction as that he felt assured his folks could take care of themselves, and which he would not consent to interfere with, as suggested by Rorex, in a way to conserve the safety of both the Ross and Skelton parties, would remain unchanged, and Ross would go to his death, as he did, without a single chance to raise his hand in defense of his life. The telegram to Ross was: “Four men on horseback with guns following. Look out.” Tally’s telegram to Huddleston was: “Do not let party warned get away. Say nothing.” “Get away” from what, or from whom? From whom, indeed, and in all common sense, but from the four men on horseback, following with guns to take his life? They alone were in pursuit. They only were following the party warned. From them alone was Ross fleeing. From them only, by what he supposed to be secret flight across the country, rather than attempt to board a train guarded by them against him, was he trying to get away. The law had no claim upon him. He had committed no offense of which it took cognizance, and no charge of crime had ever been made against him. Nobody on earth except the four men, the Skeltons, sought to prevent his getting away; and from these Judge Tally, seeing that a chance of escape was about to be afforded him, called upon his friend Huddleston to interpose, destroy that chance, and not to let him get away. Having formulated his command or request to Huddleston to prevent his getting away, and handed it to Whitner for transmission to Huddleston, the thought must have passed through his mind: “How is my command or request to be complied with? How is Huddleston to prevent Ross’ getting away?” He knew there was no ground to arrest Ross. He knew that Huddleston, although mayor of Stevenson, was utterly without authority or right to stay him for one moment of time. How, then, was he to proceed? One obvious means to this end presented itself to the respondent’s comprehension as he pondered how the thing he wanted to be done could be accomplished. That was that Ross should not be advised of the contents of the dispatch of warning. This would maintain the status quo with which Judge Tally had evinced such complaisance and satisfaction, in which his “folks could take care of themselves,” and out of which must result the death of Ross. And to suggest this effective means to his friend, he makes Whitner, who then had the original message in his possession, add to it the words, “Say nothing.” Say nothing about what? Clearly about the subject-matter of the two dispatches; nothing about the pursuit of the four men on horseback with guns; nothing about the warning to Ross. Say

nothing, so that the situation may remain unchanged. Say nothing, so that Ross shall continue to be as he is now, without the chance or hope of escape. In other words, and in short, the substance and effect of what Tally said to Huddleston, taking the two dispatches and all the circumstances into the account, was simply this, no more or less: “Ross has fled in the direction of Stevenson. The four Skeltons are following him on horseback, with guns, to take his life. Ross does not know of the pursuit. An effort is being made to get word to Ross through you that he is thus pursued, in order that he may get away from them. If you do not deliver this word to him, he cannot escape them. Do not deliver that message. Say nothing about it, and thereby prevent his getting away from them.” A most careful analysis of the voluminous testimony in this case convinces us beyond a reasonable doubt that this was what Tally intended to convey to Huddleston, and that his message means this, and only this, to all reasonable comprehension. Other meanings were suggested at the hearing, in argument, and in testimony as to uncommunicated intention which has been excluded, but the suggestions are either entirely unreasonable in themselves or do not at all comport with the attendant circumstances. For instance, it is said that the language of Tally’s telegram shows he contemplated that the message to Ross would be delivered. He said, “Do not let the party warned get away;” implying, it is argued, that the party referred to had been or would be warned by the delivery of Ed Ross’ message. This view is entirely too literal and technical. The form of expression employed was incident to the brevity usual in telegraphic communication, and was manifestly intended merely as an identification of the person who was not to be allowed to get away. Tally did not care to put the name of this person in his message. He knew a message of warning had been sent to Ross. Ross was the man he did not want to escape; and he referred to him as the party warned in the sense that he was the party to whom the other message had been started. He meant, and his message meant, that Huddleston should not let the party warned, or intended to be warned,—the party referred to in and by Ed Ross’ message,—get away; and not that Huddleston was to look after a party who had actually received the message of warning. Moreover, he spoke over the wires to Huddleston at the same time Ed Ross’ message was sent, and before there was any possible chance for the warning to have been given to R. O. Ross. He knew this. And it was at that juncture, when nobody had been warned in fact, that he referred to Ross as the party warned, when he could not have been the party warned in other sense than as being the party intended to be warned, and for whom a message of warning had been transmitted

from Scottsboro to Stevenson, but not delivered. And it would seem that he especially intended his command or request should be laid upon Huddleston just at this point, for he was careful to tell Whitner, the operator at Scottsboro, that his message was about the same matter as that of Ed Ross,—the warning of R. C. Ross,—thus impressing upon him the propriety, not to say necessity, of both being sent at the same time. They both were sent and received at the same time, i. e. in immediate succession; and Tally called upon his friend Huddleston not to let the person referred to in the other get away, and, as we have seen, indicated to him that the way to prevent his escape was to "say nothing" about the other, and indeed either, message. Again, it is suggested that Tally intended by his message to have Huddleston, who was mayor of Stevenson, arrest Ross. There are many elements of improbability, to say the least, about this. In the first place, the word "arrest" is a most common one, and in most universal use. We cannot conceive of any man, and especially not of a lawyer and a judge, employing any other word—and especially when a resort is had to telegraphic communications—to express the idea which this suggestion imputes to Tally, a lawyer and a judge. Then, as we have already seen, there was no ground for Ross' arrest. Not only did Tally know this, but Huddleston also. The cause of Ross' flight and the Skeltons' pursuit was well known, it seems, both in Scottsboro and Stevenson, and to even the most unlearned comprehension the circumstances involved Ross in no liability to arrest. It is said that Tally wanted Ross arrested because he feared that after getting the warning he would lie in wait and kill the Skeltons as they came into Stevenson. This idea is most far-fetched in view of Ross' attitude throughout of being purely on the defensive, and not standing even upon that, but flying from the Skeltons, his whole purpose being to escape from them, and not to kill them. The message itself utterly excludes the possibility of any such interpretation and the existence of any such fear or intention in the mind of Judge Tally. The fear deposed to is that Ross would entrench himself at Stevenson, and kill the Skeltons as they came. The apprehension clearly evinced by the message was that, if he got the warning, he would get away, and not that he would tarry and fight. If he got away, the Skeltons were in no danger. But Huddleston was besought, not to prevent his waiting for and killing the Skeltons, nor to do anything in that line at all, but to prevent his getting away from the Skeltons, as everybody knew he was endeavoring to do. Again, it surpasses understanding how Huddleston was to arrest Ross, if he obeyed the final injunction of Judge Tally to "say nothing;" and that the idea of having Ross arrested was not in Tally's mind further appears from the fact

that he would not agree to that being done when it was suggested by Dr. Rorex earlier in the day. Specially in respect of the words "say nothing" in Tally's message explanatory suggestions were made by him on the stand. As a reason for them, he first said he hoped by their use to keep the scandal secret. As there was nothing in either of the dispatches referring to the scandal, the force of this reasoning is not readily felt. But, more than this, everybody in Scottsboro and Stevenson knew already a great deal more about the scandal than could possibly have gotten to them through Huddleston saying all he could about those dispatches. Everybody knew it, and Judge Tally must have been fully aware of this general knowledge. Seemingly to appreciate the impotency of this suggestion, which, however, was at first advanced with every appearance of being intended to cover and account for the whole matter, Judge Tally offered another. It was that he meant by using the words "say nothing" to keep Huddleston from disclosing his connection with the message. Why he should have laid such an injunction upon his friend Huddleston, and not upon Judge Bridges, to whom he showed the message without these words, nor upon an entire stranger, young Whitner, at Scottsboro, is much more than we can understand. It also surpasses comprehension that he could have expected Huddleston to arrest Ross without saying to him or anybody else a word about the telegram on or because of which the arrest was made. There is nothing in all this. That Tally's message will bear the construction we have put on it, and no other, we have no doubt at all, on the considerations we have advanced; and our view of its meaning and intent is strengthened by the respondent's self-consciousness of its bad purpose and intent, which is shown by the facts, which the evidence leaves us no room to doubt, that he surreptitiously abstracted the original message from the files in the telegraph office, and swore, on the preliminary examination of the Skeltons, that he sent a telegram to Stevenson that morning, "but not about this matter. It was to a friend about another matter,—nothing concerning this case;" and his further testimony on that trial going to show that he did not know Ed Ross, did not follow him to the telegraph office, and did not know whether he was in the office while he (Tally) was there or not. We therefore find and hold that John B. Tally, with full knowledge that the Skeltons were in pursuit of Ross with the intent to take his life, committed acts, namely, kept watch at Scottsboro to prevent warning of danger being sent to Ross, and, with like purpose, sent the message to Huddleston, which were calculated to aid, and were committed by him with the intent to aid, the said Skeltons to take the life of Ross under the circumstances which rendered them guilty of murder.

And we are next to consider and determine the second inquiry above, namely: Whether it is essential to the guilt of Judge Tally, as charged in the second count of the information, that the said acts, thus adapted, intended and committed by him, should, in fact, have aided the said Skeltons to take the life of the said Ross,—should have, in fact, contributed to his death at their hands. As the life of Ross was not taken by the hands of Tally, the criminal consequences of the homicide could only have been visited upon him at the common law, if at all, as a principal in the second degree, or as an accessory before the fact. He could not have been charged, as he is in this information, directly with the crime of murder as a principal in the first degree. Our statute has abolished the common law distinctions between accessories before the fact and principals, and between principals, in the first and second degrees in cases of felony, and provided that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors." Code, § 3704. And, though the respondent here is proceeded against by virtue of this statute as a principal in the first degree, the evidence, it being confessed that he did not personally, or in such other way as to make him a principal in the first degree at common law, take the life of Ross, must present him in the light either of an accessory before the fact or as a principal in the second degree, as those distinctions obtained before the enactment of the statute to which we have adverted, or he cannot be convicted. We have already stated our conclusion, and the considerations which led us to it, that Judge Tally did not command, direct, incite, counsel, or encourage the Skeltons to the murder of Ross. We have failed to find, and have so stated, that he knew of their felonious purpose before their departure from Scottsboro in pursuit of Ross. Up to that time there was no instigation or incitement by him to the commission of the crime by them until after the death of Ross, and hence, pending the pursuit, he could not have encouraged or instigated them to kill Ross. Judge Tally was therefore not, on the view we take of the evidence, an accessory before the fact to the killing of Ross. To be guilty of murder, therefore, not being a common-law principal, and not being an accessory before the fact,—to be concerned in the commission of the offense within the meaning of our statute,—he must be found to have aided or abetted the Skeltons in the commission of the offense in such sort as to constitute him at common law a principal in the second degree. A principal in this degree is one who is present at the commission of a felony by the hand of the principal in the first degree, and who, being thus present, aids or abets,

or aids and abets, the latter therein. The presence which this definition requires need not be actual, physical juxtaposition in respect of the personal perpetrator of the crime. It is enough, so far as presence is concerned, for the principal in the second degree to be in a position to aid the commission of the crime by others. It is enough if he stands guard while the act is being perpetrated by others to prevent interference with them, or to warn them of the approach of danger; and it is immaterial how distant from the scene of the crime his vigil is maintained, provided it gives some promise of protection to those engaged in its active commission. At whatever distance he may be, he is present in legal contemplation if he is at the time performing any act in furtherance of the crime, or is in a position to give information to the principal which would be helpful to the end in view, or to prevent others from doing any act, by way of warning the intended victim or otherwise, which would be but an obstacle in the way of the consummation of the crime, or render its accomplishment more difficult. This is well illustrated by the case of *Stata v. Hamilton*, 13 Nev. 386, in which a plan was arranged between Laurie and others to rob the treasure of Wells, Fargo & Co. on the road between Eureka and some point in Nye county. Laurie was to ascertain when the treasure left Eureka, and signal his confederates by building a fire on the top of a mountain in Eureka county, which could be seen by them in Nye county, 30 or 40 miles distant. This signal was given by him, and his confederates, advised by it, met the stage, attacked and attempted to rob it, and in the attempt killed one of the guards. Laurie was indicted with the rest for murder, and put on his trial in Nye county, and made the point that, inasmuch as a statute of Nevada required that an accessory before or after the fact should be tried in the county where his offense was committed, he could not be held under the pending indictment or tried in the county of Nye, where the robbery was attempted and the murder committed. But the supreme court of that state held that, if he was an accessory before the fact, he was also, in legal contemplation, present and aiding and abetting at the fact, and was therefore a principal in the second degree, and indictable, triable, and punishable in Nye county as principal in the first degree, under a statute like section 3704 of our Code. He was constructively present though 30 or 40 miles away, and he was guilty as a principal in the second degree in that from and across this distance he aided and abetted his confederates by the beacon lights which he set upon a hill. It was as if he had been endowed with a voice to compass the intervening space, and to advise his accomplices of the approach of the treasure, or as if his words had been transmitted over a telephone or a telegraph line to the ears of his distant

confederates. This treasure stage was proceeding on its way without notice to those in charge of it of the impending onslaught upon it. If it had been apprehended by Laurie and his confederates that the people of Eureka—those interested in the treasure, and in the lives of the guards who went with it—would, after its departure, become aware of the situation, and dispatch a courier to overtake the stage, and warn its occupants, and Laurie had remained there to give warning by signal lights or telegram of the departure of this courier, so that he might be intercepted, and his message stopped, and the stage set upon unawares, and all this had been done, it cannot for a moment be doubted that on these facts, also, Laurie would have been present at the scene of the attempted robbery in legal sense, and been guilty thereof as a principal in the second degree, though he was all the while much further away in point of physical fact than the distance between Scottsboro and Stevenson; and this upon the principle, as stated by the Nevada court, that "where several persons confederate together for the purpose of committing a crime, which is to be accomplished in pursuance of a common plan, all who do any act which contributes to the accomplishment of their design are principals, whether actually present at its commission or not. They are deemed to be constructively present, though in fact they may be absent." 1 Bish. Cr. Law, § 650; 1 Chit. Cr. Law, p. 256; 1 Whart. Cr. Law, § 206 et seq.; Rosc. Cr. Ev. pp. 178, 179; Ralford v. State, 59 Ala. 106; Griffith v. State, 90 Ala. 583, 8 South. 812.

So far, therefore, as presence goes, Judge Tally, on guard at Scottsboro, to prevent warning being sent to Ross, or intercepting, or attempting to intercept, messages of warning which had started on their flight, was in legal contemplation present at Stevenson,—the scene of the homicide,—standing over Huddleston, to stay him in the performance of his duty of delivering warnings to Ross. He was constructively there, and hence, for all practical legal purposes, actually there. Being thus present, did he aid or abet the killing of Ross? What is meant by these terms, and what has one to do to bring himself within them? It is said in the Ralford Case, supra, that "the words 'aid' and 'abet' are pretty much the synonyms of each other;" and this has doubtless come to be true in the law, though originally a different meaning attached to each. The legal definition of "aid" is not different from its meaning in common parlance. It means "to assist," "to supplement the efforts of another." Rap. & L. Law Dict. p. 43. "Abet" is a French word, compounded of the two words "a" and "beter,"—"to bait or excite an animal;" and Rapalje and Lawrence thus define it: "To abet is to incite or encourage a person to commit a crime. An abettor is a person who, being present or in the neigh-

borhood, incites another to commit a crime, and thus becomes a principal in the offense." Id. p. 4. By the amalgamation of the two words in the meaning,—by making synonyms of them,—it may be said that to abet has come to mean to aid by presence, actual or constructive, and incitement, and that to aid means not only actual assistance, the supplementing of another's efforts, but also presence for the purposes of such actual assistance as the circumstances may demand or admit of, and the incitement and encouragement which the fact of such presence for such purposes naturally imports and implies. So we have this definition of the two terms by the late Chief Justice Stone: "The words 'aid' and 'abet,' in legal phrase, are pretty much the synonyms of each other. They comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that the defendant was present with a view to render aid should it become necessary, then that ingredient of the offense is made out." Ralford v. State, 59 Ala. 106. This definition was sufficient for the case then in hand, and it is in the form not infrequently found in the books. But it is incomplete. Mere presence for the purpose of rendering aid obviously is not aid, in the substantive sense of assistance by an act supplementary to the act of the principal; nor is it aid in the original sense of abetting, nor abetting in any sense, unless presence with the purpose of giving aid, if necessary, was preconcerted, or in accordance with the general plan conceived by the principal and the person charged as an aider or abettor, or, at the very least, unless the principal knew of the presence, with intent to aid, of such person; for manifestly, in such case, there being no actual, substantive assistance, and no encouragement by words, the only aid possible would be the incitement and encouragement of the fact that another was present for the purpose of assistance, and with the intent to assist if necessary; and, in the nature of things, the fact of presence and purpose to aid could not incite or encourage or embolden the principal unless he knew of the existence of that fact. That kind of aid operates solely upon the mentality of the actual perpetrator. When rendered at all, it is by way of assurance to his mind in the undertaking he is upon, and it nerves him to the deed, and helps him execute it through a consciousness—a purely mental condition—that another is standing by in a position to help him, if help becomes necessary, who will come to his aid if aid is needed. And that there could be this consciousness without any knowledge of the fact of such other's presence and pur-

pose cannot be conceived. That one may be encouraged or incited to an act by a consideration of which he is wholly oblivious, and which has never addressed itself to his mind, is far beyond the limit of finite comprehension. The definition we have quoted is, as an abstract proposition, clearly at fault. As applied in the concrete to cases of confederacy, as it is, we undertake to say, whenever it is stated in this form, it is free from objection; but in the absence of confederacy, or, at least, of knowledge on the part of the actual perpetrator of a crime, one cannot be a principal in the second degree who is present intending to aid, and does not aid by word or deed. The definition must go further. It should appear by it that, to be an aider or abettor when no assistance is given or word uttered, the person so charged must have been present by preconcert, special or general, or at least to the knowledge of the principal, with the intent to aid him. This view is very clearly stated by Mr. Wharton. He says: "It is not necessary, therefore, to prove that the party actually aided in the commission of the offense. If he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favor their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting." 1 Whart. Cr. Law, § 210. And the same idea is thus expressed by Mr. Stephens in his Summary of Criminal Law: "The aiding and abetting must involve some participation. Mere presence without participation will not suffice if no act whatever is done in concert, and no confidence intentionally imparted by such presence to the perpetrators." See *Connaughty v. State*, 1 Wis. 159. And Mr. Bishop says: "A principal in the second degree is one who is present lending his countenance and encouragement, or otherwise aiding, while another does the act." Bish. Cr. Law, 648. And Mr. Wharton further says: "Something must be shown in the conduct of the bystander which indicates [to the perpetrator, manifestly] a design to encourage, incite, or in some manner afford aid or consent to the particular act, though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone will be regarded as an encouragement. * * * The confederacy must be real. * * * Mere consent to a crime, when no aid is given and no encouragement rendered, does not amount to participation." 1 Whart. Cr. Law, §§ 211a, 211c, 211d. And to like effect are the following authorities: *People v. Woodward*, 45 Cal. 293; *White v. People*, 81 Ill. 333; *Cooper v. Johnson*, 81 Mo. 483; *Noftsinger v. State*, 7 Tex. App. 301; *True v. Com.* (Ky.) 14 S.

W. 684; 1 Am. & Eng. Enc. Law, p. 62; Whart. Cr. Ev. 440. Our own cases fully support these views. Thus, in *Wicks v. State*, 44 Ala. 398, with reference to section 3704 of the Code, it is said: "The testimony must show an actual participation in the commission of the offense, else the party charged cannot be convicted under this statute." And in *Cabbell v. State*, 46 Ala. 195, a mob had overpowered an officer, and taken his prisoner into a house, where they were assaulting him with intent to murder. The defendant, coming upon the scene at this juncture, and being informed that the mob was trying to kill the prisoner on account of the offense for which he had been arrested, said: "That is right; kill him. God damn him." The question was whether on this evidence the defendant was an aider and abettor in the assault made by the mob, and upon this the court said: "It is not pretended that the defendant committed the assault, it was the act of the mob; nor was it seriously contended that he was in fact a member of that unlawful assembly. Consequently, the words uttered by him cannot be held to have encouraged or aided the persons by whom the assault was committed, unless addressed to or at least heard by them or some of them." Here Cabbell had the guilty intent. He wanted the prisoner killed; and he did an act calculated to contribute to the execution of that intent. He uttered words of encouragement and incitement. But he was adjudged to be not guilty, because what he did, though with criminal intent, and calculated to accomplish or aid in the accomplishment of a criminal result, did not in point of fact contribute to that result. And this proposition is directly supported by *Ralford v. State*, supra, when the elliptical definition of "aid" and "abet" is rounded out, as we have shown it must be, and also in a general way by *Frank v. State*, 27 Ala. 37; *Tidwell v. State*, 70 Ala. 33; *Jordan v. State*, 79 Ala. 9, 13; and *Griffith v. State*, 90 Ala. 583, 8 South. 812.

We are therefore clear to the conclusion that, before Judge Tally can be found guilty of aiding and abetting the Skeltons to kill Ross, it must appear that his vigil at Scottsboro to prevent Ross from being warned of his danger was by preconcert with them, or at least known to them, whereby they would naturally be incited, encouraged, and emboldened—"given confidence"—to the deed, or that he aided them to kill Ross, contributed to Ross' death, in point of physical fact, by means of the telegram he sent to Huddleston. The assistance given, however, need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all

human probability the end would have been attained without it. If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life which but for it he would have had, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance; as, where one counsels murder, he is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel; and as, where one being present by concert to aid if necessary is guilty as a principal in the second degree, though, had he been absent murder would have been committed, so, where he who facilitates murder even by so much as destroying a single chance of life the assailed might otherwise have had, he thereby supplements the efforts of the perpetrator, and he is guilty as principal in the second degree at common law, and is principal in the first degree under our statute, notwithstanding it may be found that in all human probability the chance would not have been availed of, and death would have resulted anyway.

We have already said enough to indicate the grounds of the conclusion which we now announce that Tally's standing guard at the telegraph office in Scottsboro to prevent Ross being warned of the pursuit of the Skeltons was not by preconcert with them, and was not known to them. It is even clear and more certain that they knew neither of the occasion nor the fact of the sending of the message by him to Huddleston; and hence they were not, and could not have been, aided in the execution of their purpose to kill by the keeping of this vigil, or by the mere fact of the forwarding of the message to Stevenson, since these facts in and of themselves could not have given them any actual, substantial help, as distinguished from incitement and encouragement, and they could not have aided them by way of incitement and encouragement, because they were ignorant of them; and so we are come to a consideration of the effect, if any, produced upon the situation at Stevenson by the message of Judge Tally to Huddleston. Its effect upon the situation could only have been through Huddleston, and upon his action in respect of the delivery to Ross of the message of warning sent by Ed Ross. This latter message reached Huddleston for Ross, we suppose, about five minutes—certainly not more than ten minutes—before Ross arrived at Stevenson. Immediately upon the heels of it, substantially at the same time, Tally's message to Huddleston was received by the latter. Ed Ross' message imported extreme urgency in its delivery, and Tally's to Huddleston, though by no means so intended, emphasized the necessity and importance, from the standpoint of duty, for the earliest possible delivery of Ed Ross'

message to Robert C. Ross; and it was the manifest duty of Huddleston to deliver it at the earliest practicable moment of time. Scott & J. Tel. § 188. Huddleston appears to have appreciated the urgency of the case, and at first to have intended doing his duty. Upon receiving the two messages, he went at once without waiting, to copy them, to the Stevenson Hotel, which is located very near the telegraph office, in quest of Ross, upon the idea that he might have already arrived. We are to presume a purpose to do what duty enjoins until the contrary appears; and we therefore shall assume that Huddleston intended to deliver the message to Ross, or to inform him of its contents, had he been in the hotel. Not finding him there (for he had not yet reached Stevenson), Huddleston returned to the door of the depot, upstairs, in which was the telegraph office. By this time the command which Judge Tally had laid upon him had overmastered his sense of duty, and diverted him from his purpose to deliver Ed Ross' message to Robert. Standing there at the door, he saw a hack approaching from the direction of Scottsboro. He said then that he supposed Ross was in that hack. We do not think it was incumbent upon him, inasmuch as the hack was being driven directly to the depot, to go down the road to meet it, though the situation was then more urgent than was indicated by the telegrams, in that the Skeltons were at that time skulking on the flanks of, and immediately behind, the hack; but there is no evidence that Huddleston knew this. But we do not doubt that it was Huddleston's duty to go out to the road along which the hack was being driven, at a point opposite his own position at the depot, and near to it, and there and then have delivered the message or made known its contents to Ross. The only explanation he offers for not then delivering the message or making known its contents to Ross was not that he could not have done it (that was entirely practicable), but that he had not taken a copy of it,—a consideration which did not prevent his going to the hotel for the purpose of delivery before he saw Ross appearing, and which, had his original purpose continued, we cannot believe would have swerved him from his plain duty at this juncture. Presuming that he would have done this, because it was his duty to do it,—a duty which he at first appreciated,—and finding, as a fact, that he did not do it, the reason for his default is found in the injunction laid upon him by Judge Tally. He did not warn Ross, because he did not want Ross to get away, and this because Judge Tally had asked him not to let Ross get away; so that, as he stood there at the door, he mapped out a course of action. He would not deliver the message immediately, if at all, but he would send off for the town marshal, and in the meantime he would call William Tally from over the way, and confer with him as to what should be done;

Ross to be the while wholly unadvised of the contents of the message from his kinsman, and wholly ignorant of the pursuit of the Skeltons. So he sends a man in search of the marshal, whose whereabouts, and, of consequence, the time necessary to find and bring whom to the station, were unknown; beckons to William Tally to come to him; then turns and goes upstairs into the telegraph office. He says he went up there to copy Ross' message for delivery to him. If this be true, this was only another factor, so we have seen, in the delay that Judge Tally's message had determined him upon, for while, at first, he was anxious to deliver the message or its contents uncopied to Ross, when he thought Ross might be at the hotel, and went there to find him for that purpose, when Ross was actually in sight of him, and rapidly approaching him, he deemed it most important to copy the message before advising Ross. It was also into this upstairs office that he invited William Tally, and we cannot escape the conclusion that his purpose in going there before delivering the message was to have a consultation with William Tally as to what should be done before advising Ross, and also to give the marshal time to arrive; so that, should they conclude to adopt that course, they could have Ross arrested; and it cannot, we think, be doubted that he then had no purpose whatever of apprising Ross of the contents of the message, if ever, until he had had this conference with the brother of the man who had asked him not to deliver it at all. That this delay was to conserve such ulterior purpose as might be born of this conference, was wholly unwarranted, and was caused by the telegram of Judge Tally to Huddleston, we believe beyond a reasonable doubt.

It remains to be determined whether the unwarranted delay in the delivery of the message to Ross, or in advising him of its contents, thus caused by Judge Tally, with intent thereby to aid the Skeltons to kill Ross, did, in fact, aid them or contribute to the death of Ross, by making it easier than it would otherwise have been for the Skeltons to kill him, by depriving him of some advantage he would have had had he been advised of its contents when his carriage stopped, or immediately upon his alighting from it, or by leaving him without some chance of life which would have been his had Huddleston done his duty. The telegram, we have said, should have been delivered, or its contents made known, to Ross at the time the hack came opposite where Huddleston was, and stopped. Huddleston and William Tally were equidistant from this point when the former called to the latter, at which time also Huddleston had seen the hack approaching this point. Tally, going to Huddleston, reached this middle point between them, unhastened, as Huddleston should have been, by the urgency of the message, just as the carriage got there and

stopped. It is therefore clear that had Huddleston, instead of calling Tally and going into the depot, himself gone out to the road along which the carriage was approaching, and which was not more than 100 feet from him, he would have gotten there certainly by the time it stopped, and have acquainted Ross with the contents of the message, with the fact that four men were pursuing him with guns to take his life, before Ross alighted from the hack. Being thus advised, and not knowing of the immediate proximity of the Skeltons, it may be that Ross would have alighted as he did, exposed himself to the Skeltons' fire as he did, and been killed as he was. But, on the other hand, the Skeltons were at that time dismounted, and, two of them at least, a long way from their horses, and none of them were in his front up the road, and he had a chance of escape by continued flight in the vehicle. Again, he might then and there have put himself under the protection of Huddleston, as an officer of the law, and had the bystanders, those in the immediate neighborhood, of whom there were several, summoned to help protect him. This might have saved his life; it was a chance that he had. But, if it be conceded that, as he would not have known of the proximity of the Skeltons from mere knowledge that they were in pursuit, he would have alighted precisely as and when he did; yet, when the first shot was fired, Ross would have known that the man who fired it was one of the Skeltons, and that three others of them were present in ambush, armed with guns, to take his life. Knowing this, the hopelessness of standing his ground and attempting to defend himself from his enemies, overpowering in number, and secure in their hiding places, while he stood in the open street, would have been at once manifest to him; and, instead of standing there as he did, knowing only as he did that some one man, whom he did not know, had fired a gun, and peering and craning his neck to see whence the shot came, and who fired it, he could, and doubtless would, have sought safety by flight in the opposite direction, in which was the Union Hotel, scarce 100 feet away. And, in view of the fact that he was hit only once by the numerous shots that were fired at him while he stood there in the open, and that not in a vital or disabling part, it is very probable that, had he attempted that mode of escape as soon as the first shot was fired, he would have reached the hotel in perfect safety. Certain it is that in making that effort he would have gone away from the lurking places of his enemies, and he would not, as he did in his ignorance of the true situation, have placed himself where John Skelton, at close quarter, could and did shoot him to death from behind his back. But whether he would or would not have reached a place of refuge we need not inquire or find. The knowledge that he would have had if the telegram of Ed Ross had been delivered

to him, when it could and should have been delivered, of the pursuit of the Skeltons, together with the knowledge which would have been imparted to him by the report of the first gun in connection with the contents of the message, would instantly have advised him of the extent of his danger,—a danger which he could not combat, which was deadly in character, and from which he would naturally have been at once impressed the only hope of escape lay in immediate flight. That was a chance for his life that this knowledge would have given him. That was a chance of which the withholding of this knowledge deprived him. Tally's telegram to Huddleston deprived him of that knowledge. Tally, through Huddleston, deprived him of that chance. Again, after having been shot in the legs, and partially disabled, by one of the many shots fired at him by Robert, James, and Walter Skelton as he stood fully exposed to their broadside, he, in his then crippled condition, made an effort to find protection behind the oil house, the nearest building to him. Only these three men had fired up to that time. He knew of the presence of these three only. The house sheltered him from two of these men and partially also from the third. He got there, and stood facing the direction these three were; and he called aloud for protection from them, meantime keeping a lookout for them, and intending no doubt to protect himself from them if he could. He knew of the presence of these three only. Nobody had seen John Skelton. He did not know that John Skelton was there. Had he gotten Ed Ross' telegram, this he would have known: that there were four of them; that only three had shot at him; that the other was somewhere hidden in the immediate vicinity. And, while seeking to escape from or guard himself from the other three while he was by the side of the oil house, he would also have sought to guard himself against the fourth. He was off his guard as to this fourth man, John Skelton, because he was ignorant of his presence. This ignorance was directly due to Tally's active interference. Tally's aid to the Skeltons by way of preventing Ross being warned enabled John Skelton to come upon Ross from his rear, and shoot him down. Ross went to his death, guarding himself against the other three, and calling for protection from them, without even knowing that the man who killed him was nearer to him than Scottsboro. Can it be doubted that Ross' utter ignorance of John Skelton's presence with the others at Stevenson made it easier for John Skelton to take his life? Can it be doubted that his ignorance of the presence of all four Skeltons when the first gun was fired by Robert Skelton at Bloodwood, when, had he known it, he could have fled in the appreciable time between the time of the firing of the first and other shots,—the next one being fired by the same man,—made it easier

for them to take his life? Can it be doubted in any case that murder by lying in wait is facilitated by the unconsciousness of the victim? Or in any case that the chances of the intended victim would be improved, and his death rendered more difficult of accomplishment, if the first unfruitful shot apprises him of the number and the identity of his assailants, and the full scope and measure of their motive and purposes? We cannot believe otherwise. It is inconceivable to us after the maturest consideration, reflection, and discussion, but that Ross' predicament was rendered infinitely more desperate, his escape more difficult, and his death of much more easy and certain accomplishment by the withholding from him of the message of Ed Ross. This withholding was the work of Judge Tally. An intent to aid the Skeltons to take the life of Ross actuated him to it. The intent was effectuated. They thereby were enabled to take him unawares, and to send him to his death without, we doubt not, his ever actually knowing who sought his life, or being able to raise a hand in defense, or to take an advised step in retreat. And we are impelled to find that John B. Tally aided and abetted the murder of Robert C. Ross, as alleged in the second specification of the second count of the information, and to adjudge that he is guilty as charged in that specification, and guilty of murder as charged in said second count; and judgment deposing him from office will be entered on the records of this court.

No consideration or conclusion of fact in this opinion must be allowed to exert any influence upon the trials of the Skeltons and Judge Tally on the indictments for murder now pending against them.

BRICKELL, C. J., not sitting.

HEAD, J. (dissenting). I am of the opinion the respondent should be acquitted of both charges. I do not believe, beyond a reasonable doubt, that respondent intended, in sending the telegram to Huddleston, to aid or abet in the murder of Ross. I do not believe, beyond a reasonable doubt, that the telegram of warning would have been delivered to Ross by Huddleston before the shooting began if the telegram of the respondent had not been sent.

(103 Ala. 497)

COMMERCIAL BANK OF SELMA v. ORENSHAW.

(Supreme Court of Alabama. June 19, 1894.)

PROMISSORY NOTES—NEGOTIABILITY—DEFINITE TO RECOVER NOTE—TENDER OF AMOUNT DUE.

1. A note, secured by a chattel mortgage, attached thereto, on a cotton crop, providing for delivery to the mortgagee of the entire crop as rapidly as it could be prepared for market, to be sold by him, as agent of the maker, and the proceeds applied on the note, is not negotiable. Affirmed by a divided court.

2. A note and mortgage cannot be recovered by the maker from the holder, in an action of detinue, without paying into court, at the institution of the suit, the amount admitted to be due.

Appeal from city court of Selma; J. W. Mabry, Special Judge.

Detinue by Randall Crenshaw against the Commercial Bank of Selma to recover a note and mortgage. There was a judgment for plaintiff, and defendant appeals. Reversed.

The defendant reserved a separate exception to the following portion of the court's general charge to the jury: (1) "It was the duty of the defendant, if it refused to accept said money tendered because it was insufficient in amount, to have given that as its reason for refusing to accept it." (2) "It is not incumbent on the plaintiff to show that the note given by H. C. Keeble Company to defendant, mentioned in evidence, has been paid, unless you believe from the evidence that plaintiff had notice, as I have stated, of the transfer of plaintiff's note and mortgage to the bank." (3) "That the commercial character of the note sued for does not protect defendant against payments made thereon by Randall Crenshaw to H. C. Keeble Company, without notice of its transfer, though the note was transferred before maturity, for value, in due course of trade." The defendant then requested the court to give to the jury the following written charge: (1) "The court charges the jury that, if they believe the evidence in this case, they must find the issue in favor of the defendant." The court refused this charge, and the defendant duly excepted to the court's refusal to give said charge as asked. There was judgment rendered for the plaintiff, and defendant appeals, and assigns as error the rulings of the court upon the pleadings, and the giving of the portions of the general charge to which exceptions were reserved, and the refusing to give the charge requested by the defendant.

Dawson & Pitts, for appellant. Jeffries & Jeffries, for appellee.

McCLELLAN, J. This is an action of detinue prosecuted by Randall Crenshaw against the Commercial Bank of Selma for the recovery in specie of a certain note and mortgage executed by said Crenshaw to the H. C. Keeble Company, and by said company assigned and transferred to said bank for value before maturity. The note was executed January 21, 1890, for \$150, and payable October 15, 1890, to "H. C. Keeble Company, at the Commercial Bank of Selma." The mortgage, contemporaneously executed, covered certain live stock and farming implements, a wagon, etc., and all the crops grown, etc., by said Crenshaw, on the J. L. Crenshaw place, in Dallas county, Ala., or on any other land in said county or state, and was conditioned for the payment of said note, and the

other indebtedness thereafter to be incurred for plantation supplies. The mortgage contains, also, the following among other stipulations: "And the undersigned does hereby covenant and agree to and with the said H. C. Keeble Co. as follows, namely: * * * 2d. That the undersigned will deliver all the cotton grown, raised, received, or controlled by him during said year to the H. C. Keeble Co., at the said city of Selma, as rapidly as the same can be prepared for market, the same to be sold by said corporation, as the agent and factor of the undersigned, at the usual commission of \$1.00 per bale, and the net proceeds thereof shall be applied to the payment of the debts and liabilities herein secured; the same to be first applied, however, to any debts or liabilities of the undersigned arising out of the premises other than the debts evidenced by said note." Crenshaw, having no notice of the transfer of this note and mortgage to the Commercial Bank, delivered cotton to the Keeble Company of sufficient value to pay all except about \$18 of his indebtedness. The cotton was sold by the company, as his agent and factor, and the net proceeds of sale credited to him on its books, but no part of such proceeds was paid to the bank on, or otherwise applied to the payment of, said note, and the bank has never received anything in that behalf. The Keeble Company having failed, plaintiff, then coming to a knowledge that his note and mortgage had been transferred, tendered the bank \$18.44, as in payment of the balance conceived to be due from him on the note, and demanded that the papers be delivered to him. The tender and demand were refused, and he thereupon instituted this suit, and some days afterwards paid the sum of \$18.44 into court. It is not controverted that the note and mortgage were at the same time assigned to the bank, nor that the papers were pinned together when delivered into the hands of the officials of the bank.

The important question presented for our consideration on this appeal manifestly is as to the negotiability of the note executed by plaintiff to the Keeble Company, and assigned to the defendant. In determining this question, the note and mortgage are to be construed and looked to as one instrument, and the bank must be holden, on the facts we have stated, to a knowledge of every stipulation in the mortgage—and, among the rest, that quoted above—affecting or having reference to the note, to all intents and purposes as if such stipulation had been embodied in the note itself. 1 Rand. Com. Paper, § 197; 1 Daniel, Neg. Inst. § 156; Chambers v. Marks, 93 Ala. 412, 9 South. 74. Of course, the mere fact that the note is secured by a mortgage exerts no influence upon the question of its commercial character. Leaving that circumstance out of view, the case presented in this connection is this: Crenshaw promises, in a writing signed by him, to pay the Keeble Company \$150 on

October 15, 1890, at the Commercial Bank of Selma. Here are all the elements of a promissory note,—a written promise to pay a named person a sum certain on a stated date, and at a bank therein designated. Code, § 1756. In this promissory note is embodied, however, a stipulation, which is not essential either to its efficacy as a promise to pay or to its negotiability, to the effect that the promisor will deliver all cotton produced or controlled by him to the payee as rapidly as the same can be prepared for market, to be sold by the latter, as the agent and factor of the former, on the usual factor's commission, the net proceeds of such sales to be applied, by the agent or factor, of course, to the payment of the note. And the question recurs, does this stipulation destroy the negotiability of the note, which, without it, is confessedly commercial paper in the hands of the bank, in the sense of not being affected by any equities that might obtain between the original parties thereto? And the answer to this inquiry depends upon whether the additional stipulation introduces any element of uncertainty in the sum to be paid, or the time of payment, or the place at which payment is to be made. Very clearly, the absolute promise to pay the definite sum of \$150 was in no wise affected by the superadded agreement as to the delivery and sale of cotton and application of the proceeds. It is most manifest that this specific sum was to be paid, whether any cotton was delivered and sold or not. So far as the certainty of the amount is concerned, therefore, the special stipulation is entirely innocuous, and without effect upon the negotiability of the paper. Is the requisite certainty as to the time of payment affected or eliminated from the contract by the additional stipulation? I think not. There is, in truth and in fact, but one stipulation entered into by the parties in this connection, and that is that payment should be made on the 15th day of October, 1890. This is the express provision of the note, and there is, I undertake to say, nothing in the mortgage to the contrary. And the sum then to be paid was the amount of the note in full. There is no intimation, no stipulation, in the note or in the mortgage, from which it can be inferred, or which affords any basis for an inference, that partial payments could, as a matter of right, be made at any time before October 15th, or that the holder of the note was under any duty to receive, prior to that time, anything short of full payment of it, or, indeed, that he was under any obligation to accept even full payment before the stipulated day. The stipulations in the mortgage that the payor is to deliver cotton to the Keeble Company, as factors and agents, for sale on account of the payor, on the usual commissions, and that the proceeds of such sales shall be applied to the payment of this note and other indebtedness of the payor, furnish no ground for a different conclusion. By the note, Crenshaw undertook and obli-

gated himself absolutely to pay \$150 to the H. C. Keeble Company on October 15, 1890, at the Commercial Bank of Selma. The stipulations in the mortgage just stated were, at most, only an agreement that the proceeds of cotton delivered to the Keeble Company for sale on commission, and sold by the company as the payor's agent, should be applied to the payment of this note according to its terms; that is, to the payment of \$150 on October 15, 1890, at the Commercial Bank of Selma. But, even if it be conceded that the stipulations of the mortgage with reference to the application of the proceeds of cotton had any effect upon the time of payment set down in express terms in the note,—for which concession I can find no warrant in the contract the parties have entered into,—the utmost operation they could possibly have in the premises would be to invest the payor with the right to pay the amount before the day named, if the necessary funds should be sooner realized from the sales of cotton delivered by him to the Keeble Company. According to this effect to the special agreement, we have a contract to pay \$150 on October 15th, with a right reserved in the payor to pay that sum before that time, if the money necessary to that end, namely, \$150, should arise, or be acquired, from a certain source. The authorities uniformly support the proposition that such a stipulation does not affect the commercial character of an otherwise negotiable instrument. Thus, in *Walker v. Woollen*, 54 Ind. 164, the promise was in these words: "Six months after date, or before, if made out of the sale of Drake's horse hay fork and hay carrier, I promise to pay James B. Drake, or order," etc.; and it was held that this was an absolute promise to pay at a certain time, coupled with a conditional promise to pay sooner upon the happening meantime of a certain event, which might or might not happen, and that this stipulation for earlier payment in a certain contingency did not destroy the negotiability of the note. The court said: "Such conditional promise embodied in a note containing an absolute promise to pay at a time specified does not destroy the negotiable qualities of the paper, or take it out of the operation of the law merchant." The supreme court of Pennsylvania declared the same doctrine on a like stipulation, the promise being to pay 12 months after date, or before, if the amount of the note should be made out of the sale of a certain seeding machine. *Ernst v. Steckman*, 74 Pa. St. 13. And upon similar considerations, the law has come to be well settled that a note payable by its terms on or before a future day, therein named, though the maker thereby is invested with the right to pay such a note at any time after its date, is yet, for all purposes of negotiation, to be regarded as payable solely on the day therein named. *Jordan v. Tate*, 19 Ohio, 586; *Mattison v. Marks*, 31 Mich. 421; *Tied. Com. Paper*, § 24. So, in *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64, a note

payable 12 months after date, or before, if the money is received from a certain source, was held to be negotiable. And to the same effect are the following cases and texts: *Capron v. Capron*, 44 Vt. 410; *Palmer v. Hummer*, 15 Am. Rep. 353; *Cota v. Buck*, 7 Metc. (Mass.) 588; *Gardner v. Barger*, 4 Helsk. 669; *Cisne v. Chidester*, 85 Ill. 523; *McCarty v. Howell*, 24 Ill. 341; 1 Rand. Com. Paper, § 112; 1 Daniel, Neg. Inst. §§ 43-45. This right to pay the note before October 15th, out of the proceeds of cotton, conceding its existence for argument, does not involve a right to make partial payments on the note, any more than there would be a right to make partial payments before maturity on a note payable absolutely on a specified day. The special agreement, granting its effect to be that Crenshaw could pay the note prior to October 15th with proceeds of cotton, would operate to mature the note, in the sense of giving him the right to discharge it, when the necessary funds from this source were in hand to pay it in full.

Not only so,—not only is the contract of the parties, evidenced by the note and mortgage, without any stipulation, express or implied, for partial payments, the law being clear that, without such stipulation, no right exists to make partial payments,—but there is an equal absence of stipulation, and all basis for inference of intention, that payment was to be made, or might be made, elsewhere than at the Commercial Bank of Selma. The promise in the note is to pay at that bank. There is nothing in the mortgage to the contrary. The instrument, indeed, itself recites that the note is payable at that place. If its further stipulations are to be taken to authorize payment before October 15th,—which I deny,—they are yet wholly barren of any stipulation, or the remotest intimation or implication, that there is any right existing in, or duty resting upon, Crenshaw to make payment at any other place whatever. Conceding his right to pay the note before October 15th, if the necessary funds should arise from the sales of cotton, that right was to make payment at the bank. On the concession mentioned, the note and mortgage were notice to all holders of the former, with notice of the latter, of Crenshaw's right to so pay at that place prior to October 15th, in the contingency named, and it was, therefore, upon such holder to receive payment there made, when so made, in full of the note. And neither Crenshaw nor his agent, the Keeble Company, would have been under any necessity or obligation to run down such holder, and make even full payment to him. In the very nature of things, payment elsewhere would have been in the teeth of the plain terms of the contract, could have been made only by mutual consent, whereby those terms were in effect modified, and, if made before maturity, whether in full or partially, would have been at the risk of Crenshaw, affording him no protection against the note

in the hands of a purchaser with notice only of the stipulations of the note or mortgage. Of course, a holder of contracts to pay money, whether they be negotiable instruments or not, may accept payment at any time or place; but neither has he the right to demand, nor has the payor the right to make, payment except at the time and place stipulated. The question here is not as to the place any holder might accept payment, but as to the place at which any such holder had the right to expect and demand payment, the place of presentation for payment, and for nonpayment at which the paper might be protested. This place, in this case, was as certainly the Commercial Bank of Selma under the language of the note with the mortgage stipulations as by the terms of the note without these stipulations.

But it is insisted that the rights and duties of the parties under these writings are to be determined by reference to the customs of the country in which the contract was made, common knowledge thereof, and of the course of the seasons and habits of husbandry of the people. It is said that the court judicially knows that the cotton crop is harvested, in the latitude of Perry county, for the most part at least, prior to October 15th; that the mortgage requires the delivery of cotton as rapidly as it can be gotten ready for market; and that, therefore, it must have been the intention of the parties that this note should be paid off in installments, as cotton was received, at uncertain times before that date. Conceding the facts thus assumed to be within common knowledge, shall such knowledge of the customs and habits of a country, the course of the seasons, and the maturity of crops, the supposition that contracting parties meant this or that, because this or that would best fit in with the habits of the people, be looked to or indulged against the words they have used to express their meaning? Shall we take what they say,—the plain terms they have expressly agreed upon,—or some vague and shadowy idea evolved out of their surroundings, as to what they meant, to reach, fix, and declare their intention? The law is too well settled, and too obviously supported by every just consideration obtaining in the premises, to require discussion or citation of authority to the establishment beyond cavil of the proposition that a plain and unambiguous contract cannot be controlled, varied, modified, construed, or interpreted by reference to the customs, habits, or surroundings of the contracting parties, whether such customs, habits, and surroundings be within the judicial knowledge of courts, or be brought to their knowledge through the mouths of witnesses. But, if this contract were ambiguous, I deny that deductions from common knowledge lead to the conclusion insisted upon as to the intention of the parties. It is manifest from the mortgage that it was in contemplation of the parties that Crenshaw's whole crop of cotton

would be about five bales. He binds himself to deliver only five bales. He in fact did deliver only five bales. If it is common knowledge that the gathering of cotton commences some time before October 15th, it is also common knowledge that it is never completed in this latitude—rarely, indeed, half completed—prior to that time; and it would, I think, be entirely safe to say that, as a rule, not one-half of a given crop is gathered, prepared for, and put on the market as early as the middle of October. These parties recognized this. The mortgage contains no stipulation for the delivery of the cotton, or any specific part of it, by October 15th, but, to the contrary, the mortgagee had until January 1st to make the deliveries contracted for. Moreover, it is to be borne in mind, if we are to grovel in the labyrinths of judicial knowledge as to the seasons and customs of the country, that, where cotton is delivered to a commission merchant or cotton factor for storage and sale for and on account of the producer, the delivery is not necessarily for immediate sale, but the factor, in the absence of special instructions, has a discretion as to the time of sale. Indeed, one of the chief reasons for his existence and employment is that, having the cotton ready for sale and delivery at any time, and being always in the market, he may hold it, sometimes, indeed, for months, until an opportune moment, in the interest of his principal. It is also to be remembered that the secured debts were to be paid, not in cotton, but in the proceeds of cotton, and the proceeds of the cotton first sold were to be applied to debts and liabilities of Crenshaw to the Keeble Company other than that evidenced by this note, which other debts, it is fair to presume, the parties then contemplated would amount to the sum actually incurred afterwards, which was something over \$100. How it can be inferred that the parties intended that the whole of Crenshaw's crop would be gathered, prepared for market, delivered to the Keeble Company, and sold, prior to October 15th, surpasses any comprehension. How it can be concluded that it was their purpose to pay this note and the debt of \$100 out of the proceeds of the sale of, say, two bales of the cotton, which was all they had any reason to expect would have been delivered prior to October 15th, I cannot conceive. That they expected to pay any part of the note before October 15th, the other indebtedness having to be first paid out of the cotton first delivered and sold, it is unreasonable to suppose. It is shown in this case that the total proceeds of Crenshaw's crop, the total proceeds of all the cotton he bound himself to deliver to the Keeble Company, and of all the cotton he did deliver was insufficient to pay this note after the application of a part of the proceeds to the other debt. To say, therefore, that it was the intention of the parties to pay off this note in installments prior to

October 15th, out of the proceeds of cotton, where they had no reason to expect that any cotton would be received and sold before that time, the proceeds of which could be applied to this note, and when, indeed, the whole contemplated proceeds of cotton to be delivered up to January 1st were insufficient to pay off the other debt and the note, would be to arrive at an intention controlling and varying the express terms of a plain contract in a way, and by a process, and upon data which not only furnish all the illustration needed of the wisdom of the law in forbidding unambiguous contracts to be thus emasculated, but which also demonstrate the incorrectness and unsoundness of the conclusion as to the intentions of the party insisted upon, considered wholly apart from the terms they have set down as expressing their objects and purposes.

But it is said the Keeble Company was, by the same instrument, both the factor and creditor of Crenshaw, and entitled, in the latter capacity, to the net proceeds of sales of cotton as soon as realized. This is the assumption of the point in issue. That the Keeble Company was not the creditor of Crenshaw, in respect of the amount evidenced by the note, after that had been transferred to the Commercial Bank, seems to me to be too clear for discussion. That company was paid its debt in consideration of the transfer of the note. Thereafter, the company had no claim on this note against Crenshaw, but the latter owed the amount of it to the bank, and the bank, not the Keeble Company at all, was entitled to receive from Crenshaw, or from his agent, the net proceeds of the sale; not, indeed, as realized, but at the maturity of the note, whether that was, as I think, absolutely on October 15th, or, as I have conceded for the discussion, at such prior day as should find a sufficiency of the proceeds of cotton applicable to this debt in the hands of Crenshaw, or his agent, the Keeble Company, to pay the note in full. The mortgage in terms provides for, and thus evidences that the parties contemplated, an assignment of it, and the note secured by it, and it would be anomalous to say that the assignment, when made as thus contemplated, in which event it is stipulated, in effect, that Crenshaw shall pay the secured sums to the assignee, was not to, and did not, constitute the relation of debtor and creditor between him and the assignee. There are cases in which an assignment of the evidence of a debt does not deprive the payee of the right to make payment to the promisee, or rather, more accurately, there are evidences of debt which cannot be assigned at all so as to impose an obligation on the promisor to pay the assignee. Thus a paper, otherwise negotiable, but containing an express condition that it should be given up to the maker as soon as the amount of it was received by the person to whom the promise was made, was held to be nonnegotiable, the

court saying: "The defendant, by the terms of the note, had a right to pay it in full, at any time before maturity, to the persons to whom it was made payable. Such payment to them would have been a good discharge of the contract, although it had passed over to a third person, if the promisor had no notice of such transfer. The stipulation or condition, therefore, was inconsistent with its unlimited negotiability, and takes away from the contract the essential feature of a promissory note. *Chit. Bills, 134 et seq.*" *Hubbard v. Moseley, 11 Gray, 170.* And, partly on the same principle, it is ruled that a written promise to pay A. B. a sum to C. D., unless paid to C. D. by a day certain, and, if paid to the latter, the writing to be surrendered to the maker, is not commercial paper. *Chapman v. Wight, 79 Me. 595, 12 Atl. 546.* But neither of these is the case at bar. Here there is no stipulation that the note is to be surrendered to Crenshaw when he shall pay the amount of it to the Keeble Company. To the contrary, as we have seen, Crenshaw expressly undertook to pay to any assignee of the Keeble Company. Moreover, he executed a note having in itself all the requisites of commercial paper. He expressly agreed to pay a sum certain at a certain time and bank. Had the intention been that he was to pay only to the Keeble Company, there would have been no sense in undertaking to pay at the bank. That provision is consonant only with a purpose to pay the note at that bank, to the holder of it at maturity, whether the holder should be the Keeble Company, or not. There is absolutely nothing in the special stipulations in the mortgage, supposed to bear on this matter, which are at all inconsistent with this view, or afford any ground, in my opinion, for holding that any right was reserved by Crenshaw to pay to the Keeble Company, regardless of the fact that the latter no longer held the paper.

I am unable to interpret the special stipulation otherwise than as creating the relation of principal and agent or factor between Crenshaw, on the one hand, and the Keeble Company, on the other, both in respect of the cotton to be, and which was, delivered, and in respect of the net proceeds of the sales thereof. By the expressed terms of the agreement, the Keeble Company was to receive and sell the cotton as Crenshaw's agent and factor, and not as his creditor. The sales being made as agent and factor, the proceeds necessarily came to the hands of the company, and were held by it, not in its own right as creditor, for, in respect of this note, it had long ceased to be Crenshaw's creditor, but in the right of Crenshaw, and as his agent. Taking the matter at this point, we have money in the hands of the Keeble Company held for and as the agent of Crenshaw. Then follows the agreement between the parties—between Crenshaw, the principal, and the Keeble Company, the

agent—as to the disposition the agent shall make of the money, to the effect that it shall be applied (by the agent necessarily and obviously, since the company no longer sustains any other relation to Crenshaw, so far as the note is concerned, and in that capacity) to the debts secured by the mortgage; first, the advances, and afterwards the debt evidenced by the note. The delivery of the cotton was not a payment; it was delivered for the purposes of sale, and was to be sold at the usual commission of one dollar per bale. The receipt of the net proceeds of sale by the agent was not intended to be, and was not, a payment. After such receipt, the contract required that the proceeds should be applied to the debts, and such application alone constituted payment. The act of applying the proceeds to the debts, of payment thereof on the debts, was essentially the act of Crenshaw, whether intended to be performed, and performed, by his own hand, or by the hand of the company; and this is equally true, and manifestly so, whether the debts were still due the company, or had been assigned to third parties. And, moreover, this act of application of proceeds, this duty resting on the company to pay the note out of the proceeds, could be as well performed—it was as appropriate to the agency, as much incumbent on the agent to perform it—by payment to any holder of the paper, the same having been assigned, as it would have been right and proper for the company, as agent, to credit such proceeds on the note, if it had continued to be the holder of it. This, then, so far from being a reservation of the right to pay the Keeble Company in any event, and thereby be entitled to a surrender of the note, whether then held by that company or not, was in reality a renewed assurance of payment to any holder of the note; and the special stipulation, thus importing only that the net proceeds of cotton should be applied by Crenshaw, through his agent, the company, to the payment of the note at maturity, did not, in my opinion, destroy the negotiability of the note. The bank took it with notice only of Crenshaw's right to apply the cotton money to its satisfaction, and of the duty which the Keeble Company was under to Crenshaw to so apply the same as his agent; but it was no concern of the bank whether Crenshaw's agent was faithful to its trust or not, and of no consequence to it whether the company applied the cotton proceeds as it had agreed to do, other than would have been the case had there been no agency at all, and Crenshaw had stipulated for the application by his own hands of the net proceeds of the cotton to the note, in which case, obviously, Crenshaw's failure to so apply such proceeds would in nowise have affected his absolute obligation to pay \$150 to the holder of the paper on October 15, 1890. Crenshaw should have seen to it that his agent performed the agency. That

the agent was unfaithful is his misfortune, the cause of which lies with him, rather than the bank. The latter, having his unconditional promise to pay, with notice only of a right and duty on his part to pay out of the special fund, but to pay, at all events, out of some fund, was under no obligation to notify him that it held the paper. To the contrary, in view of the fact that he had set his hand to and issued a note which was in form negotiable, it had a right to assume that he, knowing that the note was payable on a certain day at the Commercial Bank of Selma, would have funds there on that day to meet it.

This conclusion gains support when the futility or inutility of notice of Crenshaw is considered. The mortgage recites, in the paragraph next succeeding that we have quoted, "that the H. C. Keeble Company is engaged in the business of selling cotton on commission; and the main purpose of the above advances is to promote that business by securing the sale of cotton." The stipulation for the delivery of cotton to the company was in promotion of this commission business. Crenshaw had contracted to deliver cotton, in consideration of advances, and to pay the company the usual commission of one dollar a bale for selling it. He had received the advances in consideration of which he had thus obligated himself. There is no intimation of a condition in this contract to the effect that it should not hold in the event the note in question was assigned. The fact that the note was assigned to the bank could not possibly have relieved him from the obligation to deliver the cotton to the company, nor have taken away the company's right to sell it, receive the proceeds, and charge for its services in that behalf. Of what avail, therefore, would notice of the transfer have been to him? None whatever, that we can conceive of. With or without such notice, he had no choice but to deliver the cotton as he did do, and, with or without notice to him of the transfer, the company had precisely the same right to sell the cotton and receive the proceeds. A notice which involves no legal consequences cannot be a notice which the law requires. Confessedly, if, after notice of transfer, he had delivered the cotton to the company, and allowed it to receive the proceeds of sale, he would be liable to the bank for the face of the note. The whole case was tried below on the assumption of the correctness of that proposition. Then, how can the absence of such notice protect him from liability, when, had it been given him, he would still have rested under precisely the same duty and obligation as without it, to deliver cotton to the company for sale and receipt of proceeds by it? Manifestly, I think, no right or obligation of Crenshaw involved in this case depended on his knowledge of the transfer of the note to the Commercial Bank, and he is liable now on that note, just as he

would be had he been fully advised of its transfer from the moment it was made. My own conclusion, therefore, is that the fact that the Keeble Company received the proceeds of Crenshaw's cotton, which the latter intended to go in payment pro tanto of this note, is no defense against the bank's claim of the full amount of the note against Crenshaw, and, of consequence, the latter had no right to recover the note and mortgage in this action, not having paid or tendered the full amount to the bank. I believe this conclusion is not only that which alone is justified on the law and facts of the case, but that the contrary view will lead to the most disastrous consequences in the destruction of the negotiable quality of almost every promissory note the payment of which is secured by a mortgage. The court, however, is equally divided on this question, BRICKELL, C. J., concurring in the foregoing opinion, and COLEMAN and HEAD, JJ., taking a different view, as shown in the opinion of HEAD, J.

The only other matter necessary to be considered arises on the sufficiency of the plaintiff's replication (No. 7) to defendant's fourth plea. The complainant claims "one mortgage and note executed by Randall Crenshaw [the plaintiff] to H. C. Keeble Company for the sum of one hundred and fifty dollars, and due on, to wit, October 15, 1890, and dated January 22, 1890, said mortgage being on one bay mule, one two-horse wagon, and two cows, with the value of the hire thereof," etc., without more. Defendant's fourth plea alleged, *inter alia*, the purchase of said note for value, before maturity, by it; that the same was commercial paper, being payable at a bank; and that said note has not been paid to the defendant. To this was replied facts which, according to the opinion of my associates, rendered the note nonnegotiable, and, further, that the plaintiff, prior to notice of transfer to defendant, had paid to the H. C. Keeble Company \$131.56 of the amount evidenced by the note, and "that plaintiff, as soon as informed of the transfer and delivery of the note and mortgage to the defendant, and before the commencement of this suit, tendered the defendant, in legal tender of the United States, eighteen and 44-100 dollars, which sum the plaintiff has paid the clerk of this honorable court, which sum, together with the amount paid H. C. Keeble Co., is the amount of said mortgage." This replication was filed June 12, 1891,—a considerable time after the institution of the suit. Defendant demurred to this replication on the ground, among others, that it appeared thereby that the money alleged to have been tendered was not paid into court at the time of complaint filed, but was so paid when the replication was interposed, a date long subsequent to the institution of the suit. The court overruled this demurrer, and in so doing erred, to the manifest prejudice of the defendant. The

replication confesses that the plaintiff, conceding all he claims in other respects, owed the defendant a balance of \$18.44 on the note and mortgage. Clearly, until this sum was paid or efficaciously tendered, the plaintiff could not demand the surrender of the note and mortgage, the evidences of his obligation to pay and the security for the enforcement of that obligation. The tender was made and refused. This entitled plaintiff to sue for the recovery of the papers, provided he kept the tender good, so that at any time the defendant, upon surrendering the papers, could take what was confessedly due it upon them. The only way in which the tender could have been kept good on and after the institution of suit was by the payment of the amount tendered to the clerk of the court at the time of filing the complaint. This was not done. The plaintiff, therefore, had no title to the property he seeks to recover when the suit was instituted. The title, on plaintiff's own showing, was then in the defendant, and could not be divested for any purpose of this action by the subsequent attempt to make the tender good. *Frank v. Pickens*, 69 Ala. 369; *Nelson v. Loder*, 132 N. Y. 288, 30 N. E. 369; *Jones, Chat. Mortg.* § 636; 2 *Jones, Mortg.* § 893; *Pingrey, Chat. Mortg.* §§ 948 et seq., and 1135. The judgment of the city court must, therefore, be reversed. The cause is remanded.

HARALSON, J., not sitting.

HEAD, J. I concur in the opinion of Justice McCLELLAN that the judgment of the city court should be reversed on account of the failure of the plaintiff to pay into court, at the institution of the suit, the sum admitted to be owing on the note and mortgage sued for; but, upon due investigation and study, I am impelled to a different conclusion upon the question of the negotiability of the note, as affected by the terms of the mortgage given to secure it, in the hands of one who acquired the note from the payee, with notice of those terms. We are agreed that the two papers—the note and the mortgage—in the hands of appellant, who purchased both from the payee, at the same time, must be read together as one, and the question for decision determined upon the agreement of the parties evidenced thereby. It is a cardinal rule that, in enforcing a written agreement, the court will seek to ascertain and give effect to the intention of the contracting parties. That intention will be gathered from the terms of the agreement itself, and, when necessary, a consideration of the situation and circumstances of the contracting parties, known to them at the time the agreement was entered into, and to the party claiming under them at the time his rights accrued. What, then, was the intention of the parties to the present contract, fairly deduced from

the two instruments, read together as one? It is maintained, in the opinion of my Brother McCLELLAN, that this contract contains the four statutory requisites of a commercial paper, good against all equities and defenses existing between the original parties, in the hands of a bona fide purchaser for value without notice, viz. a promise in writing to pay (1) a certain person (2) a certain sum of money (3) at a certain time and (4) at a certain designated place of payment; and that neither of these requisites or elements is, in any wise, affected or impaired by any other stipulation of the contract. I do not controvert the proposition as to the first and second elements stated; but, as to the third and fourth, I maintain that the intention of the parties, fairly deduced from the agreement itself, was that the note might be paid before maturity, in uncertain partial payments, at uncertain times, to be determined and made certain by deliveries and sales of cotton to and by the Keeble Company, which the promisor, Crenshaw, obligated himself to deliver as rapidly as the same could be prepared for market; hence, that the note would not be put in circulation, but would be retained by the Keeble Company, whereby the maker was entitled to notice of any transfer thereof, as in case of other nonnegotiable securities. The mortgage shows that the Keeble Company, the payee of the note, was a cotton factor and grocer in Selma, Ala.; that appellee, Crenshaw, was a farmer, engaged in growing cotton, in an adjoining county; and that the consideration of the note was for advances to enable him to make a crop that year, 1890. The other special stipulations important to be considered are as follows: (1) Inasmuch as the crops conveyed had not been planted (January 21, 1890), it was provided that Crenshaw should, as soon as the crops were planted, execute to the Keeble Company a supplemental conveyance, as the said company may require, "so as to invest in said corporation the complete legal title to said crops." (2) "That the undersigned will deliver all the cotton grown, raised, received, or controlled by him during said year to the said H. C. Keeble Co., at the said city of Selma, as rapidly as the same can be prepared for market, the same to be sold by said corporation, as agent and factor of the undersigned, at the usual commission of one dollar per bale; and the net proceeds thereof shall be applied to the payment of the debts and liabilities herein secured, the same to be first applied, however, to any debts or liabilities of the undersigned arising out of the premises other than the debt evidenced by said note." (3) "That the H. C. Keeble Co. is engaged in the business of selling cotton on commission, and the purpose of the above advances is to promote that business by securing the sale of cotton." And the mortgagor warrants that he will ship five bales of cotton by the 1st of January next thereafter,

or pay one dollar for each bale not shipped. (4) "That if the undersigned fail to execute said supplemental conveyance, when required, or to deliver said cotton as stipulated, or to pay and discharge said debt and liabilities as the same accrue and mature, or to keep and perform any covenant or agreement herein contained, or make any default in the premises, then, in either or any such event, the said H. C. Keeble Co., its agents and assigns, are hereby authorized and empowered to enter upon and take possession," etc.; following with full authority to take and sell the property and crops and apply the proceeds to the payment of expenses and secured liabilities. Crenshaw delivered to the Keeble Company, in the fall, five bales of cotton, without notice that the note and mortgage had been transferred.

I think it cannot be questioned that, under this agreement, the Keeble Company had the right to demand of Crenshaw delivery of all the cotton grown, raised, received, or controlled by him during that year, as rapidly as the same could be prepared for market, without regard to the fixed maturity of the note; that Crenshaw had the legal right so to deliver it, and that the parties were, respectively, invested with legal remedies to enforce these rights. Such, it seems to me, are the plain terms of the contract, expressed without doubt or ambiguity. In this connection, we know, as common knowledge, and the contracting parties will be presumed to have known, that a large proportion of the crops of cotton is, according to the growth of the product, and the customs of agriculture, gathered and prepared for market before the 15th of October; and that such crops are so prepared, in bales, in installments, as the same may be gathered in sufficient quantities, running through the harvest season. That they are so prepared, in installments, is contemplated by the very terms of the stipulation that the cotton shall be delivered as rapidly as the same can be prepared for market. The stipulation, we observe, also manifestly implies the duty and obligation, on the part of Crenshaw, so to prepare the same as rapidly as practicable. Whenever, therefore, a material part of Crenshaw's crop was made ready for market, he exercising diligence in preparing it as rapidly as practicable, it became his right and duty to deliver it, and the right of the Keeble Company to demand its delivery, although the 15th of October, the specified maturity of the note, had not then arrived. Let us suppose, then, one or more bales were delivered at different times, we will say, in the month of September, as, under the contract, might lawfully have been done. Just here the question out of which the main contention grows arises: What were the relative rights and duties of the parties in reference to the cotton so delivered? It is insisted, in support of the negotiability of the note, that, under the contract, these deliver-

ies were made to the Keeble Company as the agent and factor of Crenshaw; that the cotton should be sold by the Keeble Company as such agent and factor, and the proceeds held by it, as such agent and factor, until the maturity of the note, and be then applied to its payment, or held, at least, until sufficient cotton should be delivered and sold to raise the full amount of the note, and then applied to its payment. It is contended that such is the meaning of the stipulation: "The same to be sold by said corporation, as agent and factor of the undersigned, at the usual commission of one dollar per bale, and the net proceeds thereof shall be applied to the payment of the debts and liabilities herein secured."

On the contrary, I maintain that the rights secured by the contract to the Keeble Company to demand, and to Crenshaw to deliver, grow out of, and have reference to, the mortgage security of which the cotton is the subject; and that the stipulation that the cotton shall be sold, and the proceeds applied to the payment of the secured debts, means that it shall be sold as delivered, and the proceeds at once so applied. The issue is thus squarely presented. Unless one or the other of these propositions, viz. that the Keeble Company was to hold the proceeds until the maturity of the note, and then apply them, or until a sufficient sum accumulated, and then apply them, is successfully maintained, I will undertake to demonstrate that the note cannot be regarded as commercial paper. It will not be supposed that the parties intended by the special stipulation under consideration, authorizing the company to sell as a factor, to ignore the right and title of the Keeble Company, under the mortgage, to the cotton delivered to it, and its unquestionable right to have it made available for the payment of the secured indebtedness, and contemplated that only the relation of principal and agent existed between the parties, in respect of the cotton delivered, and its proceeds, prior to the maturity of the note, whereby the dominion and control of the cotton, and its proceeds, in the hands of the company, were retained by Crenshaw, just as would appertain to any other principal, in reference to property in the hands of his factor. Hence, the proposition is that the intention was that the proceeds should be held by the Keeble Company, as Crenshaw's agent, until the maturity of the note, at the latter's risk; and yet, by virtue of the interest the company had in them as mortgagee, free from any power on the part of Crenshaw to direct or control the manner or means of their deposit or safe-keeping. In other words, the parties agreed that the cotton should be prepared for market as rapidly as it could be done, and delivered as rapidly as prepared, and then sold, and the proceeds applied to the payment of the secured debts; but, nevertheless, the intention was that the proceeds should not then be so ap-

plied, but should lie idle in the hands of the company, as Crenshaw's factor, kept according to its judgment and discretion, free from the control of Crenshaw, but at his risk of loss, until the maturity of the note, or until a sufficient sum accumulated to pay the note in full. I am persuaded such a conclusion not only does not comport with common experience, but that it is opposed to the plain terms of the agreement itself. It cannot be denied that the right of the Keeble Company to demand and compel the delivery of the cotton as rapidly as it was prepared for market, and of Crenshaw to make the deliveries, were alone by virtue of the security which the mortgage afforded, and not by reason of any relation of principal and factor created between the parties. It could not be contended that if, on the 15th of October, Crenshaw, then having the cotton in his possession, had paid the mortgage debt with money, the Keeble Company could thereafter maintain an action against him for the recovery of the cotton, for the obvious reason that its right to it was only for the security of the debt. The cotton, therefore, when delivered, necessarily went into its possession as mortgagee. It was its stipulated duty to sell and apply the proceeds to the payment of the mortgage debt. I cannot avoid the conclusion, universally applicable as between mortgagor and mortgagee, in such cases, that the law, eo instanti, upon a sale, applied the proceeds to the secured debt. The provision that the cotton should be sold by the company, as agent and factor of Crenshaw, at the usual commission, is no more, in legal effect, so far as it affects the question now under discussion, than a power of sale in any other mortgage. All such powers are but the creation of agencies coupled with interests, and the universal rule is that they must be strictly pursued. The law recognizes the same relation of trust and confidence between a mortgagor and a mortgagee invested with a power of sale as obtains between other principals and agents, and holds the mortgagee to strict observance of good faith towards the mortgagor, and rigid conformity to the powers conferred. A stipulation that the mortgagee shall sell as agent of the mortgagor is no more than the law would have implied without it. The superadded relation of factor, in the present case, manifestly had no other purpose than to entitle the mortgagee to charge the commission of a factor for making the sales, which, without the provision, probably it could not have done. If I am correct in this conclusion, it follows, unavoidably, that the contract in question was not governed by the commercial law touching the rights of bona fide purchasers without notice. In that event, a fair statement of its terms would be: A promise by the maker to pay a certain person a certain sum, at a certain time and place, but subject to the binding stipulation that the maker might discharge the same,

in whole or in part, before maturity, by making thereon partial payments, at uncertain times and in uncertain sums, to be rendered certain by the deliveries and sales of cotton, as the same could be prepared for market.

Upon the postulate that the note was intended by the parties to be and remain what, on its face, it purported to be,—a negotiable promissory note governed by the commercial law,—let us notice the practical operation of the contract, if effect be given (as it must, as against appellant) to the qualifying stipulation above mentioned. The note, then, was given to perform the office of money, to be used and to pass as money in the business of the country; for such is the nature of commercial paper. The Keeble Company, by the indorsement of its name thereon, could put it in circulation, and, in that condition, it would pass from hand to hand and place to place, through as many successive holders and places as the exigencies of commerce, in respect to it, might demand. The indorser, the Keeble Company, who put it in circulation, was under no duty or interest, and possessed of no power, to keep track of it, so as to locate, at any given time, the place or person where or by whom it might be held. It could never return to charge or affect that company, until after maturity, and formal notice to it of dishonor by the maker. The obligation of the maker, Crenshaw, was that he would be ready at the stipulated place of payment, on the day of maturity, to pay the note upon its due presentation there, by the then holder and owner thereof, or have funds provided, at that time and place, for its payment, on presentation. Meanwhile, it did not concern him by whom or where the note was held. Unless by some accident of business or intercourse, he did not know, and could not know, where the paper was, or who was the holder thereof, at any given time. The holder would take the paper with the absolute right to demand and receive payment, at the time and place appointed, freed from all infirmities and defenses which might impair it as between the original parties. He was under no duty or interest, meanwhile, to notify the maker, or any indorser, of his acquisition. Indeed, the paper, put afloat by the payee, would flow, like a bank note, through the channels of commerce to unknown places, and into unknown hands, until at last the final holder brings it back to the place of payment, on the day of payment, and visits its obligations upon the parties bound. The maker, when called upon for payment at maturity, was entitled to production of the note, that he might know the demand was made by the veritable owner. These are elementary principles of the commercial law. The law books, recognizing that the party primarily bound on commercial paper cannot know its holder until presentation at maturity, inform us of limited defenses which accrue to him when sued without pre-

vious presentation and opportunity to pay; and we are not wanting in authorities which hold that an action will not lie at all, against the acceptor of a bill or maker of a negotiable note, when no opportunity has been given to pay, by due presentment, according to law. *Chit. Bills*, marg. p. 353, and cases cited in note. Other cases hold that it dispenses with the necessity of tender before suit, and that tender, in such case, may be made for the first time by bringing the money into court. *Id.* Our own decisions recognize qualified defenses in such cases. *Irvine v. Withers*, 1 Stew. (Ala.) 234; *Evans v. Gordon*, 8 Port. (Ala.) 142; *Montgomery v. Elliott*, 6 Ala. 701; *Connerly v. Insurance Co.*, 66 Ala. 433.

Applying the special qualifying stipulation as I interpret it, and the logic of the argument in support of the commercial character of the note must force its advocate to the position that, when the Keeble Company received and sold a bale of cotton, the company (or Crenshaw, seeing to it, as he must have had the right to do, that his agent was faithful) must have set forth upon the world of commerce, and, through its unknown labyrinths, traced and located the holder of the note, and there effected the partial payment. And let us suppose the task performed, and the holder found, and what results? The holder has purchased for value without notice, and is under no obligation whatever to receive the offered payment, and he relies and stands upon his right to demand payment of the whole when the paper matures. But let us suppose the payment accepted; clearly there was no right in the debtor, making partial payment, to demand a surrender of the paper, and no right or power to require or compel the indorsement of the payment thereon. Hence the result that, though partially paid, the note still stands as a circulating commercial paper, ready to be transferred, the next moment, to an innocent holder for value, to return upon the maker at maturity with the resistless demand of full payment. Thus we see, obviously, that the two principles, viz. that the note should be a circulating medium under the commercial law, and that the maker was entitled to make partial payments, in the manner I have attempted to show, will not adjust themselves to each other. They are utterly inconsistent. "A note or bill must be free from contingencies or conditions that would embarrass it in its course." *Chit. Bills*, marg. p. 134, note. As I have endeavored to show, this note must be read, as against appellant, as if it contained, on its face, the special stipulation in question, authorizing the maker to make undefined, uncertain partial payments before maturity, the times and amounts to be determined by the sales of cotton, as aforesaid. Let us, then, suppose the stipulation to be incorporated in it, and it is perfectly apparent

that it would represent, to the person to whom offered in commercial dealing, no certain sum whatever which could be collected upon it at maturity. It could not pass from hand to hand, and be accepted as a paper which, at maturity, would represent and entitle the then holder absolutely to a certain sum of money, freed from all payments, discounts, or defenses, for the reason that, on its face, it shows the maker reserved the right to make partial payments before maturity, and it could be known at no time after the cotton season began what payments may have been made thereon. It cannot be doubted that such a stipulation would destroy the commercial character of a note otherwise negotiable. I do not deny that the negotiable quality of the paper, having a fixed day of payment, with the other requisites, is not destroyed by the incorporation therein of a contingency upon which the sum thereof may become payable sooner. Such was the nature of the case of *Walker v. Woollen*, 54 Ind. 164 (23 Am. Rep. 630), and other cases cited by my Brother McCLELLAN. In that case the note was: "Six months after date, or before, if made out of the sale of Drake's horse hay fork and hay carrier, I promise to pay James B. Drake, or order," etc. There the contingent promise was to pay the whole sum on the given contingency, just as the absolute promise was to pay the whole sum at the fixed time; and it was properly held that the mere superadded promise to pay sooner, upon a contingency, did not affect the negotiable quality of the paper, since, by the absolute promise, it must, at all events, be certainly paid at a certain appointed time. Whether paid upon the happening of the contingency, or at the time specially fixed, the result would be the same. The whole contract would, in either event, be discharged, and the note withdrawn from circulation, and surrendered to the maker. But suppose, instead of the contingent promise therein made, the note had stipulated that, whenever the maker should sell a hay fork and carrier, he should have the right to pay upon the note the amount realized upon the sale, and the creditor should have the right to demand payment thereof; we see at a glance that the analogy between that case and the present is complete. Most clearly, such a stipulation would have been inconsistent with the uses and purposes of a circulating paper. At no period in its history could it be known, to any person to whom it might be offered in commercial dealing, how much was unpaid upon it, and, taking it charged with knowledge of the maker's right to make partial payments, at indefinite times and in indefinite amounts, save only as the times and amounts would be made definite by the sale of machines, the purchaser would, in law, be charged with notice of all such payments as may have been made to any

previous holder. Such a paper lacks the most vital attributes of a circulating medium. It could not be trusted anywhere as representing any particular sum of money, for no one could know what it would bring, if anything, when presented for payment on the day of maturity. Such, in my judgment, is substantially the nature of Crenshaw's contract. Nor do I deny that valid commercial paper may be payable in installments; but it is well settled that, in order to render it negotiable, the amount and time of payment of each installment must be certainly expressed in the writing. Tied. Com. Paper, § 25d, note 4. No inconvenience can result from such a paper. When a given installment matures, the paper, as to that installment, ceases to be negotiable, and the maker, paying the installment at maturity, will be protected against any subsequent holder; and the installment, as in case of a note payable in gross, must be presented by the holder, for payment, at the proper time and place.

The view I have taken, that the parties intended the securities to remain in the hands of the Keeble Company, and be paid as I have indicated, is strongly fortified by the emphatic provision that the purpose of making the advances was to promote its business as a cotton factor, and that the cotton conveyed by the mortgage should be sold by it, as factor, at the usual commission of one dollar per bale. It cannot, of course, be disputed that it was not the intention of the parties that the note should be transferred without the mortgage, for the reason that it was legally impossible to do so, and preserve the integrity of both instruments. The mortgage was inseparable from the debt, and a transfer of the debt necessarily carried the mortgage with it, in equity. Nor can it be denied that, if the debt had been transferred, and notice thereof given to Crenshaw, the debtor and mortgagor, he would have been bound to deliver the cotton to the transferee. By no sort of construction of the contract could a conclusion be tolerated that he was bound to deliver the cotton to the Keeble Company, knowing that it had divested itself of all right, title, and interest therein, and invested them in another. Thus, we see, upon the mere statement of the case, a transfer of the debt, under circumstances binding Crenshaw to a knowledge of it, necessarily destroyed the possibility of carrying into effect the controlling purpose with which the contract was made, to wit, that the Keeble Company should have the sale of the cotton as a factor, and earn the usual commission for that service. Considering that all parties intended to act in good faith; that the person entitled thereto, when the time should come for action, should enjoy the benefits of the security the mortgage afforded,—how was it possible for the Keeble Company to carry out its prime purpose, of

earning commissions as a cotton factor, if it was not intended and expected that it should retain the possession and ownership of the securities which would give it the right to the possession and sale of the cotton? It is very clear that the provision that the mortgage should stand as security for any additional advances which might be made, and which, if made, should be first paid, exerts no influence upon the case, as it comes before us. There was no obligation on the part of the Keeble Company to make additional advances. There was no debt, when the contract was entered into, except the note. It was but a precautionary provision to the effect that if, in the future, a further indebtedness should arise, the mortgage should stand as security for the same. Such an indebtedness might or might not have arisen. It is immaterial, as far as concerns the question we have in hand, that it so turned out that it did arise.

(24 Fla. 233)

HAYES v. TODD.*

(Supreme Court of Florida. July 19, 1894.)

REMOVAL OF CAUSES—ORDER OF STATE COURT—FAILURE TO FILE BOND—INTEMPERATE CHARGE BY COURT—REVERSAL.

1. An assignment of error submitted without argument will be considered as abandoned.

2. A petition for removal of a case from a state court into a United States circuit court, made by a nonresident defendant, need not state the citizenship of the plaintiff when the same clearly appears of record in the case.

3. A petition and bond upon an application to remove a case from a state court to a federal court are based upon a right purely statutory, and must in their terms strictly comply with the provisions of the statute before the state court is ousted of its jurisdiction. The state court has a legal discretion to decline to accept the petition and bond when they are not in compliance with the statutory requirements, and to retain jurisdiction of the case.

4. Upon an application for removal of a case to the United States court, it is not necessary for the state court to make any order of removal. Upon the filing of the proper bond and petition the case is eo instanti removed; but until there is such a bond and petition filed the jurisdiction of the state court is undisturbed.

5. The court below made an order upon an application for removal as follows: "Being satisfied that the party defendant is within the provisions of the statute of the United States providing for the removal of causes, and therefore entitled to the order prayed for, it is ordered that, upon petitioner's executing a good and sufficient bond as required by law, to be approved by the clerk of this court, it is ordered that the cause be transferred to the U. S. district court at Tampa, Florida." No bond, after the order, was filed, that complied with the condition of the order. Held, that the order was inoperative to divest the state court of its jurisdiction, and that it was not error to afterwards rescind the same.

6. A judgment will not be reversed because the court, in its charge to the jury, uses language that is intemperate, and seems to evince feeling in the matter, where there is no objection that the instruction complained of is erroneous as a matter of law, and a verdict and

* Rehearing denied.

judgment against the defendant is the only one that could have been rendered, according to the law and the evidence in the case.

(Syllabus by the Court.)

Error to circuit court, Polk county; G. A. Hanson, Judge.

Action by Mary A. Todd against W. B. Hayes. Judgment for plaintiff, and defendant brings error. Affirmed.

Wall & Knight, for plaintiff in error. Crozier & McDermott, for defendant in error.

LIDDON, C. J. Mrs. Todd brought an action of slander in the circuit court of Polk county against Hayes, the plaintiff in error. The declaration alleged that Mrs. Todd, the plaintiff, was, at the time of the filing of the same, and had been for over one year previously, a bona fide citizen of Polk county, Fla. On the rule day in June, 1889, being the same at which the defendant was required to plead to the declaration, he filed a petition praying for removal of said case to the United States circuit court for the southern district of Florida. The petition was in the usual form required by the statutes of the United States. As a ground of removal of the cause, it alleged that the defendant, Hayes, was, at the time of filing said petition, a citizen of the state of New York, and that he was a citizen of said state at the time of the commencement of said suit. The petition further alleged that the amount involved in the case exceeded the sum of \$2,000, exclusive of interest and costs, and that the petitioner files therewith a bond, as in such cases is required by the statute. The defendant, on the same day (June 3, 1889), filed his bond upon removal; but whether such bond was actually filed before or after the order of removal hereinafter set forth is not clearly shown by the record. This bond was in the sum of \$2,000. The condition of it is as follows: "Whereas, the said Mary A. Todd has filed a suit in the circuit court of said state and county, in which she claims to have been damaged by the defendant, W. B. Hayes, and the principal in this undertaking, in the sum of \$10,000; now the said W. B. Hayes alleges and claims through his attorneys at law, Sparkman & Sparkman and Samuel T. Fletcher, that he is a citizen of the state of New York, and that the amount involved in said suit exceeds the sum of \$2,000, exclusive of interest and costs of said suit, therefore prays a removal of said cause to the United States district court in and for the 5th judicial circuit for the southern district of Florida, to be held at Tampa, in said state; now, if the said W. B. Hayes shall pay, or cause to be paid, all costs that may accrue in consequence of the improper removal of said cause, and well and truly enter his appearance in the said United States court, then this bond is to be void; otherwise, to remain in full force and virtue." On the same day (June 3, 1889), the circuit judge made an order as follows:

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"This petition came on to be heard, and, the court being satisfied that the party defendant is within the provisions of the statutes of the United States providing for removal of causes, and therefore entitled to the order prayed for, it is ordered that upon petitioner's executing a good and sufficient bond, as required by law, to be approved by the clerk of this court, it is ordered that the cause be transferred to the U. S. district court at Tampa, Florida." On the same day this order was made, the plaintiff, by her attorneys, moved the court to set aside and annul the same upon several grounds, of which it is only necessary to notice the second and third. The second ground of said motion was that "the petition of said defendant for the removal of said cause is not sufficient in point of law to entitle him to said order;" and the third ground was that "the bond of petitioner is irregular in form, improperly executed, and insufficient in law." By agreement of counsel, argument upon the aforesaid motion was deferred until June 11, 1889, on which day it was postponed until the 12th. On June 15, 1889, the court made an order vacating the order of removal of June 3, 1889, upon the ground that the same was improperly or inadvertently granted. The circuit court then proceeded in the case. The defendant filed a plea of not guilty, upon which a trial was had, and a verdict rendered for plaintiff for \$2,500, and judgment for said amount, and costs, entered thereon. The defendant, in further stages of the case, protested against proceedings in the state court, on the ground that the case had been properly removed to the United States circuit court, and that the state court had lost jurisdiction of the same. A motion for a new trial was made on behalf of the defendant, and refused. Such of these grounds as are presented to the court by the brief of plaintiff in error will be considered in the course of this opinion.

The plaintiff in error makes eight assignments of error. In his brief he argues only three of them. In accordance with the rule laid down in this court, we consider all assignments not argued as abandoned, and we consider only those contended for by argument in the brief for plaintiff in error. *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co.*, 27 Fla. 1, 157, 9 South. 661; *Everett v. State*, 33 Fla. 661, 15 South. 543; *Clarke v. Express Co.*, 33 Fla. 617, 15 South. 252; *Meinhardt Bros. & Co. v. Mode*, 22 Fla. 279.

The first and second assignments of error are predicated upon the circuit court maintaining jurisdiction of the case after the petition and bond for removal to the United States court were filed, and in revoking the order of removal which it once made in the case. It is contended by the defendant in error that the petition for removal does not show, as required by the United States statutes, that the plaintiff is a citizen of the state

of Florida, or that she is not a citizen of the same state with the defendant. While the citizenship of the plaintiff is not stated in the petition for removal, it sufficiently appears in the record of the case, for in her declaration she alleges that she is a bona fide citizen of Polk county, Fla. This renders an allegation of her citizenship in the petition unnecessary. *Fost. Fed. Pr. § 385; Bondurant v. Watson*, 103 U. S. 281; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58. Other objections are urged against the petition which we think it unnecessary to consider. We are of the opinion that the petition was in due form.

The next question is as to the sufficiency of the bond. The statute of the United States regulating the subject of removal of cases from the state courts into the United States courts is the act of congress of March 3, 1887, c. 373 (page 552 et seq., Statutes of the United States, passed at the second session of the forty-ninth congress). The enrollment of this act was corrected by chapter 866, Acts of the first session of the fiftieth congress (25 Stat. 433 et seq.). The act in question, after providing for a petition, and the time of filing the same, reads as follows: "And shall make and file therewith [the petition] a bond with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if such court shall hold that such suit was wrongfully or improperly removed thereto, and also for his or their appearing and entering special bail in such suit, if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in said suit," etc. Examining the bond in question, we see that it does not meet the requirements of the act quoted. This bond only provides that the defendant, Hayes, shall pay, or cause to be paid, all costs that may accrue in consequence of the improper removal of said cause, and well and truly enter his appearance in the said United States court. The bond also, upon its face, shows that it is based upon a petition praying for a removal of the case into the United States district court. This latter defect is the only one pointed out by counsel for either party. By reference to the petition, which is virtually, by the terms of the bond, made a part thereof, it would appear that this defect was a clerical error. The most serious defect in the bond was its failure to provide that the defendant would enter a copy of the record in the case in the United States circuit court on the first day of its then next session. The provision for "special bail" would probably be unnecessary, in view of the fact that we have no practice requiring such bail. The bond given fails to comply with the requirements of the statute. A statute which ousts a court

of general jurisdiction—a jurisdiction given by law, and which it was proceeding to exercise—should be strictly construed. The act of congress prescribes, as a jurisdictional fact, in removal cases, the giving of a bond, and the condition of the same. The act makes it obligatory upon the state court to accept proper petition and bond. If proper petition and bond are filed, the state court is powerless to prevent the removal, and the case would stand removed *eo instanti*, without any order to that effect. Without a proper petition and bond, the state court does not lose its jurisdiction, and is without power to order a removal, and the case does not stand removed by the filing of a defective petition and bond, or either of them. *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Chambers v. McDougal*, 42 Fed. 694, text 696; *Burdick v. Hale*, 7 Blas. 96, Fed. Cas. No. 2,147; *Railroad Co. v. Rabasse*, 44 La. Ann. 178, 10 South. 708; *Railway Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869; *Shaft v. Insurance Co.*, 67 N. Y. 544. A great many cases speak of the jurisdiction of the state court ceasing upon the filing of a petition and bond for removal; but this means a proper bond and petition, and we have been unable to find any case where the state court was ousted of its jurisdiction unless the party seeking a removal brought himself clearly within the terms of the statute, and filed a proper petition and proper bond. While the state court has not the final determination of the question whether the case is removed, or removable, to the federal court, still it must exercise its discretion, and determine if the petition and bond are in proper form, and whether it will surrender its jurisdiction, or retain the same. If there was no discretion in the state courts, then it would follow, as a matter of course, that upon every application for a removal the state court would lose its jurisdiction until the case was remanded by the federal court, without regard to the character of the controversy, the amount involved, or the citizenship of parties. *Meyer v. Construction Co. (Removal Cases)* 100 U. S. 457, 474; *Brown v. Murray Nelson & Co.*, 43 Fed. 614. Judge Gresham says, in the case of *Shedd v. Fuller*, 36 Fed. 609: "The removal act of March 3, 1887, as well as the prior acts upon the subject, provide that a party desiring to remove a suit from a state court to a circuit court of the United States shall file his petition and bond in such suit in the state court, when it shall be the duty of that court, if the petition and bond be sufficient to satisfy the statute, to accept both, and proceed no further in the case. The right of removal is purely statutory, and the jurisdiction of the state court remains undisturbed until a proper petition and bond are presented to that court for its judicial action." We hold that the bond in question, in its failure to comply with the removal act, as already pointed out, was so defective that no order of removal of the

cause could properly be made in the case. The brief of the plaintiff in error, speaking of one defect in the bond,—the mistake in the name of the court to which removal was sought,—says that it was a clerical error, and could have been amended. We agree that the bond might have been amended, but, as it was not amended, nor any effort made to amend it, we are dealing with it in the shape in which we find it. If it was desired to amend the bond, such amendment should have been made in the state court. *Overman Wheel Co. v. Pope Manuf'g Co.*, 46 Fed. 577, text 580.

The second assignment of error is that the court erred in rescinding his order for the removal of said cause, and all the papers therein, to the circuit court of the United States. The assignment does not correctly quote the order. The order, as it appears of record, had already been fully set out in this opinion. The order, if it transfers the case at all, transfers it to the district court of the United States, and not to the circuit court. We confess that we do not clearly comprehend what the court below meant by the order. The order directs "that upon the petitioner's executing a good and sufficient bond, as required by law, to be approved by the clerk of this court, it is ordered that the cause be transferred to the U. S. district court at Tampa, Florida." We are at a loss to decide whether the circuit judge meant that no bond had been filed at all, or whether he ignored the paper purporting to be a bond, and directed that such a bond as is required by law be given. The latter would seem to be the more reasonable conclusion, because the removal statute requires the bond to be filed with the petition, and it is the most favorable view for the defendant that he was endeavoring to comply with the statute as to the time of filing the bond. The order conditionally directing a removal upon the giving of a good and sufficient bond, etc., would appear to have been made upon the opinion of the court that the bond filed with the petition was defective. We regard this order as wholly inoperative and very defective. In the first place, it directs a removal to the United States district court, which would have no jurisdiction over the case; next, it prescribes a condition of removal, in regard to the giving of bond, which does not appear to have been complied with. Indeed, under the decisions of the federal courts, which must control in these cases, but small importance is attached to the judgments of state courts in removal cases. The uniform tendency of such decisions is, when an applicant for a removal of a case has taken such steps as clearly bring him within the terms of the United States statute, no order of the state court for the removal of the cause is necessary. It is immaterial whether the state court does or does not make an order of removal; the case, upon the filing of the proper papers, stands eo

instanti removed, and the state court should cease the exercise of any jurisdiction over the same. *Hatch v. Railroad Co.*, 6 Blatchf. 105, text 117, Fed. Cas. No. 6,204; *Wilson v. Telegraph Co.*, 34 Fed. 561. The most that could be said of an order of removal by a state court is that it is evidence that it has accepted the papers filed for removal as sufficient upon their face, and will cease to exercise jurisdiction over the case. The order in this case was clearly intended to preserve the jurisdiction of the court until such a bond as the statute required should be filed. It does not appear that any such bond was filed after the order was made, or that the court has accepted or passed upon such a bond. It could not have been intended by the order that the clerk of the court should pass upon the legal form and sufficiency of the bond, because that would have been a delegation of judicial power, which the law would not permit.

The next assignment of error argued by the plaintiff in error is that the circuit judge charged the jury as follows: "Exemplary damages are such as not only compensate the wrong done, but also tend to protect all good citizens of the state from like wrongs from the reckless and malicious tongue of such lawless persons as have no regard for the good name of their fellows, or for the fair name and virtue of the women of the land, but turn themselves loose, like ravenous wolves, to destroy that which money cannot buy, and that which, when lost, the powers of earth cannot restore." It is not claimed that this charge states incorrectly any proposition of law, but that the language in which it was couched was calculated to arouse both passion and prejudice in the minds of the jury against the defendant. There can be no doubt that the language of the instruction complained of was somewhat intemperate, and that it seems to indicate feeling on the part of the judge, and is not suited to a grave judicial charge. However, when we take into consideration that there could not have been any verdict and judgment in the case otherwise than in favor of the plaintiff, whatever might have been the charge of the court, and that the evidence was ample to sustain the verdict, and the defendant offered not a syllable of evidence to maintain his plea of not guilty, or to mitigate the damages, that there is no allegation or showing that the verdict is excessive in amount, however much we may disapprove of such language, we cannot reverse the judgment on that account. Under the circumstances of this case, the charge complained of could not have caused any injury to the defendant. *Wooten v. State*, 24 Fla. 335, 5 South. 39; *Brown v. State*, 18 Fla. 472; *Jacksonville, T. & K. W. Railway Co. v. Peninsular Land, Transp. & Manuf'g Co.*, 27 Fla. 1, 157, 9 South. 661; *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747. The judgment of the circuit court is affirmed.

MABRY, J. The charge given by the court to the jury, and referred to in the opinion, was not, in my opinion, proper, and was calculated to improperly influence the jury. I cannot see that no harm resulted from giving the charge, therefore do not concur in the views expressed in reference to it.

(34 Fla. 253)

CHABOT v. WINTER PARK CO. et al.

(Supreme Court of Florida. July 16, 1894.)

EQUITY—CONSTRUCTION OF CONTRACT—ABANDONMENT—RESCISSION—PERFORMANCE—SPECIFIC PERFORMANCE—LACHES.

1. In a court of equity, time is not considered as of the essence of a contract unless expressly so provided by the terms thereof.

2. Where one party to a contract for the sale of lands is in default, and is guilty of laches and negligence to perform the same, the other party may give a notice fixing a reasonable time for the performance of the contract, and has the right to treat the contract as abandoned if not complied with in such limited time.

3. Where a party to a contract is in default, and receives a notice of the character mentioned in the preceding headnote, and makes no reply thereto, or any protest or assertion of right contrary to the notice, and makes no effort to comply with the requirements of the same, he will be held as acquiescing in the demand contained in the notice, as consenting to a rescission of the contract, and as abandoning all rights he might have had to enforce the performance of the same.

4. There can be no general rule as to what is a reasonable time to be allowed a party in default for the performance of a contract, when required to do so by a notice of the kind mentioned in preceding headnotes. Much depends upon the circumstances of each case. In this case, the act required to be performed was simply the payment of a sum of money. The time fixed for the performance of the act by the notice requiring performance was nearly 40 days. Under all the circumstances of this case, held to be a reasonable time.

5. While a court of equity does not regard time as of the essence of a contract, unless it is so expressly stipulated, yet it will require, of one who seeks specific performance of a contract, that he shall not be guilty of unreasonable delay, and shall bring his suit with reasonable promptness.

6. The specific performance of a contract for the sale of lands is not a matter of right in either party, but rests in the sound, reasonable discretion of a court of equity.

7. In this case, the complainant, who was in default in performing his contract, received from the Winter Park Company, the other party to the contract, a notice fixing a reasonable time for the performance of the contract, or that it would consider the same abandoned, and resume possession of the land; he paid no attention to such notice, and made no effort to perform the contract, for considerably more than a year, and waited for nearly a year and four months after the expiration of the time fixed in the notice, and after the property had been sold to another, before bringing his suit. Held, that such delay was unreasonable, and that, by reason thereof, a court of equity should not decree a specific performance of the contract.

8. In cases where the complainant does not make such a showing as entitles him to specific performance of a contract for sale of lands, the prayer of the bill for specific performance may be denied, and, if the bill contain appropriate prayers, it may be retained for the purpose of adjusting other equities which may have

arisen between the parties in relation to the same contract.

9. Where a vendee in possession under a contract of purchase makes valuable improvements upon the land, upon the faith of his contract, and the contract is such that specific performance cannot be enforced, the vendor will be compelled to refund the purchase money, and to pay the actual value of the improvements.

10. A vendee in possession, who sues for specific performance of a contract for sale of lands, is entitled to compensation for improvements only when he is free from fault himself, and fails to obtain specific performance of the contract by reason of some technical defect in the contract, or on account of its failure to comply with the statute of frauds. If the failure to obtain specific performance is owing to laches or negligence of the vendee to perform his part of the contract, he is not entitled, in a court of equity, to compensation for such improvements.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Bill by Charles S. Chabot against the Winter Park Company and George B. Dorn. Bill dismissed, and complainant appeals. Affirmed.

W. H. Jewell, for appellant. Massey & Willcox, for appellees.

LIDDON, C. J. The appellant, who was complainant below, brought his bill in equity against the appellees. The bill prayed for specific performance by the defendant the Winter Park Company of a contract for the sale of a lot in the town of Winter Park, and for cancellation of a deed made to the same lot by said defendant by George B. Dorn, its codefendant; and also prayed, in the alternative, that the defendant the Winter Park Company be compelled to refund to the complainant the difference between the fair value of the premises and the amount due to said company by the complainant. After demurrers to the bill of complaint were overruled, the defendants answered the same. The case was set down by the complainant for hearing upon bill and answer, and was so heard, and upon such hearing the court dismissed the bill. By this course all the material averments of the answer were admitted to be true.

The facts of the case, as gathered from the bill and answer, are substantially as follows: On the 12th day of September, A. D. 1885, the Winter Park Company agreed to sell to the complainant, and the complainant agreed to buy, the lot in the bill of complaint mentioned. The purchase price of said lot was \$250, of which amount \$100 was paid in cash, and the remainder, with interest at 8 per cent. per annum, was to be paid one year from the date of said sale. The complainant went into possession, but the Winter Park Company reserved the title to said lot, agreeing to execute a warranty deed to the complainant, upon his compliance with the terms of sale. The record does not disclose whether this original contract was in writing or by parol, but it is stated, in the

brief for appellant, to have been by parol. The complainant, after taking possession, made some small improvements upon the lot, not exceeding \$300 in value, consisting of an inferior dwelling and a blacksmith shop. The complainant failed to pay the balance of the purchase money on September 12, 1886, according to the terms of the agreement. In the spring of 1887, when the complainant was about to remove to the state of Massachusetts, a new agreement was made by the parties. This agreement was, in substance, that complainant should give his note, dated September 12, 1885, payable in one year, to the order of said company, for \$150, with interest at 8 per cent. per annum from date, payable at the Lyman Bank, Sanford, Fla.; and that the defendant the Winter Park Company should place a warranty deed to said lot in escrow with said bank. The said note and said deed were duly prepared by the parties, and were by the secretary of the Winter Park Company, but with the full knowledge and consent of the complainant, both placed in an envelope, which was marked as follows: "The inclosed deed and note are hereby left in escrow with the Lyman Bank, Sanford, with the following conditions: In case the note is promptly and fully paid, the deed is to be delivered to Charles S. Chabot, or order; otherwise, the deed to be returned to the Winter Park Company, and the note to said Charles S. Chabot. For the Winter Park Company, J. S. Capen, Secretary." The said note and deed, inclosed in said envelope, were deposited with the Lyman Bank, in accordance with said agreement. The note was antedated, and by its terms was already past due at the time it was signed, but it was, at said time, verbally agreed, by the parties to the transaction, that it should become actually due and payable September 12, 1887. The bank was advised of the time of the maturity of the note under the agreement. Before September 12, 1887, the date fixed for the payment of said note, the complainant wrote to the Winter Park Company that he would be unable to pay it at maturity; and thereupon the Winter Park Company instructed the bank to hold the papers on the same terms until January 1, 1888. Some weeks after this date, the complainant not having paid the note, the bank returned the papers to the Winter Park Company, and they were afterwards canceled. The complainant was, at the time fixed for the payment of the note, and continuously afterwards, absent in the state of Massachusetts. It appears from a letter of the defendant the Winter Park Company to the complainant, dated October 24, 1888, which was attached as an exhibit to the bill of complaint, that it had written complainant several times in the spring of 1888 in reference to the lot, especially about the taxes upon the same, without obtaining any reply whatever. On June 14, 1888, the defendant

the Winter Park Company sent a letter to the complainant by registered mail, and which was duly received by him. This letter read as follows:

"The Winter Park Company. Winter Park, Orange County, Florida, June 14, 1888. Charles S. Chabot, Esqr.—My Dear Sir: I inclose a statement of your account for lot thirty, block 31, of the town of Winter Park, which you bargained for from the Winter Park Co. on Sept. 12, 1885, promising to pay the balance in one year from date, at eight per cent. interest. Not having carried out any part of that arrangement, this is to notify you that if the balance (\$149.56) due, as shown on the statement, is not fully paid by or before July 20, 1888, the aforesaid agreement will be null and void, and we shall take possession of the premises, and in our own name occupy, own, rent, or dispose of said property. Very resp'y, The Winter Park Co., per J. S. Capen, Sec'y." The above was signed in presence of Henry S. Chubb, J. H. Abbott.

This letter was accompanied by a statement of account, which was as follows:

Winter Park, Florida, June 14, 1888.	
C. S. Chabot, in account with the Winter Park Co.	
1885	Dr.
Sept. 12. To lot 30, block 31, of the town of Winter Park, as per contract	\$250 00
1887	
Decr. 16. To putting glass in window..	1 40
1888	
Jany. 31. To taxes.....	3 42
	<u>\$254 82</u>
1885	Cr.
Sept. 12. By cash.....	\$100 00
1887	
Oct. 17. By cash rent, Waas	10 00
" 31. By cash rent of kitchen..	\$2 00
Less fixing pump	1 50
Nov. 19. By cash rent, Waas	10 00
Decr. 23. By cash rent, Waas	7 00
1888	
June 1. By cash rent, Klemmer	10 00
	<u>138 50</u>
	<u>\$116 32</u>
June 5. To interest to date.....	33 24
	<u>\$149 56</u>

The complainant paid no attention whatever to this letter, not even acknowledging receipt. On the 26th of July, 1888, the defendant the Winter Park Company sold and conveyed said lot to its codefendant, George B. Dorn, for \$300, and put him into possession of the same, the said defendant Dorn having full knowledge of the status of the contract between the complainant and his codefendant. The defendant the Winter Park Company had, according to their notice, taken possession of said property before selling the same to Dorn. The complainant, by

himself or his tenant, had been in possession of the property a portion of the time intervening between the date of the sale and the retaking of possession by the defendant the Winter Park Company, but what portion of said time is not shown by the record. The secretary of the Winter Park Company, acting for its benefit, had looked after the property, collected some rents, and accounted for the same to the complainant as part of the purchase money, as shown by the statement of account hereinbefore set out. The complainant, a short time before November 16, 1889, tendered to the Winter Park Company the amount due, and demanded a deed to the premises. The complainant offered to pay the amount due, upon delivery of a deed to the premises, or to pay the money into the registry of the court. The tender having been refused, and the Winter Park Company refusing to make the deed, the bill of complaint was filed November 16, 1889. Upon these facts, the appellant contends that the court below should have granted one or the other of his prayers for relief; that, if the court below found that the complainant was not entitled to a specific performance of the contract, it should have retained the bill of complaint, and have allowed the complainant compensation for the improvements placed upon the lot by him while he was in possession under his contract of purchase.

From the facts stated, it appears that the Winter Park Company had been extremely liberal in extensions of time to the complainant, and endeavored to afford him full opportunity to comply with his contract. In granting such favors, it canceled the original contract, and made a new one, giving an extension of one year, or until September 12, 1887. At complainant's request, it granted a further extension until January, 1888. After this date, the complainant ceased, until October 16, 1888,—long after the lot had been sold to Dorn,—to have any communication with the Winter Park Company. Although it wrote him several times in reference to taxes upon the lot, and other matters connected with the same, he entirely ignored the letters, not even acknowledging receipt of them; and a reasonable conclusion, from his actions in the matter, was that he did not desire further negotiations with the company, and had abandoned his contract with them. During this interval, the notice of June 16, 1888, hereinbefore set forth, was sent to complainant. Not only did he fail to comply with the notice, but it failed to elicit any reply whatever from him, beyond the receipt required to be given by the recipient of a registered letter by the United States postal laws and regulations. Upon the expiration of the time limited in the notice, the Winter Park Company canceled the contract, resumed possession of the property, and sold and conveyed it to Dorn.

It is admitted by all parties that the various extensions granted the complainant amount-

ed to an acquiescence in his failure to perform his contract, and kept the contract in force until the time limited in the notice of June 14, 1889. It is insisted by the appellant that time was not of the essence of the contract, and that the Winter Park Company had no right to make it such, or to put a limitation upon the time of performance by the complainant, by giving such notice. We agree that time was not of the essence of the original contract in this case; unless expressly stated so to be, it is not generally so regarded in a court of equity. *Trust Co. v. Cole*, 4 Fla. 359. While time may not be of the essence of the original contract, the principle is well established that where one party to a contract is guilty of laches and negligence to perform the same, and the time for performance has passed, the other party may, by giving notice, fix a reasonable time for the performance of the contract, and has the right to treat the contract as abandoned if not complied with in such limited time. *Wat. Spec. Perf.* §§ 465-483; 2 *White & T. Lead. Cas.* Bq. p. 1137, note to *Seton v. Slade*, 7 *Ves.* 265, and authorities cited; *Kirby v. Harrison*, 2 *Ohio St.* 328. Although the complainant was in default, he made no reply whatever to the notice. If he had desired still further extension of time, he should have let his wishes be known. If he considered that he had further rights in the matter, and that the Winter Park Company could not put a limitation of time upon him, he should have been prompt in the assertion of such rights. Failing to ask any further extension, or to assert any right, he must be held as acquiescing in the demand contained in the notice, and as abandoning all rights he might have had to enforce the performance of the contract. *Gentry v. Rogers*, 40 *Ala.* 442, text 449. In order that such a notice have the effect to put a limitation upon the time for the performance of a contract, the time fixed for the performance of the contract should be a reasonable time within which to do the act required. There cannot, in the nature of things, be any fixed rule as to what constitutes a reasonable time in such cases. It must depend upon the facts of each particular case. The time fixed for the performance of the contract in the notice in question was nearly 40 days. The simple act required to be done was the payment of a sum of money. True, the complainant lived in Massachusetts, and the defendant corporation was in Florida. We cannot, however, close our eyes to what is a matter of common knowledge, that, in this age, electricity and steam, in the facilities they afford for communication between different states of the Union, and the transmission of money and other articles from one portion of the country to another, have practically annihilated distance and time. Under all the circumstances of the case, we think the limitation of time fixed in the notice was a reasonable one.

There is another reason why we think the

complainant was not entitled to specific performance of the contract: He did not come into court with sufficient promptness. While a court of equity will not, as stated, regard time as of the essence of a contract, unless expressly made such by the contract itself, yet it will require that one who seeks specific performance of a contract shall not be guilty of unreasonable delay, and shall seek his redress with reasonable promptness. The specific performance of a contract for the sale of lands is not a matter of right in either party, but rests within the sound, reasonable discretion of a court of equity. This discretion will only be exercised where the complainant shows himself prompt and eager to perform the contract on his part, and to have same performed by the other party. *Knox v. Spratt*, 23 Fla. 64, 6 South. 924; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Porter v. Dougherty*, 25 Pa. St. 405; *Gentry v. Rogers*, 40 Ala. 442, text 448, and authorities cited. In this case, the complainant had no agreement or understanding for any extension of time for performance of his contract after January 1, 1888. His laches after that time was of his own fault and willfulness, and without the consent of the Winter Park Company. He had been long in default when the notice of June 14, 1888, was sent to him. After this notice he made no protest or assertion of his rights, no payments or efforts for further extension of time. When defendant the Winter Park Company wrote to him, he ignored the letters. Then, after the notice of June 14, 1888, was given him, making no reply, he waited for considerably more than a year after the property had been sold to another party, before he tendered the money, and sought to perform his contract, or sought to have the deed made to him. The suit was brought November 16, 1889; nearly one year after default was held to be an unreasonable delay upon the part of a vendor. In *Gentry v. Rogers*, supra, likewise cited in *Knox v. Spratt*, nine months was held to be unreasonable delay. The ground upon which delay in this class of cases is considered unreasonable is that it raises a presumption that the party has abandoned the contract, and is equivalent to a consent to a rescission. *Knox v. Spratt*, supra; *Wat. Spec. Perf.* § 473, and authorities cited.

It is claimed by the appellant that, although he might not have been entitled to a specific performance of the contract, yet that, while he was a vendee in possession, he made valuable improvements upon the land, and that the bill should have been retained, that

he might recover compensation for these improvements. The alternative prayer of the bill is "that said company be compelled to refund to complainant the difference between the fair value of said premises and the amount due said company." The "fair value" of the premises is not shown in the record. The price for which they were sold to Dorn, and the value of improvements put upon them by the complainant, are the only data throwing any light upon the subject of value of the premises. The case of *Lewis v. Yale*, 4 Fla. 418, asserts the general doctrine to be "that a court of equity cannot award compensation in damages for injury sustained by nonperformance of a contract, where the primary relief [specific performance] cannot be decreed." This case was upon the general subject of damages for the breach of contracts for the sale of lands, and the damages sought to be recovered were not on account of improvements erected upon the land. The headnotes in the case of *Ghinski v. Zawadzki*, 8 Fla. 405, say: "(1) Where the object of the bill is to compel the 'specific performance' of a contract, if the prayer be denied (as a general rule), the bill will be dismissed; but there are exceptional cases, as where equity is found to have arisen between the parties to the contract, growing out of its peculiar character or nature. In such case the bill may be retained for the purpose of having that equity adjusted. (2) Where one contracts to purchase real estate, and proceeds to erect improvements thereon, if compensation therefor be decreed him, the amount is to be based upon the actual value of the improvements, or, at furthest, upon a reasonable allowance, and not upon the amount expended." We have no doubt that, in a proper case, the equities might be such that, where the prayer of the bill for specific performance is denied, the court would retain the bill, and adjudicate any other equities which had arisen between the parties. In cases where the vendee in possession had made valuable improvements upon the faith of his purchase, and the contract is such that specific performance thereof cannot be enforced, the vendee will be compelled to refund the purchase money, and to pay the actual value of the improvements. *Wat. Spec. Perf.* § 281, and authorities cited. We find a large number of cases of specific performance of contracts for the sale of land wherein the primary relief prayed for, i. e. specific performance, was denied, and yet compensation was allowed the complaining vendee for improvements put upon the land, upon the faith of his contract. In all of these cases, the complainant was free from fault, and specific performance was denied by reason of some defect in the contract, or non-compliance with the statute of frauds. These adjudications are reiterations of the doctrine, everywhere enforced by courts of equity, that the statute of frauds should not be used as an instrument of fraud. We have been un-

able to find any case where compensation was allowed a vendee where his case failed, not from any technical defect in the form of his contract, but on account of his own laches, negligence, and disregard of his obligations. The appellant in this case may suffer some pecuniary loss from which we might wish to save him, but he is in a predicament into which he has gotten himself by his own conduct, and from which we are powerless to extricate him. *Hatch v. Cobb*, 4 Johns. Ch. 559; *Goodwin v. Lyon*, 4 Port. (Ala.) 297.

There is no error in the decree appealed from, and it is affirmed.

(34 Fla. 217)

WILLIAMS v. STATE.

(Supreme Court of Florida. July 16, 1894.)

CRIMINAL LAW—MANSLAUGHTER BY DEATH OF UNBORN CHILD.

The crime of manslaughter, under our statute, involved in the willful killing of an unborn, quick child by injury to the mother, is sufficiently made out where the injury to the mother, that results in the death of the child, is inflicted upon her under such circumstances as would have made it murder, had the injury resulted in the death of the mother, instead, simply, of producing the death of the child. (Syllabus by the Court.)

Error to circuit court, Leon county; John W. Malone, Judge.

Frank Williams was convicted of manslaughter, and brings error. Affirmed.

E. M. Hopkins, for plaintiff in error. W. B. Lamar, Atty. Gen., for the State.

TAYLOR, J. Frank Williams, the plaintiff in error, was indicted, tried, and convicted at the spring term, 1894, of the circuit court for Leon county, under the provisions of section 2386 of the Revised Statutes, of the crime of manslaughter, involved in the willful killing of an unborn, quick child by injury to the mother thereof, and seeks reversal here of such conviction and sentence, by writ of error.

The only error assigned is the overruling of his motion for new trial. The grounds of the motion for new trial were (1) that the verdict was contrary to law; (2) the verdict is contrary to the evidence; (3) the evidence did not sustain the allegations in the indictment that defendant made an assault on the mother with a premeditated design to effect her death.

The provisions of the statute under which the defendant was indicted are as follows: "The willful killing of an unborn quick-child by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."

There is some conflict in the evidence, but, without rehearsing it here, there was an abundance of proof to show that the defendant committed an unprovoked and cruel assault and battery upon his wife, with a

club of such dangerous dimensions as that the production of death might have been feasible with it; his wife at the time being in an advanced stage of pregnancy, and the assault and battery being accompanied by threats from him of killing her if her parents did not take her away. The proof shows further the premature birth and death, within a few hours after the assault and battery, of the child with which the wife was pregnant. The injury to the mother here, that resulted in the premature birth and death of the child, was inflicted upon her by the defendant under such circumstances as would have made it murder, had the injury resulted in the death of the mother, instead, simply, of producing the death of the child. When this is shown the crime is made out. The evidence being ample to sustain the verdict found by the jury, it is not for us to disturb their settlement of its conflict, weight, or credibility.

The judgment of the court below is affirmed.

(34 Fla. 271)

JACKSONVILLE, T. & K. W. RY. CO. v. PRIOR.

(Supreme Court of Florida. July 16, 1894.)

RAILROAD COMPANIES—KILLING STOCK—FAILURE TO FENCE—MODIFICATION OF INSTRUCTIONS—ATTORNEY'S FEES—CONSTITUTIONAL LAW.

1. A declaration against a railroad company, alleging that it was the duty of the company, under the act of 1887, c. 3742, to erect and maintain suitable fences on the sides of its railroad track, sufficient to exclude and turn live stock therefrom, and that the company failed to erect and maintain such fence at a point on the road not in a town or city or at a public road crossing, and, by means of such neglect, plaintiff's cows, of certain value mentioned, strayed upon the track at a point not fenced, and were killed by a passing train of the company, states a good cause of action.

2. The testimony showed that a railroad company entered into a contract with L. to furnish cross-ties delivered on the track, and that L. employed J. to haul the ties to the track. J., being examined for the defense, was asked on what terms he was employed to haul the ties, and answered that L. paid him so much per tie, and he was not paid by the day. On objection of plaintiff, the question and answer were ruled out. *Held*, that L. and J. were not strangers to the company, in getting and hauling the ties, and that it was wholly immaterial, so far as defendant's liability was concerned, whether J. was employed by the day, or at so much per tie.

3. Although a modification of a charge requested by a defendant may not contain a correct proposition of law, yet if the charge, as requested, and as modified by the court, states the law more favorably for the defendant than he is entitled to on the evidence, and it further affirmatively appears that no injury could have been done the defendant by giving the charge, as modified, the judgment will not be reversed on account of the charge.

4. A plaintiff and another witness in his behalf testified that they were familiar with the market value of cows in the county where plaintiff's cows were killed, and stated the value of the cows killed. Defendant offered no evidence in contradiction of the value placed on the cows by plaintiff and his witness, but, on

cross-examination of plaintiff, asked him what he paid for the cattle. This question was ruled out by the court, on objection of plaintiff. *Held*, that as the question was general, having no reference to place or time, and as it did not appear that defendant was injured by excluding the question, there was no error.

5. The provision in the second section of the act of 1887, c. 3742, for the allowance of reasonable attorney fees in case of suit and recovery for live stock killed, as provided in the statute, is not in violation of any constitutional inhibition against such legislation.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; J. J. Finley, Judge.

Action by William K. Prior against the Jacksonville, Tampa & Key West Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. R. Parrott and T. M. Day, Jr., for appellant. Calhoun, Gillis & De Witt, for appellee.

MABRY, J. The appeal in this case is from a judgment rendered in 1890, in the circuit court for Putnam county, in favor of appellee against appellant. The declaration, as originally filed, after stating that the defendant company was a railroad corporation, using locomotives and cars, and operating a railroad through Putnam county, alleges, in substance, that it was the duty of the company to erect and maintain suitable fences on the sides of its line of railroad track, sufficient to exclude and turn live stock therefrom, but that it neglected to erect and maintain such fences about midway between mile posts 72 and 73, $1\frac{1}{4}$ miles south of Como, in said county; that, by means of said neglect to erect and maintain such fences at the place mentioned, three cows and one heifer, the property of plaintiff, strayed and went upon defendant's railroad track at said place, and were killed on the 1st day of June, 1889, by the locomotive and train of defendant operated on said road. It was also alleged that by reason of the negligence of the defendant to erect and maintain substantial fences at said place, and at the time mentioned, sufficient to exclude and turn all live stock, as it was its duty to do by virtue of the statute in such cases made and provided, the locomotive and train of defendant, then and there operated upon said railroad, with great force and violence, ran upon and struck the said animals of plaintiff, and by means thereof they were killed, by reason of the negligence aforesaid of the defendant. Due notice and presentation of plaintiff's claim for the cows to the defendant, and its refusal to pay for the same for more than 30 days before bringing the suit, are alleged. The value of the cows was also alleged, and the total damages claimed was \$350.

The declaration was demurred to on the grounds (1) that it did not allege that defendant was required by law to maintain fences at the point where the cattle went upon the

track; (2) that it did not allege that the point where the cattle went upon the defendant's railroad track was not in a town or city, or at a public road crossing; (3) that it did not allege the damage to the live stock was caused by a failure to erect or maintain fences and stock guards. The second ground of the demurrer was sustained, and plaintiff amended by alleging that the place where the cows were killed was not in a town or city, or at a public road crossing. The general issue and contributory negligence on the part of plaintiff were pleaded by the defendant, and, on the trial, plaintiff obtained a judgment.

It is assigned for error, and contended here by counsel for appellant, that the court erred in overruling the demurrer, as to the first and third grounds thereof. The statute requires every railroad company or other corporation and every person operating or running any railroad in this state to erect and maintain substantial fences on the sides of said railroads, except through towns and cities, unless such towns and cities require them, sufficient to exclude and turn all live stock therefrom, with stock guards at all public crossings, and at such other crossings as may be necessary, for the use of owners and tenants of lands adjoining such roads; and, in case of failure on the part of any company or person operating a railroad to erect and maintain such fences, the company or person operating such road is made "liable for all damages which shall be done by its or his engines or cars to any live stock, caused in either case by a failure to erect or maintain said stock-guards." It is made by law the duty of the company to fence its road, and a failure or omission in this respect cannot be regarded otherwise than as a high degree of negligence, and should cattle stray upon a track not fenced at a point where fences are required, and be killed by a passing engine and cars, no other act of negligence need be shown, in order to impose liability upon the company. *Railway Co. v. Harris*, 33 Fla. 217, 14 South. 726; *Blair v. Railroad Co.*, 20 Wis. 254. The declaration in the present case alleges all the essential facts necessary to impose liability upon the company, and the court did not err in overruling the grounds of the demurrer mentioned.

The testimony in the record before us shows that the defendant company had fenced its track, and plaintiff's cows were killed on said track, in Putnam county, at a place where some 30 feet of the fence had been taken out for the purpose of permitting wagons hauling ties for the company to pass into the space inclosed by the fence. One Lanier had a contract with the company to get ties for it, and one Johnson was employed by Lanier to haul the ties to the railroad track. Johnson cut the fence, by direction of Lanier, some 10 days before plaintiff's cows went upon the track and were

killed; and it is shown that the gap in the fence, through which the wagons passed in hauling ties to the road, had been open five or six days before the destruction of the cattle. The place where the gap was made by Johnson was not in a town or city, or at a public or private crossing; and it also appears that the company received the ties hauled to the track, and took them onto its cars. Johnson, being examined for the defense, was asked on what terms he was employed by Lanier to haul ties, and answered that Lanier paid him so much per tie, and that he was not paid by the day. Plaintiff objected to the question and answer, and it was ruled out by the court, and exception taken. We held in the case of *Railway Co. v. Harris*, supra, that where there is a gap, with bars, in a railroad fence, at a place where there is no public or other authorized crossing, and the gap is used, with the knowledge of the company, by persons supplying the company with wood under contract, and engaged in hauling the same to a wood rack on the road, to be used by the company's engines, and such bars are left down by such persons so engaged, and live stock pass through the gap and go onto the road, and are killed, the persons so leaving the bars down cannot be regarded as strangers to the company, but their acts will be regarded as the acts of the company, and it will be held liable for the damage resulting to the owner of the stock. Whether Johnson was employed by Lanier by the day, or so much per tie, for hauling the ties, was wholly immaterial, so far as the defendant's liability was concerned. Lanier and Johnson cannot be regarded as strangers to the defendant in opening the fence for the purpose of hauling the ties to the railroad track, as it was done, not only with the knowledge, but in pursuance of a contract by the company, and for its benefit. The company cannot relieve itself of liability to cattle owners, imposed by statute, for a failure to maintain the required fence, by entering into a contract with a third party to get ties for it, and, in so doing, opening and leaving open a fence required to be maintained by the company. *Corwin v. Railroad Co.*, 13 N. Y. 42. There was no error, or injury to the defendant, in having the question and answer excluded.

In this connection we will consider an exception to a modification of a charge requested by the defendant. For the defendant, the court was requested to give the following charge, viz.: "If the jury find from the evidence that the defendant erected a substantial fence, and that this fence was broken down and left open by some person not the agent or servant of the defendant, and that the defendant was not guilty of negligence in failing to repair and close said fence, and that the cattle of the plaintiff entered and came upon the defendant's railroad track through the opening made as aforesaid, they will then find for the defendant." The court

gave the charge, with the following addition: "But if you find from the evidence that the cattle were killed by the defendant's engine or train five or six days after the fence was cut, without closing it up, then you will find for the plaintiff." There was no testimony whatever upon which the jury could have found that strangers, or persons for whose acts the defendant would not have been liable, broke down and left open the fence through which plaintiff's cows passed onto the railroad track and were killed. The proof is positive and uncontradicted that Johnson, who was engaged in hauling ties to the company's railroad track, and for its use, broke down the fence in order to get to the road with wagons loaded with ties. It is equally clear that the fence remained open for at least one week before the cows were killed, and it seems that the company's section master knew this fact. The charge given, with the modification added, was more favorable to the defendant than it should have been, and, though the addition may not contain a correct statement of the law, we do not see how it could have misled the jury to the detriment of the defendant. It was bound to maintain the fence, and was liable for the consequences to the stock by reason of the open condition of the fence for any length of time, under the circumstances of this case. We will not stop to consider whether or not the addition to the charge was correct, as a legal proposition, had there been testimony before the jury to justify a conclusion that strangers, or parties for whose acts the defendant was not liable, cut the fence. On such a showing, what would have been sufficient delay in repairing the fence as to amount to negligence would properly be a question for the jury; but whether the court was authorized to tell them that, as matter of law, five or six days' delay was sufficient to fix liability, we need not here decide. Conceding that, in the particular mentioned, the court was in error, there is no ground here for reversing the judgment on that account, as the defendant's liability was clear, if the fence was left down, under the circumstances stated, for a less time than the shortest period mentioned in the charge.

The plaintiff testified on direct examination that his cows mentioned in the declaration were killed on defendant's railroad track opposite or near the gap in the fence in Putnam county; that he had sold cattle for over 40 years, and was thoroughly familiar with their market value. He further stated what each of the cows killed was worth. He introduced another witness, who stated that he had bought and sold cattle in that country, and was familiar with their market value; that he knew plaintiff's cows,—and placed a value on them in excess of that given by plaintiff. Defendant offered no testimony as to the value of the cows. On cross-examination of plaintiff, he was asked, "What did you pay for these cattle?" and on objection

of plaintiff it was ruled out. There is nothing in the record to indicate what defendant expected to elicit from the witness by the question, or the purpose for which it was asked. The measure of recovery, as to value, in a case like this, is just compensation in money for the property destroyed, with the interest allowed by the statute. The just compensation is the value of the property at the time of its destruction, and this value ordinarily is fixed by ascertaining what was then its market value. Where personal property has a well-recognized standard of value, wherever found, an inquiry as to its value is not necessarily confined to the market value at the time and place of its destruction, as such a restricted inquiry might, under some circumstances, exclude an investigation as to the real value of the property lost to the plaintiff. *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co.*, 27 Fla. 1, 9 South. 661. The market value, and not what plaintiff may have paid for the cows, was, however, the true estimate of what he was entitled to recover. There may be cases where an investigation into the cost of personal property destroyed may be proper, but where such property is not shown to have been removed from a locality, and has a demand and market value at the time and place of its destruction, its cost to the owner, without connecting such cost in some way with the market value, will not be proper. In order to make an investigation into the cost of property destroyed proper, it ought to appear that the cost was necessary in some way to fix the market value of the property when destroyed, or it may be for the purpose of impeaching the estimate of the witnesses as to market value. The question propounded by defendant was general, without reference to time or place, or that plaintiff had in fact bought the cattle; and no offer was made, so far as we can see, to show the materiality of the answer to it. We think the trial court should be liberal in permitting an investigation as to the value of property, but still, under the circumstances here, we do not see any detriment to the defendant in excluding the question under consideration.

The remaining assignment of error requiring consideration is that the verdict was erroneous in including an attorney fee for plaintiff. This objection is not that the attorney fee was not sufficiently proven, but that the provision in the statute allowing attorney fees is unconstitutional. A statute in Alabama provided that any corporation, person, or persons owning or controlling any railroad in that state, or any complainant against such corporation, person, or persons, taking an appeal from a decision rendered by a justice of the peace in a suit for damages brought under the provisions of an act defining and regulating the liability of railroads for damage to live stock, and failing to

sustain such appeal, or to reduce or increase the judgment before the appellate court, shall be liable for a reasonable attorney's fee incurred by reason of such appeal, to be assessed by the court, not to exceed \$20, and the attorney's fee shall be part of the costs, and collected as such. The provision in reference to the attorney fee was declared void, as being violative of that equality and uniformity of rights and privileges which, by the principles of the constitution, state and federal, are secured to all persons, and as creating unequal and unjust discrimination against a particular class of litigants. *Railroad Co. v. Morris*, 65 Ala. 193. The Mississippi court, in the case of *Railroad Co. v. Moss & Co.*, 60 Miss. 641, declared unconstitutional and void the following statutory provision, viz: "That whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this state against any corporation, a reasonable attorney fee for the appellee shall be assessed by the court and certified by the clerk of the court or justice of the peace, as the case may be, to the appellate court, and, upon affirmance of the judgment, a judgment for the amount so assessed shall be rendered in favor of the appellee and against the appellant, and the sureties on his appeal bond, and collection thereof shall be had in the same manner as of other judgments rendered on appeal; provided the fee so assessed shall not be less than fifteen dollars in appeal from the court of a justice of the peace, nor less than twenty-five dollars in appeal from the judgment of a circuit court." In the case referred to the court said: "The subjection of every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint, as unequal, for it would operate on all; and such a rule for the unsuccessful appellant in certain classes of actions, tested by the nature and subject of the actions, would be equally free from objection on the ground of its discriminating character. But to say that where certain persons are plaintiffs, and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally, is to deny the equal protection of the law to the party thus discriminated against." A statute in Arkansas provided, in substance, that, whenever any stock should be killed by a railroad in that state, the owner of the stock or the railroad company could demand an appraisement by sworn appraisers,—one to be selected by each party,—and, if the appraisers so selected could not agree, they to select a third appraiser. Should either party decline to select an appraiser as provided by the statute, when notified, the appraiser selected by the other party demanding the appraisement was authorized to select an appraiser, and proceed to ascertain the value of the stock killed. The act further provid-

ed that if the company failed, for 30 days after delivery of the appraisalment to its agent, to pay the amount assessed, the owner could sue for damage done to the stock, and recover, in addition to the amount assessed as damages for killing or injuring the stock, a reasonable attorney fee for the plaintiff, and, in any court to which an appeal should be taken, a reasonable attorney fee should be allowed in that court, to be taxed and collected as other costs in the case in such court; but if the company tender the full amount of such appraisalment within the 30 days, and the same be refused, and suit instituted for the damage to such stock, unless the owner recovered a greater amount than that tendered, the court trying the case was required to assess a reasonable attorney fee for the defendant, and in case of appeal the appellate court was required to assess such attorney fee for the defendant, to be taxed and collected as other costs in such court. This act was declared unconstitutional in the case of *Railway Co. v. Williams*, 49 Ark. 492, 5 S. W. 883. A statute in Michigan required railroad companies to fence their tracks, and provided that, until the fences and cattle guards required should be constructed, the companies should be liable for all damage done to cattle, resulting from a failure or neglect to construct said fences and cattle guards, to be recovered in any court of competent jurisdiction, together with an attorney's fee of \$25, to be taxed as costs against the defendant in case of recovery in the action. This act was declared unconstitutional in the case of *Wilder v. Railway Co.*, 70 Mich. 382, 38 N. W. 289, and is, we concede, an authority directly in favor of the position of appellant. Corporations, it must be conceded, have equal rights, as to the privileges granted to them, with natural persons, in the courts of justice, as they may sue and be sued with respect thereto as natural persons, and the law must be administered with the same equality and justice when applied to the one character of persons as to the other. Unless there is some legal and constitutional ground authorizing the legislature to impose upon a railroad corporation the burden of a reasonable attorney fee in addition to damages to stock injured by reason of a failure to fence its track, or, to speak more accurately, as to the powers of the legislature, if there is a constitutional inhibition, state or federal, against the right to impose such fee in a suit against a railroad company to recover damages done to stock by reason of a failure to fence as required by statute, then the act in question must be declared void, but if it does not conflict with some constitutional provision it is the duty of the courts to enforce it. Statutes allowing such a fee have been held constitutional under provisions in bills of rights similar to our own. The theory upon which railroad corporations can be required by the legislature to fence their tracks is protection

against accidents to life and property in conducting such business. It appertains to the police power of the state to protect life and property in any business or employment, whether in the charge of a private individual or a corporation. When the legislature requires railroads to fence their tracks, a public duty is thereby imposed upon them, and they can be coerced in the performance of this duty by the imposition of penalties for a failure to comply. This view, we think, is fully sustained by the courts. *Corwin v. Railroad Co.* and *Blair v. Railroad Co.*, supra; *Railway Co. v. Duggan*, 109 Ill. 537; *Railway Co. v. Mower*, 16 Kan. 573; *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110. The case last cited from the United States supreme court involved the constitutionality of a Missouri statute requiring railroad companies to fence their tracks, or become liable in double the amount of all damages done to stock straying upon the tracks, and occasioned by the failure to construct such fences. Judge Field, who wrote the opinion of the court, after stating that the state legislature had the right, by virtue of its police power, to require railroad companies to fence their tracks, says: "In few instances could the power be more wisely or beneficially exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident in thickly-settled portions of the country absolutely essential. The omission to erect and maintain such fences and cattle guards, in the face of the law, would justly be deemed gross negligence; and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed, and it is not a valid objection that the sufferer, instead of the state, receives them. That is a matter on which the company has nothing to say, and there can be no rational ground for contending that the statute deprives it of property without due process of law." In the case of *Railway Co. v. Mower*, supra, Judge Brewer discusses the question fully, and the decision was that the legislature had the right to provide that a reasonable attorney fee should be allowed to a successful plaintiff in a suit to recover damages to live stock caused by the failure of a railroad company to fence its tracks when required by law to do so. We think the correct view is announced in this decision. The Illinois case referred to sustains the same view. The acts declared void in Alabama and Mississippi had features which distinguish them from our statute on the subject. They attempted

to impose a penalty, in the guise of attorney fees, for the privilege of prosecuting an appeal. In neither of these acts, nor in the one in Arkansas, were the railroad companies required to fence their tracks, and the attorney fees allowed in suits to establish damages to stock by reason of a failure to fence. Other differences might be pointed out, but we do not deem it necessary here. Our statute applies to all railroad corporations and persons operating railroads in this state, and cannot be said to be a special law applicable to an individual class. All of the same class are affected by it.

We find no sufficient reason for reversing the judgment in this case, and it is therefore affirmed.

(34 Fla. 219)

McMICHAEL v. GRADY, Sheriff, et al.

(Supreme Court of Florida. July 16, 1894.)

HOMESTEAD EXEMPTIONS—EQUITY JURISDICTION—
WAIVER OF EXEMPTION RIGHT—COURT COMMISSIONER'S POWER TO GRANT INJUNCTION—INJUNCTION WITHOUT BOND.

1. Under chapter 3246, Laws approved March 7, 1881, entitled "An act to enlarge the equity jurisdiction of the circuit courts," our courts of equity are clothed with full and complete jurisdiction over the matter of the homestead and exemptions allowed by the constitution and laws; not only to adjudicate as to the rights of parties thereto, but to control and direct the setting apart and allotment thereof, and to restrain interference therewith, or sale thereof, under any inhibited process of law, and to pass upon and adjudicate the propriety of any exemption set apart by any officer, and to rectify it if improper.

2. Where personal property that is exempt from forced sale to the head of a family, under our constitution, is simply levied upon by attachment or other process of law, the mere silence or failure of the party entitled to such exemption to assert or claim it until there is an actual attempt at forced sale of such property, under the process of some court, cannot constitute a waiver of the right, or work an estoppel to its assertion when the inhibited forced sale is actually attempted.

3. During the absence of the circuit judge from the county where the bill is pending, court commissioners, appointed under the provisions of our constitution, have the authority to grant an injunction in any cause in which a circuit judge could have granted it if present.

4. Under our statute, where summary process by injunction is prayed, and the bill justifies it, and affidavit shall be made of the truth of the statements of the bill, and that the complainant is unable to give bond of indemnity, or other security, if the statements of the bill and accompanying affidavit shall appear by ex parte evidence to be true, to the chancellor or court commissioner to whom the application is made, it is not error to grant the injunction without bond.

(Syllabus by the Court.)

Appeal from circuit court, Pasco county; G. A. Hanson, Judge.

Bill by John T. McMichael against James A. Grady, sheriff of Pasco county, and others. Bill dismissed, and plaintiff appeals. Reversed.

R. W. Williams, for appellant. Sparkman & Sparkman and John B. Johnston, for appellees.

TAYLOR, J. John T. McMichael, the appellant, on the 6th day of January, 1890, filed his bill in equity in the circuit court of Pasco county against James A. Grady, as sheriff of said county, and against the firms of Eckman & Vetsburg, Frank & Co., Joseph Rosenheim & Co., Meinhard Bros. & Co., Hexter & Kohn, A. Einstein Sons, Einstein & Lehman, and A. R. McCowan & Co., alleging therein that on the 5th of December, 1889, the defendants the above-named firms obtained final judgments against him, in sundry suits in assumpsit, with ancillary attachments. That on the 21st day of December, 1889, the said defendants, upon an affidavit averring that the stock of goods that had been levied upon by virtue of the attachments in said suits was of a perishable nature, obtained an order at law from the circuit judge for the sale of said goods. That, under said order, the defendant Grady, as sheriff of Pasco county, has duly advertised the said stock of goods for sale on the 6th day of January, 1890. (Copy of the sheriff's advertisement is attached, as an exhibit, to the bill.) That he is the head of a family residing in this state. That his family consists of himself, wife, and two small children. That, as such head of a family, he is entitled to the constitutional exemption of \$1,000 worth of personal property from forced sale under process of any court. That he has never had the benefit, or availed himself, of said constitutional provision. That, subsequent to the levy of said writs of attachments and executions on his property, as aforesaid, by the defendant Grady, as sheriff, your orator notified the defendant Grady, in his official capacity as sheriff, in custody and control of your orator's property, in writing and in person, that your orator desired to avail himself of his right to exempt \$1,000 worth of the property levied upon, or so much as might be necessary to enable him to avail himself of the benefit of said constitutional exemption. That said Grady refused to comply with your orator's desire, and your orator again, on the 2d day of January, A. D. 1890, served a written notice on said defendant Grady, as such sheriff, of his desire to avail himself of his right to exempt \$1,000 worth of personal property from forced sale, and offering then to point out all of his property, and desiring the said Grady, as sheriff, to make an inventory of the same, that orator might make oath to its containing a true and perfect list of all his personal property, so that appraisers might be appointed to appraise same at its cash value, in order that orator might select from such inventory of personal property an amount, according to such appraisal, not exceeding \$1,000, and exempt the same from forced sale under process of any court, and especially from the sale under the said order of this court, made on the law side thereof, advertised to take place on the 6th of January, 1890, under executions in

favor of the defendants the said firms aforesaid. And your orator charges that the plaintiffs in said executions, who are the defendants named in this bill, have no specific lien upon the property which your orator is entitled to have exempted to him. (A copy of the demand upon Grady, as sheriff, is attached as a part of, and as an exhibit to, the bill, and is as follows: "To James A. Grady, Sheriff of Pasco County, State of Florida: I desire you to make an inventory of all of my personal property, and am now ready to point out the whole of my personal property to you, so that you may make an inventory, and to make oath that said inventory, when taken, contains a true and perfect list of all of my personal property, so that appraisers may be appointed to appraise the same at its cash value, in order that I may select from such an inventory an amount of such property, according to such appraisal, not exceeding one thousand dollars, which I claim and desire to be exempt from forced sale under the laws of this state, and especially from sale under executions in favor of Eckman and Vetsburg et al. against myself, as advertised by you to take place on 6th day of January, A. D. 1890. John T. McMichael.") That the said Grady, as sheriff, combining and confederating with the other defendants herein, with the intent to deprive your orator of his constitutional right to an exemption, and knowing full well that your honor is now absent from Pasco county on the circuit in Monroe county, in the city of Key West, some hundreds of miles from railroad communication, so that no order could be obtained of benefit to your orator to compel him, as such sheriff, to set apart your orator's exemption, and desist from the sale of same, and taking advantage of the order of sale made by your honor, wherein it is ordered that he, as sheriff, do pay over the proceeds of said sale to be had on January 6, 1890, to the said plaintiffs in execution, has absolutely refused to entertain any of your orator's requests or demands that he comply with orator's desire to have exempted to him \$1,000 worth of personal property, and have the same selected and set apart to him, out of the goods levied on, described in the advertisement of sale heretofore referred to as Exhibit A, before said sale should take place, in utter disregard of your orator's right as the head of a family in the premises. That if said sale advertised to be made by said sheriff on January 6, 1890, is allowed to take place, it will of itself operate to defeat your orator's constitutional exemption, as said order of sale is for the sale of a certain stock of goods, wares, and general merchandise, consisting of clothing, boots and shoes, hats, millinery, dry goods, etc., levied upon, as the property of your orator, to satisfy executions in favor of the other defendants herein specified. That said sale is to be for cash, and the proceeds of sale are to be paid over to the said defend-

ants, who are named as plaintiffs in said executions. That said property so advertised for sale is about all of the personal property now owned by your orator in the state of Florida, and, if that property is sold, then there will none be left from which to select an exemption, and your orator cannot exempt the proceeds of the sale of same, because it is ordered to be paid over to the defendants above named, as plaintiffs in said executions, and, owing to the absence of your honor in Key West, as aforesaid, the proceeds of said sale would be in their hands before any order could be obtained to stay the same in the hands of the defendant Grady, as sheriff, or to pay the same into the registry of the court, and the injury would be irreparable, as all of said defendants, the plaintiffs in said executions, are nonresidents of this state.

The bill prays that the defendants be restrained and enjoined from selling, or offering for sale, the property levied upon and advertised to be sold on the 6th day of January, A. D. 1890, until after your orator be allowed to select, and have set apart to him, from sale, an amount not exceeding \$1,000 worth of personal property, as exempt from levy and sale under process of any court, and particularly from sale under the said executions in favor of the defendants, especially as your orator alleges and charges that said defendants have established no specific lien upon any of said property for the purchase money of the same. There is a prayer, also, for general relief. Said bill was verified by the oath of the complainant, in which oath he further swore that he was unable to give bond of indemnity, or other security, upon the granting of the restraining order prayed for.

On the 6th day of January, 1890, the day the bill was filed, a court commissioner for Pasco county made an order in said cause restraining the said sheriff from selling the personal property of the complainant advertised to be sold on January 6, 1890, until \$1,000 of said personal property shall be set apart and delivered to the said complainant, as the exemption to which he is entitled under the constitution and laws of Florida; but it was stipulated in the order that it should not be construed so as to delay the sale of other property advertised to be sold on said day, but, on the contrary, that the said personal property claimed to be exempt shall be scheduled by him immediately upon the issuance of said order, that the appraisal thereof, as the law directs, shall be had without delay, and that the sale of the other property, not included in that exempted, should proceed as advertised. The property so selected and appraised as the exemption was further ordered to remain in the custody of said sheriff until the further order of the circuit court.

The defendants in said bill gave notice on the 13th of January, 1890, that on the 14th

day of that month they would move before the circuit judge, at his office at Bartow, Fla., to reverse and vacate the order made in said cause by said court commissioner, and for an order dismissing the bill upon the following grounds: (1) That said court commissioner did not have the power to make the order he made, nor any order in the premises; (2) that there is no equity in the bill; (3) that said property was not exempt under the exemption laws of the state, nor any part thereof; (4) that, if said property ever had been exempt, said McMichael had waived his right to said exemption; (5) that no bond was filed, as the law requires, to indemnify plaintiffs in execution, nor had the said McMichael paid the costs in the proceedings; (6) and for other good and sufficient reasons apparent upon said proceedings.

This motion came on to be heard on the 15th of January, 1890, and the circuit judge then made an order sustaining said motion, and vacated the said injunction order, and dismissed the bill. From this order, the complainant, McMichael, appeals. The court below erred in granting this order, particularly to the extent that it goes of dismissing the complainant's bill. As to the first ground of the motion upon which the order appealed from was made, we think the court commissioner transcended his power in the matter of ordering an appraisal and scheduling of the property claimed to be exempt. His only power in the premises was to grant an injunctive order restraining the sale of so much of the property levied upon, and advertised to be sold, as was exempted to the complainant from forced sale. Beyond this he had no authority to go; but that he, as such court commissioner, did have the authority, during the absence from the county of the circuit judge, to grant a writ of injunction in any cause in which a circuit judge, if present, could have granted such writ, there can be no question, under the provisions of section 14 of article 5 of the constitution of 1885.

The second ground of said motion should properly have been set up in the form of a demurrer to the bill, but, as the circuit judge must have considered the same in making the order of dismissal of the bill, we also will treat it, in the consideration of the question it presents, as being tantamount to a demurrer to the bill. We cannot agree that there is no equity in the complainant's bill. Ordinarily, a court of equity would have no jurisdiction to entertain a bill predicated upon the facts set up in this bill, and praying the relief therein sought; but by chapter 3246, Laws approved March 7, 1881, entitled "An act to enlarge the equity jurisdiction of the circuit courts," the jurisdiction in equity is expressly conferred upon the circuit courts, and the judges thereof, upon bill filed, to enjoin and restrain the sale of all property, real or personal, that is exempt from forced sale, under the constitution and laws of this

state; and, by section 2 of that act, said courts are further clothed with jurisdiction in equity, upon bill filed, to order, adjudge, and decree the setting aside the homestead, and exemptions of personal property, from forced sale under said constitution and laws; and, by section 3 of the same act, said courts are further given jurisdiction in equity, upon bill filed, to enjoin and restrain a sheriff or other officer from setting aside real or personal property, as exempt from forced sale, when the same is not exempt; and to adjudge and decree the vacation of, and to annul, all exemptions made and set aside by any sheriff or other officer, when the same has been illegally and improperly made; and to order the sale of the same, or so much thereof as may be legal, equitable, and proper to be sold,—thus giving to our courts of equity full and complete jurisdiction over the matter of homesteads and exemptions, not only to adjudicate as to the right of the party thereto, but to control and direct the setting apart thereof, and to restrain interference therewith by any inhibited process of law, and to pass upon and adjudicate the propriety of any exemption set apart by any officer, and to rectify it if improper.

The bill here makes out a *prima facie* case entitling the complainant to an exemption of \$1,000 worth of the property levied upon and advertised to be sold by the defendant sheriff, under the executions in favor of the other defendants, from forced sale under said processes of law; and the case, as made by the bill, entitles the complainant to the interposition of a court of equity, not only to restrain the alleged threatened sale of property claimed to be exempt, but to pass upon and adjudicate his right to such exemption out of the particular property claimed to be exempt, and, if he be found to be entitled to have the same exempted to him, then to order and direct the allotment thereof to him. If there was anything that disentitled him to an exemption out of this particular property, the court, in the exercise of its equity jurisdiction, could have so declared; but the facts that would have defeated such exemption right therein should have been set up in the orderly way, by answer to his bill, and duly sustained by proofs, and not left to surmise upon a bare motion, unsupported by proofs, as was done here. The third ground of said motion, to the effect that said property was not exempt under the exemption laws, nor any part thereof, is a traverse of a material fact alleged in the complainant's bill, and is not a proper ground of assault by motion upon a bill in equity, but should be set up and urged by answer, and sustained by formal proof. Upon a motion of the kind made here, this ground could not, and should not, have been entertained or considered, unless the bill upon its face, by its own allegations, had shown that the property claimed therein to be exempt was not, in law, subject to such exemption.

Under the fourth ground of the motion, it is urged here that, if the complainant ever was entitled to an exemption out of this property, he has waived his right thereto, as shown by his bill, because the property had been seized by attachment writs in said suits some time prior to the rendition of final judgments in such suits, and that the complainant should have interposed his claim to exemption out of said property promptly after the levy of said attachments; that by waiting to assert his right until after said attachments had been merged into final judgments, and until after the court, by its order, had directed a sale of the property to satisfy such judgments, he had waived his right. In support of this proposition, we are cited to the cases of *Harlan v. Haines*, 125 Pa. St. 48, 17 Atl. 248, and *Stanton v. French*, 83 Cal. 194, 23 Pac. 355, and *State v. Manly*, 15 Ind. 8, cited by Thompson, in his work on Homestead Exemptions, to sustain the text of section 826. In the latter case, from Indiana, it is held that, after the court has rendered final judgment for the sale of property attached, it is too late for the defendant to claim it as exempt; but it is also held that the defendant has the right there to set up his claim to the exemption as a defense to the attachment. The exemption claimed there was under a statutory provision, and the court in that case treats the final judgment rendered in the attachment suit as being *res adjudicata* of the defendant's right to the exemption out of the property attached. By not setting up his claim to the exemption before the trial of the attachment suit, in which he could have made his right thereto an issue, he is held to have waived the right. In the California case, the party claiming the exemption waited in silence until the officer had sold his property claimed as exempt, under a judgment and execution against him, and, after the sale, sued the officer for the value of the property sold. The court there holds that, "while the law exempts certain property of a judgment debtor from execution and forced sale, such exemption is a personal privilege, which may be waived by the debtor, and a failure to claim the property as exempt, when levied on to satisfy a judgment against him, within a reasonable time thereafter, is a waiver of the exemption right, and the officer selling exempt property without such claim of exemption is not liable for the value thereof." The Pennsylvania case rested upon a statute giving the right of exemption. In that case the court says: "The exemption statute of April 9, 1849, is not self-executing. It extends a privilege to the debtor which he may claim or waive, and it is operative only on his demand. In connection with the privilege it confers on the debtor is the duty which rests on him of promptly claiming it. When a debtor has notice of the seizure of his property on execution process, he must, without unnecessary delay, claim his exemption, or

he will lose it. It is a right which may be defeated by his laches, or may be protected by his vigilance."

In so far as these decisions may be pertinent to the question under discussion, they cannot be applied to the exemption provisions of our constitution and laws.

Our constitution does not contemplate that the right to the exemption that it gives shall be adjudicated and passed upon, as an issue, in any proceeding instituted to enforce a debt, or to put a debt into the form of a judgment, but shields the property it exempts "from forced sale under the process of any court." Its inhibitory hand is not actively lifted until a forced sale under the process of some court is attempted. When such sale is attempted, then, no matter when it may be, the party clothed with the right can call upon the proper courts to apply the shield that the constitution guarantees to him. That he may waive the right of action that he might have against an officer, for damages for a wrongful sale of exempt property, by standing idly by, without protest, until after the sale was made, we are not prepared, nor are we called upon now, to decide; but we are satisfied that there can be no waiver of the constitutional right, by a failure to assert or claim it until the forced sale is ordered or attempted, that is inhibited by the organic law. In the case of *Carter's Adm'rs v. Carter*, 20 Fla. 558, this court has expressly repudiated the doctrine of the Pennsylvania cases, and has ranged itself on the side of those courts that hold that a party entitled to the benefit of the exemption cannot waive it by an express agreement to that effect contained in a promissory note; that such an agreement in a promissory note is inoperative, as against the policy of the exemption laws. The decision of the court in that case is put upon the ground that "the object of exemption laws is to protect people of limited means, and their families, in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill-advised promises, which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasions of others." In that case it was also held that, when property which may be claimed as exempt from the satisfaction of debts has been sold or converted into funds by administrators, the heirs entitled may claim the value out of the funds in the hands of the administrators.

If a party entitled to the exemption cannot waive it by express agreement in a promissory note, founded on a valuable consideration, because his family have an interest in it, and because it would be against the policy of the law thus to allow him to defeat the protection that is designed for his family, it would seem to follow, as a corollary, that he could not effect such a waiver by parol declarations, or by mere negative silence, or

failure to act; or, as Thompson puts it in his work on Homestead Exemptions (section 823), "a right which I cannot part with by express contract, because it is only in part mine, I cannot, for the same reason, lose by estoppel in consequence of my own act or failure to act."

The fifth ground of the motion was that the injunction was improperly granted, without any bond of indemnity being required from the complainant to the defendant. The act of February 14, 1861, c. 1098 (section 19, p. 158, McClell. Dig.), expressly provides that in all suits in equity, where summary process by injunction is prayed, and the bill justifies such process, and affidavit shall be made of the truth of the statements of the bill, and that the complainant is unable to give bond of indemnity or other security, the chancellor shall receive ex parte evidence of the truth of the statements of the bill, and of the accompanying affidavit, and, if they shall appear to be true, shall grant such process without requiring security. Thompson v. Maxwell, 16 Fla. 773.

The complainant, in the verification of his bill, complies with the requirements of this provision of the law; therefore, there was no impropriety in the granting of the injunction on the ground of the absence of a bond.

The court below was in error in dissolving the injunction upon the showing made on the motion for that purpose, and was clearly in error in ordering a dismissal of the plaintiff's bill. The bill made a case, on the complainant's behalf, that prima facie entitled him to the relief prayed at the hands of the court, and required an answer in due form to overcome it. The complainant, upon the showing made, was entitled to be heard with his proofs, and it was error to dismiss him from the court in a fashion so summary and unceremonious. The decree appealed from is reversed, with directions to reinstate the injunctive feature of the order made by the court commissioner.

(34 Fla. 212)

WARBURTON v. COUMBE.

(Supreme Court of Florida. July 13, 1894.)

MECHANICS' AND LABORERS' LIENS—EXTENT AND DURATION.

1. Section 10, c. 3747, Laws 1887, approved June 3, 1887, giving to the bookkeepers, clerks, etc., of merchants, transportation companies, and other corporations a lien upon the stock, fixtures, and other property of such merchants, transportation companies, etc., to the extent of the value of any labor performed in the conduct of their business, does not give such lien to the bookkeeper of a person engaged in the sawmill business, upon the mill and other property of his employer.

2. Said chapter 3747, Laws 1887, approved June 3, 1887, did not become operative or effective as law until the expiration of 60 days after the final adjournment of the legislature that enacted it, or until August, 1887. No lien could be acquired under it for any labor performed prior to the time it became operative as law.

3. Under section 17 of said chapter 3747, Laws 1887, the liens provided for therein spring into existence at the time any labor is done or material is furnished for which a lien is given, and such liens live only for six months from the last day upon which such labor was done or material furnished. If no proceeding is instituted within that time to enforce such liens, they lapse and expire.

(Syllabus by the Court.)

Error to circuit court, Polk county; G. A. Hanson, Judge.

Walter R. Coumbe sues Piers E. Warburton to enforce a laborer's lien. Judgment for plaintiff, and defendant brings error. Reversed.

Foster & Gunby, for plaintiff in error.
Tucker & Clark, for defendant in error.

TAYLOR, J. Walter R. Coumbe, the defendant in error, sued Warburton, the plaintiff in error, in the circuit court of Polk county, by the summary statutory proceeding, in attachment to enforce an alleged laborer's lien upon certain lots of land in Polk county, and a steam sawmill and machinery located thereon. The amount of the claim sued for was \$608.79. The lien is claimed and sought to be enforced under the provisions of chapter 3747, Laws 1887, approved June 3, 1887. The labor performed for which the lien is claimed was chiefly that of bookkeeper for the defendant in his sawmill business, and in other business enterprises in which the defendant was engaged. A notice of the lien was filed in the circuit court clerk's office on February 21, 1888, and the summary suit by attachment to enforce it was instituted on the same day.

The items of the account for which the lien is claimed are as follows:

1885, Jan. 9th.	
Part of traveling expense N. Y. to Acton	\$ 10 00
Salary 25th Jan., 1885, to 30th April, 1886, 3¼ months, at \$40 per month	130 00
Salary 1st May, 1885, to 18th February, 1888, 33 months, 18 days, at \$60 per month	2,016 00
Extra salary while drumming, from February, 1886, to end of April, 1887, say 12 months, at \$15 per month	180 00
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	\$2,336 00
Cr. by payments	1,727 21
	<hr/>
Balance sued for	\$608 79

The cause was submitted to a jury, who returned a verdict for \$600, upon which the court entered judgment against the defendant for \$600, besides the costs, and the further sum of \$100 as an attorney's fee for the enforcement of the lien. To this judgment the defendant, Warburton, has sued out a writ of error.

Various errors are assigned, but we shall notice but one of them, as that will dispose of the whole case. The defendant moved for a new trial upon the ground that the verdict was contrary to the evidence and contrary to law. To sustain his alleged lien the plain-

tiff testified that Warburton represented various large business interests, such as Key West Gaslight Company, agent for Hanbury lands, also general land agent. "For all these various agencies I kept the books, attended to the correspondence, and did such other things as directed by Warburton. I was bookkeeper and manager for the Acton Sawmill. I also acted as clerk and caterer for the Acton Hotel, that Mr. Warburton owned, during the time I worked for him." He says further that the sawmill closed down in June, A. D. 1887, and did not run again up to the time he quit the employment of Warburton. From the time the mill shut down to the time he quit the defendant's employment, he says that he drummed for the sale of the lumber on hand, and also tried to sell the mill. The plaintiff in his pleadings bases his claim to a lien under these proofs upon section 10 of said chapter 3747, Laws 1887, approved June 3, 1887, that is as follows: "Sec. 10. That bookkeepers, clerks, agents, porters and other employees of merchants and transportation companies and other corporations, shall have a lien of superior dignity to all others upon the stock, fixtures and other property of such merchants and transportation companies and other corporations, to the extent of the amount of any labor performed in the conduct of the business of said merchant, transportation company or other corporation." There is no special provision in this statute putting it in force earlier than the time limited by section 18, art. 3, of the constitution of 1885, for all laws to become effective, viz. 60 days after the final adjournment of the legislature enacting them. It did not, therefore, become operative or effective until August, 1887, and no lien could be acquired under it until it became effective. The operations of the mill on which he claims the lien were shut down, according to his own evidence, in June, 1887, and it did not resume again during the time of his service. The only service or labor that he performed, in any way connected with the mill business of the defendant, subsequent to June, 1887, was in drumming for the sale of lumber on hand, and making efforts to sell the mill for the defendant. For these latter services he was certainly not entitled to any lien upon said mill, or upon the land on which it was located. Section 10 of the statute, upon which he relies for his lien, gives the bookkeepers, clerks, agents, porters, and other employees of merchants, transportation companies, and corporations such lien, but the defendant here is shown not to belong to either of these classes. He was neither a merchant, a transportation company, nor a corporation. But, again, suppose we should attach some importance to the very general assertion of the plaintiff that the services for which he claims this lien were those of general manager for the defendant's mill, and should hold that, under the provisions of section 2 of the statute re-

ferred to, a general manager of a mill was one of the persons who, under that section, are given a lien upon mills for any labor done in the construction, repairing, or operation thereof; even then, under the proofs, he was not entitled to a recovery in this action; and why? The proof shows that the mill ceased operations in June, 1887. His suit to enforce his supposed lien thereon was not instituted until February 21, 1888, more than seven months after any labor was performed by him, according to his own statement, in connection with the operation of such mill. Section 17 of said statute provides "that the liens provided for in this act shall be created at the time any labor is done or material furnished, and shall continue for six months from the last day upon which such labor was done or material furnished." At the time that he instituted his action to enforce it, the plaintiff's lien, if he was ever entitled to one, had lapsed and expired. We do not think that the proof shows that the plaintiff was ever entitled to any lien upon the defendant's property; but, even if it be conceded that he did have such lien, the proof shows clearly that it had lapsed and expired before action brought to enforce it. He was therefore not entitled to a recovery in the form of action adopted, and the verdict therein was contrary to the evidence, and contrary to the law of the case. The judgment is therefore reversed, and a new trial awarded.

(34 Fla. 244)

CITY OF ORLANDO v. GOODING et al.

(Supreme Court of Florida. July 13, 1894.)

ALTERATION OF INSTRUMENT—PLEADING—BURDEN OF PROOF TO EXPLAIN—PARTIES—ADMINISTRATOR OF DECEASED OBLIGOR.

1. A suit upon a bond, made payable to the mayor of an incorporated city or town and his successors in office, to secure the faithful performance of the duties of its clerk and treasurer, should be brought in the name of the mayor, for the use of such city or town.

2. When an instrument is offered in evidence that is assailed as having been materially and unauthorizedly altered after execution by interlineation or otherwise, if the alteration is in itself suspicious,—as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the alteration, or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the alteration suspicious on its face, the presumption will be that it was an unauthorized alteration after execution, and the onus would rest with the party offering the instrument to explain it. On the other hand, if the alteration appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to its execution, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution; and in the latter cases the onus would be cast upon the party alleging an unauthorized alteration to show that it was unauthorized in fact.

3. Where a bond or other obligation with sureties is unauthorizedly altered after execution by a stranger to such instrument, without

the knowledge, sanction, connivance, or procurement of the payee, such alteration, as between the payee and sureties, will not avoid the instrument and release the sureties, but it remains in full force as it stood in its original form prior to its alteration.

4. In order to render a bond or other instrument admissible in evidence to sustain a suit thereon, that has been materially and unauthorizedly altered after execution, under circumstances that do not avoid its obligatory force and effect in its original unaltered form, the declaration must be so framed as to seek recovery thereon in its original, unaltered form.

5. The administrator of a deceased obligor cannot be jointly sued in the same action with surviving obligors. The form of the judgment against the one is *de bonis testatoris*, and against the others *de bonis propriis*,—two forms of judgment that the law courts cannot blend into one.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Action by the city of Orlando, by F. S. Chapman as its mayor, against Charles T. Gooding and others. Plaintiff entered a nonsuit, and appeals. Affirmed.

J. M. Cheney, for appellant. Hammond & Jackson, for appellees.

TAYLOR, J. The city of Orlando, by F. S. Chapman, as its mayor, sued Charles T. Gooding, as principal, James J. Patrick, Nathaniel C. Motley, and Mary Sweetapple, as administratrix of the estate of Henry Sweetapple, deceased, as sureties, in the circuit court of Orange county, for an alleged defalcation of \$843.50 by Gooding, upon a bond given by Gooding, as principal, to E. J. Reel, as mayor of the city of Orlando, and his successors in office, to secure the faithful performance by Gooding of his duties as clerk and treasurer of said city, and the faithful application of all funds of said city that might come to his hands as such clerk and treasurer. The declaration contains but one count, and seeks to recover upon the following bond, attached thereto as the cause of action:

"State of Florida, County of Orange—ss. Know all men by these presents that we, Charles T. Gooding, as principal, and J. J. Patrick and H. Sweetapple and N. C. Motley, as sureties, are held and firmly bound unto E. J. Reel, mayor of the city of Orlando, and his successors in office, in the sum of three thousand dollars, as follows: The said Charles T. Gooding, as principal, in the sum of three thousand dollars, the said J. J. Patrick, as surety, in the sum of one thousand dollars, the said H. Sweetapple, as surety, in the sum of one thousand dollars, and the said N. C. Motley, as surety, in the sum of one thousand dollars, for the payment whereof well and truly to be made we hereby bind ourselves, 'jointly and severally,' our heirs, executors, and administrators, firmly by these presents. Signed and sealed the 10th day of November, A. D. 1886. The condition of the above obligation is such that, whereas, the above-boun-

den Charles T. Gooding has been elected as clerk and ex officio treasurer of the city of Orlando, and is about to enter upon the duties of said office, now, if the said Charles T. Gooding shall well and truly perform all the duties devolving upon him as such clerk and treasurer of the city of Orlando, and shall faithfully account for all moneys which shall pass into his hands by reason of said office, as required by ordinances of the said city of Orlando or by resolution of the city council, and shall deliver to his successor in office all books, moneys, and other property which may belong to said city of Orlando, and which may be in his hands at the expiration of his term of office, then this obligation to be void; else to remain in full force and effect. C. T. Gooding. [Seal.] J. J. Patrick. [Seal.] H. Sweetapple. [Seal.] N. C. Motley. [Seal.] Signed and sealed in presence of A. W. Acree, M. Silver, as to J. J. Patrick. S. P. Gooding, M. Silver, as to H. Sweetapple. E. M. Shepard, M. Silver, as to N. C. Motley."

The declaration sought to recover upon the bond in the form in which it is presented above, without any allegation or explanation as to changes, alterations, or additions thereto that were made after its execution.

The defendants Patrick and Motley plead to this declaration as follows: (1) *Non est factum*. (2) That after the execution and delivery of said bond by them as sureties, and before the same was accepted by the plaintiff, said bond was materially altered, without their knowledge, consent, or privity, by interlining and inserting the words "jointly and severally," in the covenant thereof, as now set out in the bond which is attached to the declaration herein; and that said alteration was made by the defendant Gooding, or by his procurement or direction, with the knowledge and by the authority, consent, or direction of the plaintiff. (3) That the plaintiff, by its ordinance, duly adopted and approved, without the privity or consent of these defendants, extended the term of office of the principal in said bond, the defendant Charles T. Gooding, as its clerk and treasurer, and provided that he should hold his said office until December, 1887, instead of one year from July 31, 1886, the term for which he had been elected, and thereby extended the time in which he was required to render his final account and settlement as such clerk and treasurer, and enlarged, varied, and extended the liability and obligation of these defendants as sureties. (4) That the plaintiff at the time of the commencement of this suit was, and still is, indebted to the defendant Gooding in the sum of \$400, for fees due him as clerk from the plaintiff in mayor's court of said city for recording the records, proceedings, and ordinances of said city and its council from the 31st of July, 1885, to the 11th day of August, A. D. 1887, which should be allowed by the plaintiff in an accounting between

it and said Gooding. That Gooding is insolvent, and, as a reduction of the amount of their liability, they claim that said set-off should be allowed.

The defendant Mary Sweetapple, as administratrix of Henry Sweetapple, deceased, pleaded: (1) That the bond sued upon was not the deed of her intestate; (2) the same alteration in the bond pleaded by the other two sureties above; (3) the extension by ordinance of the term of office of Gooding, as pleaded by the other two sureties.

These pleas were demurred to by the plaintiff upon various grounds. The demurrer was overruled, and such ruling is assigned as error, but this assignment is not urged or insisted upon here, and we treat it as abandoned.

The principal defendant, Gooding, pleaded a set-off of \$601.50, alleged to be due him from the plaintiff city upon an account for work, labor, and services performed by him for the plaintiff city as clerk, and for fees to which he was entitled. This plea was demurred to by the plaintiff, and the demurrer was overruled, and such ruling is also assigned as error, but is not insisted upon or urged as such here, and we treat it, too, as abandoned. Thereupon issue was joined on all the pleas filed by the defendants. The parties proceeded to trial before a jury.

The plaintiff offered in evidence the original of the bond sued upon, that showed upon its face that the words "jointly and severally" had been interlined therein. Its introduction was objected to by the defendants upon the ground that it showed upon its face that it had been interlined, and that it became, therefore, the duty of the plaintiff to prove that such interlineation was done either before its execution, or, if done afterwards, that it was by and with the knowledge, sanction, and consent of the defendants. The court sustained the objection, to which plaintiff excepted. The plaintiff then introduced an expert in handwritings, who, after examining the bond, testified that the interlined words "jointly and severally" therein were in the same handwriting, and apparently written with the same ink, as were the names of the parties written in the body of the bond, and of the several amounts that the sureties bound themselves for, and of the date of the instrument. With this evidence the plaintiff again offered the bond in evidence, but it was again objected to, on the ground that the said interlineation therein had not been sufficiently explained. The court again ruled it out, to which the plaintiff excepted. The plaintiff then introduced the defendant Gooding as a witness, who testified that the bond offered in evidence was signed by himself as principal, and by the said sureties, without having the interlined words "jointly and severally" therein. That, after being so signed, it was left with him by the sureties, whereupon he took it to the city attorney, Mr. J. D. Beggs, soon after it was signed. That Mr.

Beggs told him the form of it was all right, except that the words "jointly and severally" should appear in the bond, and indicated, by a pencil mark, the place where they should appear, and where they do now appear, and suggested that those words should be written in the bond. He then took the bond to one M. Silver, who had witnessed its execution, and told him what Mr. Beggs had said, and asked him to attend to it. That some time during the same day M. Silver returned the bond to him with the words interlined as they now appear in the bond offered. He took the bond next day to the city council, and it was accepted and approved, and he at once assumed the duties of the office. That was all he knew about it. The plaintiff then introduced in evidence the following statement of facts, that, by written consent and agreement, was introduced as the evidence of said Silver: "Silver witnessed the signatures of the defendants to the bond sued on, as is shown by said bond, and took the justifications of the sureties thereto. That thereafter, on November 10, 1886, said Silver, at the request of the defendant Gooding, interlined in the covenant of said bond the words 'jointly and severally.' That he (Silver) interlined said words without the authorization of defendants Motley, Patrick, or Sweetapple, and not in their presence, and that he did not inform them, or either of them, while said Gooding was in office as city clerk; nor did either of them, to the knowledge of said Silver, ever acquiesce in said alteration thereof. That the words interlined were suggested by a memorandum made in pencil on the margin thereof in the handwriting of Mr. J. D. Beggs, then city attorney, and the place where said words were to be interlined was also marked in pencil, and the same were thereupon inserted by him as above stated." The plaintiff then also introduced Mr. J. D. Beggs, who testified that on the 10th of November, 1886, he was city attorney for said city of Orlando. That Gooding came to his office, and showed him the bond. It was then already executed by the principal and sureties. "I examined it, and told Gooding that it was all correct in form except that the words 'jointly and severally' should appear at the place where they are now interlined. I told him he could have the words written in at the proper place, that I indicated with a lead pencil, and I also wrote the words to be interlined on the margin in pencil. I think, but am not certain, that I also told him he could make the interlineation with the consent of the sureties. I handed him back the bond, and he went off with it, saying he would fix it. That was the last I ever saw or heard of it again, that I remember of." With this evidence the plaintiff again offered the bond in evidence, but it was again objected to by the defendants, on the ground that the evidence showed that it was not entitled to admission in evidence, which objection the court again sustained, refusing to

allow said bond to be admitted in evidence, to which ruling the plaintiff excepted, whereupon the plaintiff entered a nonsuit, and appeals here, assigning as error the several rulings of the court refusing to admit said bond in evidence.

The refusal of the court to admit the bond in evidence when it was first offered by the plaintiff, upon the ground that it was the plaintiff's duty first to explain the interlineation apparent on the face thereof, raises the question: Upon whom falls the burden of proof, in the first instance, to account for interlineations or other obvious alterations in written instruments offered in evidence? This question has received diverse answers by different courts, and four different rules have been announced as the answer: (1) That an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; (2) that it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible; (3) that it raises such a presumption only when it is suspicious on its face, otherwise not; (4) that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance. 1 Am. & Eng. Enc. Law, p. 512, and citations. The last or fourth rule above announced is the one that has been adopted and followed here. *Stewart v. Preston*, 1 Fla. 10; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871. In the latter case the court says: "In the absence of evidence to the contrary [italics ours], an alteration will be presumed to have been made contemporaneously with the execution of the instrument, and properly made, if nothing appears to the contrary." How, or from whom, or from what source, the evidence to the contrary is to be made to appear, that case does not state, but there is nothing therein that even tends to deny the proposition that the evidence necessary to destroy this presumption may appear, *prima facie*, on the face of the paper itself, from the alteration made. We think, therefore, that the more correct rule in such cases, because more fully stated, is the following, from the decision of Judge McCrary, in *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16: "If the interlineation is in itself suspicious,—as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words, or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution, and the onus would rest with the party offering the instrument to explain it. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the

execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution; and in the latter cases the onus would be cast upon the party alleging an unauthorized alteration to show that it was unauthorized in fact." The rule thus announced does not conflict with the one adopted heretofore by this court in the cases cited, but amplifies it only. Under this rule—that we think is the correct one—the court, in view of the appearances of the paper offered, as disclosed by the evidence of the expert in handwritings, should have overruled the first objection urged against the admission of the bond, and should have thrown the onus of proof to sustain the alleged illegality of the alteration therein upon the defendants, who set it up in their pleas as a defense.

We pass now to the third and last objection sustained by the court to the admission of the bond in evidence, to the effect that the evidence introduced by the plaintiff in explanation of the interlineation complained of established a legal vitiation of the bond, and showed that it was not entitled to admission in evidence for any purpose. The court was in error here. The evidence, already quoted, of Gooding, Beggs, and Silver, shows that the plaintiff, the city of Orlando, for whose benefit the bond was made, had no instrumentality whatever in the alteration set up as an avoidance of it; that neither it nor any of its officers had any knowledge that such an unauthorized alteration had been made therein subsequent to its execution by the defendants. The bond was delivered to and accepted by the city authorities after the alteration had been made therein. It appears to have accepted the bond in good faith, and in entire ignorance of the unauthorized change made in it. Without its connivance, sanction, consent, or knowledge the alteration was made, according to Gooding's version, by Silver, a stranger to the transaction, of his own motion; and according to Silver's version it was made by him (Silver), but at the instigation and suggestion of Gooding, the principal in the bond. In either case, whether it was made by the stranger (Silver) of his own motion or by him at the instigation or request of Gooding, the principal in the bond, we do not think that the alteration, even if it can be considered a material one, made under the circumstances here, will vitiate the bond so as to relieve the sureties thereon from liability thereunder to the city of Orlando, which is shown to be entirely innocent of any instrumentality whatever in the alteration made, and of all connivance therein or knowledge thereof. In *Williams v. Moseley*, 2 Fla. 304, where the principal maker of several notes payable to another as guardian for minor heirs got possession of said notes as the successor in the guardianship to the payee, and mutilated

them by cutting therefrom the names of two sureties thereon, this court held that such alteration or mutilation of said notes, made without the knowledge or consent of the parties beneficially entitled to the proceeds thereof, did not relieve the sureties from liability thereon. In *Bigelow v. Stilphen*, 85 Vt. 521, one of the best-considered cases of the many we have examined on the subject, where a note with sureties was unauthorizedly altered, after execution, by the addition of the words, "jointly and severally and with interest," by the agent of the payee, to whom it was delivered for the payee by the makers, and before it came to the hands of the payee, but without the knowledge, sanction, connivance, or procurement of the payee, the court held that the act of the payee's agent in altering the note was not within the scope of his authority as an agent, and did not, therefore, bind the payee, but as to him was the same as the act of a stranger; and, discussing the question of the alteration thus made upon the instrument, the court says: "Clearly, it is not just that a man should be deprived of an honest debt, or have the evidence of it destroyed for all beneficial purposes, in consequence of the misconduct of a stranger, to whose act he did not assent, and of which he had no knowledge. It is not the fact that an instrument is altered that makes it void. If it was, an alteration by accident or mistake would have that effect. It is the intent that gives the act its character, and avoids the instrument; and it is difficult to understand why a man who has done no wrong, nor consented that any should be done, should be punished to the extent of the amount of his demand by having his claim canceled by operation of law, solely because another has been guilty of an act for which he ought to be punished. Public policy does not require any such rule. Declaring the instrument void in case of alteration has no tendency to deter a stranger from making such alteration. Punishment inflicted upon the innocent has no terror for the guilty; and, if such a rule was established, it would by no means follow that when an alteration was made by a stranger it would be made for the benefit of the holder. The sole object in making the alteration might be to render the instrument void. It might be from motives of friendship to the maker, or enmity to the holder, or from selfishness on the part of the stranger, he expecting thereby to add to the security, or increase the probability of collecting a debt of his own against the maker. We think the rule, as indicated by reason and authority, is that an alteration of a written instrument by a stranger without authority does not render such instrument void." The note in that case was held to be a good and valid instrument as originally drawn and executed, and that the

bringing of suit to enforce it in its altered condition did not amount to a ratification or adoption of the act of alteration, in the absence of knowledge that such alteration has been made until after suit brought. With the views thus expressed we are in perfect accord, and find them amply sustained by the authorities. *U. S. v. Linn*, 1 How. 104; *Hunt v. Gray*, 35 N. J. Law, 227; *Van Brunt v. Eoff*, 35 Barb. 501; *Boyd v. McConnel*, 10 Humph. 68; *Waring v. Smyth*, 2 Barb. Ch. 119; *Evans v. Williamson*, 79 N. C. 86; *U. S. v. Spalding*, 2 Mason, 478, Fed. Cas. No. 16,365; 1 Greenl. Ev. § 568, and citations; 1 Am. & Eng. Enc. Law, p. 505, and citations. Upon the objection to its admission, as made by the defendants and sustained by the court, the court was in error. But there was another objection to its admission, of which no notice was taken at the trial, that rendered its rejection proper and necessary under the pleadings. The plaintiff declares in a single count upon the bond in its altered condition, and seeks to enforce it in such altered condition. There is nothing in the declaration showing or claiming a right of recovery upon the instrument in its original form as it stood prior to the alteration. There was no proper allegata to which the bond would be responsive as proof in its original, unaltered form, the only form in which the plaintiff, under the proofs, can recover upon it. Had the plaintiff's declaration accounted for the alteration in the bond, showing that it had been done without its authority, consent, or knowledge, but in such manner as that the sureties would not be bound by the alteration, and had claimed and sought recovery upon it in its original and unaltered form, then the bond, under the proofs made, should have been admitted. *U. S. v. Linn*, supra. Although the point was not raised or noticed in the court below by demurrer or otherwise, yet we cannot refrain from noticing the fact of the improper joinder in this action at law of the administratrix of a deceased party as defendant with the surviving co-obligors upon the cause of action sued upon. This is contrary to settled elementary principles. The one is to be charged *de bonis testatoris*, the others *de bonis propriis*,—forms of judgment that the rules of law governing the law courts are not flexible enough to permit them to include in the same judgment. 3 Wms. Ex'rs, p. 1843; 2 Chit. Pl. 120. A separate action should have been brought against the administratrix of the deceased surety. We think, too, that the action should have been brought in the name of F. S. Chapman, as mayor of the city of Orlando, for the use of said city.

For the reasons herein announced, but not for the reasons upon which the rulings of the court below were based, the rulings appealed from are affirmed.

(34 Fla. 149)

LEE v. PATTEN.

(Supreme Court of Florida. July 18, 1894.)

RESULTING TRUST—RELIEF ON PRAYER FOR GENERAL RELIEF—PRIVILEGED COMMUNICATIONS—LACHES—EVIDENCE—VARIANCE—COLLATERAL ATTACK ON JUDGMENT.

1. Where G., being the owner of a military bounty-land warrant, gave it to L., for the purpose of entering with it the number of acres of land that it called for, for the use and benefit of G., and L. entered the land with such warrant in his own name, and took a patent thereto in his own name, without the knowledge or consent of G., and, in ignorance of the way in which such entry had been made, G. took possession of the land at or soon after such entry, and he and his alienees, for many years thereafter, with the knowledge of L., exercised acts of ownership over the same, and L. during all that time asserted no adverse claim to or right therein, *held*, that from such entry a trust resulted in favor of G., and that L. acquired by such entry only the bare legal title, and held it in trust for the use and benefit of G. and his alienees, and that, upon bill filed for that purpose, L. would be decreed to execute the legal title to said land to an alienee of G., who had succeeded to all of G.'s rights therein.

2. The well-settled rule is that, although the complainant may not be entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief consistent with the case made by the bill, and that does not conflict with the relief specifically prayed.

3. Where a written instrument, offered in evidence by a complainant in a bill, contains enough to sustain the material substance of a pertinent allegation of the bill in reference to it, it is admissible to sustain such allegation, even though such instrument varies, on its face, in an immaterial particular, from the description of it given in such bill.

4. Where a judgment is not void on its face, and is rendered by a court having competent jurisdiction, the presumptions are all in favor of its regularity and validity until vacated by some proper proceeding instituted directly for the purpose of correcting errors therein; and it cannot be collaterally attacked by parties or their privies, or by strangers whose rights are not affected thereby.

5. The law is very strict in its prohibition against the disclosure by attorneys of communications made to them in confidence by their clients.

6. Laches in assailing a fraud will not be imputed until the discovery of the fraud by the party affected thereby.

(Syllabus by the Court.)

Appeal from circuit court, Manatee county; G. A. Hanson, Judge.

Bill by George Patten against Edmund Lee. Decree for complainant, and defendant appeals. Affirmed.

Macfarlane & Pettingill, for appellant. J. B. Wall and Sparkman & Sparkman, for appellee.

TAYLOR, J. In February, 1882, George Patten, the appellee, filed his bill in equity in the circuit court for Manatee county against Edmund Lee, the appellant, for the purpose of compelling the defendant to convey to him all that tract of land in Manatee county, Fla., described as being the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 27, township 34 S., range

17 E., excepting the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section, that had theretofore been sold to one Stephen A. Brown. The suit resulted in a final decree in the complainant's favor, declaring the title to said land to be in the defendant, Lee, as trustee for the complainant, and ordering him to convey the same by deed to the complainant. From this decree the defendant, Lee, appeals.

The bill alleges, in substance, that about January, 1854, one Robert Gamble, being the owner of a bounty-land warrant for 160 acres of land, delivered the same over to the defendant, Lee, authorizing and requesting him to locate said warrant for him (Gamble) on the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 27, township 34 S., range 17 E.; that Lee, in pursuance of said authority and request, located the said warrant on said land for the sole use, benefit, and behoof of said Gamble, but, intending and contriving to perpetrate a fraud upon Gamble, entered said tract of land with said warrant in his own name, instead of in the name of the said Gamble, as he should have done, and falsely and fraudulently represented to the said Gamble that he had entered said tract of land in his (Gamble's) name; that Gamble, relying upon the representations of Lee as to the entry of said land, entered upon and took possession thereof with the full knowledge of the defendant, and, without objection or protest on his part, cut timber therefrom, paid the taxes thereon, and in every way held and used said lands as his own; that, in the year 1858, Gamble, with the knowledge of the defendant, and without objection from him, sold and conveyed said land, with other lands, to John C. Cofield and Robert M. Davis, who were partners under the name and style of Cofield & Davis, taking a mortgage from them on said lands for the purchase money therefor, which mortgage was afterwards assigned to and became the property of one Allen M. McFarlan; that the said Cofield & Davis, with the knowledge of Lee, and without objection from him, entered upon and took possession of said land, cut and used the timber thereon, paid the taxes thereon, and held and used said land as their property; that, during the year 1873, said lands were sold under a decree of foreclosure of said mortgage in favor of said Allen M. McFarlan, and were purchased by your orator (George Patten), with the knowledge of, and without any notice, objection, protest, or other interference of or from, the defendant; that your orator immediately entered upon and took possession of said lands as his own, and paid the taxes thereon, save and except the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section, containing 10 acres, that was sold by him to one Stephen A. Brown about the year 1877; that, during the year 1877, the said Lee, for the first time to the knowledge of your orator, laid claim to said land, and, upon investigation thereof, your orator

ascertained that they had been entered in his (Lee's) name on or about the 22d day of September, 1854; that he has applied to the defendant to execute and deliver to him a deed to said land, but he refuses to do so, and now claims said land as his own, and has been endeavoring to sell the same as his property, which claim of said Lee throws a cloud upon the title of your orator to said land, and greatly hinders and obstructs him in the enjoyment thereof. The prayer of the bill, as originally filed, was that the defendant, Lee, be decreed to make, execute, and deliver to the complainant, Patten, a good and sufficient deed of conveyance to said land, saving the portion thereof conveyed to said Stephen A. Brown, and prayed also for general relief, such as the facts of the case might entitle him to.

The defendant filed an original and amended answer, in which he denies that Gamble authorized or requested him to locate said warrant upon said land for him and for his sole use and benefit, and he denies that he ever represented to Gamble that he had entered said land for him with said warrant. He denies, also, that Gamble ever took possession of said land, or paid the taxes thereon, or used the same as his own lands. He admits that Gamble cut and used the timber on said land, but avers that it was done under an express agreement between him and Gamble. He admits obtaining from Robert Gamble the bounty-land warrant with which he made the entry of this land, but says that he got it from him for his own use and benefit, for the purpose of procuring therewith for himself another tract of land in the same locality, upon which another party had made a settlement and improvements, which improvements he had traded for, and upon which there was a quantity of live-oak timber, and that, when he obtained the warrant from Gamble, he agreed verbally with him to allow him to cut this live-oak timber therefrom; that no price was ever agreed upon to be paid by him to Gamble for the land warrant, and that all the consideration he ever expected to pay for said warrant was to allow Gamble to cut the timber on said land, and considered the passing of said warrant to him by Gamble more a gratuity than for any money consideration; that they were all laboring to build up a good community for the general welfare, and working in perfect harmony and in close and intimate relations of friendship; that Gamble was engaged in the business of getting live-oak timber for market, and, the live-oak timber situated on the tract of land that he desired to locate for himself with said warrant being of no value to him, but of great value to Gamble, who was in that business, he agreed to allow Gamble to cut the live oak therefrom whenever he should enter same, as a remuneration for his kindness in letting him have the warrant. He avers that Gamble duly assigned and transferred the warrant to him

as his property; and that, ever since the date of such transfer to him, it has been his property, and he at once forwarded it to the United States district land office, to be located upon the land that he thus desired, and for the improvements and buildings upon which he had traded, as aforesaid, with another party, but was at once informed by the land officers that it could not be located on that particular land; that, upon receiving this information, he at once called upon Gamble for advice as to how he (the defendant) could utilize said warrant, upon which Gamble told him to locate the warrant upon any land that he chose, so that he (Gamble) might cut the timber therefrom; that he never did agree with Gamble to return said warrant to him, or to locate it on any land for Gamble's use and benefit, and he denies that he ever represented to Gamble that he had located it on any land for his (Gamble's) use and benefit; that the said land warrant was assigned to him more as a gratuity than for any money consideration; and that all the consideration Gamble ever expected or claimed or desired to receive for the same was the use of the timber on whatever land might be located therewith by the defendant. He denies any promise or agreement to locate said warrant upon any land for any one save himself, and avers that it was located by him for his own use and benefit, in the absence of any request or agreement or instruction to locate it for the benefit of Gamble or any one else, but that, having promised and agreed to let Gamble have the use of the timber therefrom, and acting in good faith, he entered the land in dispute with said warrant, lying one mile up and down the Manatee river, so as to give said Gamble the widest sweep at the timber; that, at the time he obtained this warrant from Gamble, such warrants were of but little value, the prices therefor then ranging from \$25 to \$50; that, the land warrant having been assigned in writing to Edmund Lee, it could not be located on land for the use, benefit, and behoof of any one else but him. He avers in his answer that the lands embraced in the entry of said warrant were considered valueless save for the timber thereon; that, besides Gamble's business of timber getting, he was also engaged in the cultivation of sugar cane on a large scale on the north side of Manatee river; and that said land to him would have been valuable only for the timber that was needed in the manufacture of sugar, as well as for the various uses of his farm. He denies that Gamble ever laid claim to any of said land, but admits that he did cut and use the timber therefrom, that was of great money value. He avers that in 1855 he sold and conveyed to Robert Gamble another tract of land in the same neighborhood, for the sum of \$300,—and that the only credit that Gamble is or ever was entitled to on the above purchase is the sum of \$70 or \$75, paid to the defendant

for him by one Allen M. McFarlan, and the price of said land warrant that was not over \$25 to \$50; that, notwithstanding this land was entered by defendant in 1855 in his own name, yet during all these years neither Robert Gamble nor any one else has ever applied to him for any conveyance thereof; that, at the time of the entry, there was no inducement for him to perpetrate any fraud on Gamble, since at that time the land was valuable to Gamble only for the timber thereon, to which he was entitled, and that he did use for the various purposes of his farm; that at that time said land was worth no more than 10 cents an acre, and for many years thereafter could not have been sold for any sum much greater than that; that his entry, made in his own name, in 1855, became and was a matter of public record in the United States land office, but that he did not obtain the patent thereto until during the year 1877; that the Civil War of 1861 came on, and he left the state to join the army, and did not return until the close of the war. In the meantime the United States land office, at Newnansville, had been broken up and its business suspended by the war, and he had lost his wife soon after the war; and, under his many trials and difficulties, he had well-nigh lost sight of said land, as it was of such little value at that time that he paid but little attention to it. In fact, he had lost sight of it entirely, until some one else was informed from the land office that it had been entered by him in 1855, when he at once, in 1877, procured an attorney, one E. M. Graham, to obtain the patent to him therefor, and as soon as the patent was received, he at once had it put on record in Manatee county, Fla. He denies any knowledge of the sale of said land by Gamble to Cofield & Davis. He denies any knowledge of this land being embraced in the mortgage from Cofield & Davis to the Gambles that was assigned to Allen M. McFarlan, or of its being included in the decree of foreclosure and sale thereunder to the complainant, Patten. He avers that no one has entered upon, taken possession of, cultivated, or improved any part of said land, save and except one Stephen A. Brown, who, in the year 1874 or 1875, built a house on the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section 27, for which the defendant, Lee, has paid him the sum of \$600, and which said land and house he sold afterwards to one Hubbard. He avers that since the receipt of his patent, in 1877, he has paid all taxes on the land.

After replication to the answer, and after the testimony was all taken, and at the final hearing of the cause, the complainant was permitted to amend the special prayer of his bill so as to include therein a prayer "that the defendant, Edmund Lee, might be decreed and declared to be the trustee for the complainant over said land." This ruling is assigned and urged here as error. There is no merit in this assignment. The amend-

ment asked for was wholly immaterial. It did not change in the least the case as made by the bill and by the proofs, and did not affect the defense made by the answer, and sought to be established by the defendant's proofs. In fact, the amendment asked for and made was altogether useless and immaterial. The facts set up in the bill, and fully sustained, as we think, by the proofs, made out a clear case of a resulting trust in reference to the lands in controversy, and showed, without any express allegation to that effect, that it was a case where the defendant held the legal title to said lands, from an equitable standpoint, as trustee for Robert Gamble and his alienees; and, under the prayer for general relief, the court could, with propriety, have adapted its decree to the case made by the bill and proofs, and could therein have declared the defendant to be trustee for the complainant, holding the legal title to the land in trust for his use and benefit, without the special amended prayer. *Bank v. Hogle*, 25 Ill. App. 543; *Hill v. Beach*, 12 N. J. Eq. 31; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40. In *Watts v. Waddle*, 6 Pet. 389, the court says of the general prayer for relief: "Under this prayer, any relief may be given for which the basis is laid in the bill." The well-settled doctrine is that, although the complainant may not be entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief consistent with the case made by the bill, and that does not conflict with the relief specifically prayed. *Beach*, Mod. Eq. Pr. § 91.

The complainant, to sustain the allegation of his bill that Robert Gamble, in 1858, sold and conveyed said tract of land to Cofield & Davis, introduced in evidence a deed executed by the executors of John G. Gamble, deceased, to Cofield & Davis, conveying the land in controversy, which deed was executed by Robert Gamble, as one of the executors of John G. Gamble, but in his own individual right as well, the other executors joining him in the execution of such deed. The admission of this deed is also assigned and urged as error, upon the ground that it does not sustain the allegation of the bill that Robert Gamble individually conveyed the disputed land to Cofield & Davis. The groundlessness of this assignment is self-evident. Because Robert Gamble included a tract of land that he owned in his own individual right in a deed of conveyance executed by him and others as executors that also conveyed lands of his testator, using apt words therein, as in this deed, to carry his own individual rights, interests, and holdings, makes it none the less his own individual conveyance in so far as the land embraced therein is concerned that he owned in his own individual right. Two or more individuals may each solely own separate and distinct parcels of land.

They may all join individually in the execution of one conveyance, including and covering the aggregated parcels of each of them. Such a conveyance, as to the separate holdings of each, would be the individual conveyance of each of them.

The next assignment of error is the admission in evidence of a deed made by one Curry, as referee or special master, to the complainant, Patten, conveying the land in dispute, which deed recites that it is executed in pursuance of a decree of foreclosure of mortgage, in a cause wherein the executors of Allen M. McFarlan are complainants, against Cofield & Davis. The admission of this deed is urged as error, upon two grounds: (1) Because of its variance from the allegations of the bill, which were that Curry, the referee, conveyed to Patten under a decree of foreclosure in favor of Allen M. McFarlan, instead of, as this deed recites, in favor of McFarlan's executors; (2) and because the deed shows upon its face that the foreclosure proceedings under which it was executed were illegal and void, because it shows that said proceedings were originally instituted at law under the code practice then in force in this state, when there was no court of chancery in existence here, as distinguished from a court of law, and that the proceeding culminated on the equity side of the court; that under the code procedure the sale should have been made under an execution as at law, instead of directly under the decree.

As to the first of these grounds of objection, we do not think there was error in admitting the deed. The material substance of the allegation in the bill was that Patten acquired his title to the land by means of the foreclosure of the mortgage that had been given by Cofield & Davis to Gamble to secure the purchase money of the land in dispute; that Cofield & Davis' title had passed to him by means of the foreclosure of such mortgage. The allegation that Allen M. McFarlan was complainant in this foreclosure proceeding was only a part of the identification or description of the medium by which Patten became possessed of Cofield & Davis' title; and because the deed offered in evidence to sustain such devolution of title shows that the foreclosure proceedings were had in the name of Allen M. McFarlan's executors, instead of in his own individual name, as alleged, is not such a material variance from the allegata as should have excluded the deed. The deed admitted, even with the variance pointed out, contained enough to sustain the material substance of the allegation of the bill. 1 Greenl. Ev. (15th Ed.) §§ 56, 57, and citations.

Neither was there any error in admitting this deed because of the second objection urged against the same. The foreclosure proceedings, it seems, were begun under the act of February 19, 1870, entitled "An act to simplify and abridge the practice, pleadings,

and proceedings of the courts of this state," popularly known as the "Code Practice," that abrogated the distinctive lines of demarkation between the law and equity jurisdictions of the courts, and blended legal and equitable remedies together in the same proceeding; but, at the time the decree of foreclosure was rendered,—July 30, 1873,—the code practice had been repealed by chapter 1938, approved February 24, 1873, by the second section of which latter act all laws, practice, pleadings, rules, and proceedings existing in this state at the time of the passage of said code practice act which were repealed or supplied by the same were revived. It is true that by section 11 of the latter act of February 24, 1873, it is provided that all suits then already commenced, and all pleadings then already in, should not be affected by the provisions of that act, but should be proceeded in as if the latter act had not been passed; but it is also true that the court that rendered the decree of foreclosure, viz. the circuit court, did have full jurisdiction of the subject-matter and of the parties in the cause, and, according to subdivision 2 of section 194 of said Code, the judgment of foreclosure was such a judgment as required the direct action and signature of the judge to give it force and effect. In the judgment thus signed by the judge, that is recited in the deed objected to, we find that Curry, the referee therein appointed to enforce the same, is directed to sell the lands in said judgment described at public auction according to law. Nowhere in this judgment of foreclosure is the referee ordered, directed, or required to sell said land under and by force of the judgment itself without the process of execution to enforce the same; and neither does the said Curry in his said deed recite or declare that he sold the said lands directly under said judgment, and without an execution, but he does declare in said deed that he "did advertise said land and did sell the same in conformity with the provisions of said decree." The decree or judgment directed the sale to be made according to law. The presumption, for the purposes of this collateral attack upon same, is that it was made in conformity to law. While there might have been some irregularities and informalities attendant upon the judgment or decree of foreclosure, still we do not find it to be clearly void upon its face, nor even clearly voidable. The rule, then, is, where the judgment is such a one as the court had jurisdiction to render, that the presumptions are all in favor of its regularity and validity until vacated by some proper proceeding instituted directly for the purpose of correcting errors therein, and that it cannot be attacked collaterally, as is sought to be done in this case.

The court admitted in evidence a written agreement, signed by the counsel representing all the parties, in which it was stipulated, as an admission of fact on the part of the complainant's counsel, that the land warrant with which the defendant, Lee, entered this

land, was formally transferred to him by Robert Gamble, in the presence of two witnesses, and was acknowledged before a judicial officer. The admission of this agreement is the fourth error assigned, and the objection urged against it is that, in contradiction of the documentary evidence in the cause, "it is a unilateral admission, by the complainant's counsel alone, that the warrant with which Lee entered the land had been transferred by Lee to Gamble, in the presence of witnesses and a judicial officer," etc. The agreement in the record before us does just the reverse of this contention, and represents that the transfer was by Gamble to Lee, in the presence of witnesses, etc. This objection falls to the ground, then, for the want of facts to sustain it; but even if this were not true, in the light of all the evidence in the cause, its admission would have been immaterial error.

The fifth and sixth assignments of error are objections to certain parts of the evidence of the witnesses E. M. Graham, George Patten, and Robert Gamble. Without setting out in detail the particular features of the evidence of these witnesses that is objected to, we will say that we have examined them carefully, and find no merit in the objections made, except to that of E. M. Graham. The chief objection to Graham's evidence was that it was a disclosure of confidential communications made to him by the defendant, Lee, while he occupied the relationship of attorney towards Lee as his client. We think that the evidence of Graham objected to was subject to the objection made. He testifies, it is true, that the whole scope of his employment by Lee was for the sole purpose of writing to the land office at Gainesville, Fla., to obtain the patent that had been long before issued to Lee for the land in dispute; that when the patent was thus obtained by him, and delivered to Lee, the sole purpose of his employment by Lee was accomplished, and the relationship of attorney and client ended; but he testifies, further, that he had been employed by Lee to institute proceedings in trespass against the complainant concerning this very land, and he does not disclose in his evidence whether the conversation with Lee that he relates did not transpire at the time of or subsequent to that employment. So jealous is the law against the disclosures by attorneys of communications made to them in confidence by their clients that we think, under the circumstances of this case, Mr. Graham's evidence as to what Lee told him should have been excluded. The objection to Patten's evidence and to other parts of Graham's evidence is that, where they undertake to rehearse the different devolutions of title from Gamble to Patten, the titles themselves were the best evidence, and should have been introduced. The titles mentioned by them were introduced, and their oral rehearsal of them was simply an immaterial, passing mention of

them, not intended to establish the existence of the titles mentioned, but simply as a connecting link in their statements. In view of the fact that the hearing was before the judge himself, who could discriminate closely from the evidence (that was all in writing) between the legally competent and incompetent parts of it, we do not think these objections thereto should have been given any weight. Without considering the improper evidence mentioned of E. M. Graham, we think there is an abundance of evidence to sustain the decree appealed from.

The seventh, eighth, and ninth objections urged against the correctness of the decree appealed from are that it is contrary to law and equitable rules; that it is not supported by and is inconsistent with the evidence; and because it is founded upon facts and conclusions that are immaterial to the issues made. Without rehearsing the evidence here in detail, we cannot agree with the counsel for the appellant that the decree appealed from is not sustained by the evidence, or that it is contrary to the law and equity of the case. The great preponderance of the evidence, viz. the evidence of Robert Gamble and George Patten, coupled with the admissions of the defendant's answer, establishes the fact that Gamble, being the owner of a military bounty-land warrant, issued under the act of congress approved February 11, 1847, entitled "An act to raise for a limited time an additional military force, and for other purposes," that was receivable at any of the United States land offices in full payment for the entry of 160 acres of any land then subject to private entry, and that was assignable, turned the same over to the defendant, Lee, as his (Gamble's) property, with the request that he (Lee) should with it enter the land in controversy for the use and benefit of Gamble. Lee made the entry in his own individual name, using Gamble's warrant in making it. The defendant's answer admits that the only value the land had at the time of the entry was the timber that stood thereon, and that Gamble desired it only for the timber on it. They all agree that Gamble at once after the entry took possession of and treated the land as his own, cutting and using the timber therefrom ad libitum, and paid the taxes thereon, and then sold and conveyed it to Cofield & Davis, with other lands, taking a mortgage from them upon it to secure the purchase money, which mortgage was foreclosed, and at the sale thereunder Patten became the purchaser. From the time of the entry, in 1854, up to 1877, Lee laid no pretense of any claim to the land; admits that it had passed entirely out of his mind until some one else, in 1877, discovered that the entry had been made in his name, and that it still stood in his name. Then it was, after the lapse of 23 years, that we find him for the first time asserting claim thereto. His answer, in its effort to account for his asserted ownership of the

warrant with which he entered and procured the land, is highly contradictory, inconsistent, technical, and evasive, and is overwhelmingly overthrown by the evidence and by all the circumstances in proof. The facts clearly establish a case of a resulting trust, and show that Lee has all along held the legal title to the land in trust for the use and benefit of Robert Gamble and his alienees. It is also urged that, under this land warrant, Lee could not make the entry for the use and benefit of any one else but himself; that to have done so was contrary to the policy of the law; and we are cited to section 2262 of the Revised Statutes of the United States, as being the provision of law whose policy would be violated by setting up such an entry to have been made for the use of any one else than the entry man. There is no merit in this contention. The section of the Revised Statutes of the United States referred to has reference entirely to pre-emption entries of land, where the acquirement of the government's title depends upon personal occupancy and improvement of the land entered. The entry of the land in dispute with Gamble's warrant was practically a cash purchase thereof, direct from the government, unaccompanied by any requirement of personal occupancy. Such warrants were locatable upon any government land anywhere that was subject to entry. They were transferable, and, in the hands of any transferee, were equivalent to the full purchase price, whatever it might be, of the number of acres called for therein.

It is also contended that the complainant is barred by laches in waiting so long before enforcing his remedy. The case establishes clearly a fraud in law upon Gamble, out of which springs the resulting trust in his favor, and in favor of those claiming under him. Any apparent laches in applying for the remedy, we think, is sufficiently avoided here by the principle that laches in assailing a fraud will not be imputed until the discovery of the fraud. The defendant admits that he kept silent about the whole matter from 1854 to 1877, and that he then began for the first time to assert himself to be the owner of the land. The patent issued to him individually was not recorded in the local public records until 1877, and in the meantime Gamble and his alienees go on in uninterrupted possession of the property, exercising all necessary acts of ownership and dominion over the same, without suspicion of any adverse claim, until the defendant, on the accidental discovery of some apparent foundation of right in himself, sets up then, in 1877, his newly-discovered claim. In February, 1882, five years afterwards only, the complainant, as Gamble's successor in the trust, instituted this action. We do not think that laches is imputable to him, under all the circumstances of the case. Our conclusion is that the decree appealed from was entirely proper, and it is hereby affirmed.

(34 Fla. 130)

JOHNSON v. DREW.

(Supreme Court of Florida. July 19, 1894.)

EJECTMENT—EQUITABLE PLEA—PATENT AS EVIDENCE—CONCLUSIVENESS—MILITARY RESERVATION—HOMESTEAD ENTRY—RECORD OF DEED—COMPETENCY AS EVIDENCE.

1. A plea on equitable grounds may be interposed in an action of ejectment, provided it sets up matters not available as a legal defense, and which would authorize the defendant to obtain relief in equity by injunction against the judgment in ejectment.

2. It will not be error to refuse an application to file a plea on equitable grounds if the defense sought to be set up in the plea can be made available as a legal defense under the general issue.

3. A patent purporting to have been issued by the land office under authority of law, and regular on its face, is evidence of a good conveyance of the land therein described; but it may be shown in an action of ejectment for the possession of the land that the land-office department did not in fact have authority to issue the patent, and that the land undertaken to be conveyed had never been subject to disposition by that department, or, if so, had been withdrawn from sale before the patent issued. In such case the patent will be void, and its invalidity may be shown as a defense in an action at law for the possession of the land.

4. A patent issued by the land-office department for any portion of the public lands is at least prima facie evidence of the authority of that department to dispose of the land patented, and all matters passed upon and properly coming within the jurisdiction of the land department in granting the patent are conclusive until set aside by proper direct proceedings.

5. The right given by the act of congress (chapter 214, Acts 1884) to a settler upon a military reservation, when entitled to make a homestead entry, to enter 160 acres in a body, is dependent upon the fact that said land was subject to entry under the public lands laws at the time of its withdrawal; and when a settler upon a portion of a military reservation, without any certificate of entry, or showing any privity with the title of the government other than that of bare possession, and claiming to enter the land under said act, seeks to defeat a patent to the land issued by the land-office department on the ground that he was in actual possession when the patent issued, it is incumbent upon him to show that the land occupied by him was subject to entry under the public lands laws at the time of its withdrawal for a military reservation.

6. A mere occupier of public land not shown to be subject to entry under any of the land laws of the United States, and who does not base a claim to such land upon any title from any source, or who does not connect himself in privity with any source of title, is in no condition to attack a patent issued by the land office, apparently valid and regular on its face.

7. The original record of a deed in the record book of deeds is not evidence to show a conveyance of the land described in the record book. Section 21 of article 16 of the constitution makes deeds and mortgages duly recorded prima facie evidence in the courts of this state without requiring proof of execution, and also certified copies of the record of deeds and mortgages that have been duly recorded shall be admitted as prima facie evidence thereof and of their due execution, with like effect as the originals, when duly proved, provided it is made to appear that the originals are not within the custody or control of the party offering such certified copies; but the constitution has not made the original record itself, without

any other showing, evidence of deeds or mortgages.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; G. A. Hanson, Judge.

Ejectment by George F. Drew against James Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucius Finley and S. Y. Finley, for appellant. Sparkman & Sparkman, for appellee.

MABRY, J. Appellee brought ejectment against appellant to recover possession of lot 8 of section 19, township 29 S., of range 19 E., and lot 7 of section 24 in township 29 S., of range 18 E., containing in all 40.19 acres, and obtained judgment.

The defendant below filed the plea of not guilty, and a plea on equitable grounds. A demurrer was sustained to the latter plea, and an amended plea on same ground was offered to be filed, but was refused by the court, for the reason assigned,—that it presented no equitable defense. A consideration of the merits of the amended plea will suffice to dispose of the errors assigned in the rulings of the court in reference to the equitable pleas.

The amended plea offered to be filed alleges, in substance, that the land sued for was situated within the Ft. Brooke military reservation of the United States, at Tampa, Fla., and that the plaintiff claimed title to the same by virtue of a patent predicated upon a pretended location and entry on the land made in the United States land office at Gainesville, Fla., by Louis J. Brush, plaintiff's grantor, with Valentine scrip; that at the time of the said location and entry of said land, and at the time of the issuance of the patent to Brush, the defendant was in actual occupancy and possession of said land, and was residing upon it, with his family, as a home; that defendant had settled upon and was in the actual possession of said land, it being a portion of said Ft. Brooke military reservation, prior to the location of said reservation in the year 1877, and prior to the location of said reservation upon said reservation in the year 1878, and had settled thereon prior to January 1, 1884, in good faith for the purpose of securing a home, and of entering the same under the general laws of the United States, and continued in such occupancy from a period prior to the 1st day of January, 1884, to the time of the approval of the act of congress of July 5, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience is entitled to the exclusive right of possession thereof; that at the time of the said pretended location and entry of said land with Valentine scrip by plaintiff's grantor and the issuance of said patent to him, said land was occupied by defendant as aforesaid, and was appropriat-

ed, and was not then, and is not now, unoccupied and unappropriated public land of the United States, as required, specified, and limited by the act of congress in such cases made and provided in authorizing the location of said scrip; that at the time of the said pretended entry of said land and the issuance of said patent to plaintiff's grantor, said land had not been surveyed under the direction and control of the general land office of the United States, and that said entry was made upon tracts less than the subdivisions provided for in the United States land laws, and did not conform to the general system of the United States land survey; that at the time of the entry of said land with Valentine scrip, and the issuance of the said patent to the plaintiff's grantor, said land was within the jurisdiction of the war department of the United States, and not within the land department. And defendant alleges that said patent is in fraud and violation of the acts of the congress of the United States and of the rights of the war department; and that said patent is void, and vests no legal or equitable title nor right of possession in and to said land in plaintiff; and that defendant, by virtue of said acts of congress, and in equity and good conscience, is entitled to the exclusive possession of the said land mentioned in plaintiff's declaration.

It will be seen by reading the foregoing plea that, while the issuance of a patent on a location and entry of the land with Valentine scrip is admitted, one purpose is to impeach the patent on the ground that the land was reserved, and not subject at the time to be entered by such scrip. Before examining the allegations of this plea, reference will be made to the acts of congress on the subject, and also to some decisions bearing on the character of the defense sought to be made by the plea.

In April, 1872, congress passed an act authorizing the ninth circuit court of the United States, for California, to hear and decide upon the merits of the claim of Thomas B. Valentine, under a Mexican grant to Juan Miranda, to a place called the "Rancho Arroyo de San Antonio," situated in Sonoma county, state of California, with right of appeal to the supreme court of the United States. It was also provided in said act that any decree that might be obtained in favor of said claim should not affect any adverse right or title to the lands described in the decree, but in lieu thereof the claimant or his legal representatives might select and should be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of the United States land surveys; and the commissioner of the general land office, under the direction of the secretary of the in-

terior, was authorized to issue scrip, in legal subdivisions, to Valentine, or his legal representatives, in accordance with the provisions of the act, provided that no decree in favor of Valentine should be executed, or be of any force or effect against any person or persons, nor should any land scrip or patents be issued as therein provided, unless Valentine should first execute and deliver to the commissioner of the general land office a deed conveying to the United States all his right, title, and interest to the lands covered by the said Miranda grant. The scrip located upon the land in question, and for which the patent issued, was the Valentine scrip, authorized to be issued by the act above mentioned.

In August, 1856, provision was made by an act of congress as follows: "That all public lands heretofore reserved for military purposes in the state of Florida, which said lands, in the opinion of the secretary of war, are no longer useful or desired for such purposes, or so much thereof as said secretary may designate, shall be and are hereby placed under the control of the general land office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States; provided, that said lands shall not be so placed under the control of said general land office until said opinion of the secretary of war, giving his consent, communicated to the secretary of the interior in writing shall be filed and recorded." Chapter 129, Act Aug. 18, 1856. This act was repealed in 1884, and provision made by the repealing act that whenever, in the opinion of the president of the United States, the lands, or any portion of them, included within the limits of any military reservation theretofore or thereafter declared, have become or shall become useless for military purposes, he shall cause the same, or so much thereof as he may designate, to be placed under the control of the secretary of the interior for disposition as provided in the act, and shall cause to be filed with the secretary of the interior notice thereof. Provision was also made for the secretary of the interior to have the said lands, or any part of them, surveyed, or subdivided into tracts of less than 40 acres, and into town lots, or either or both, and also for an appraisalment and public sale of said lands, and, after offering them at public sales, to allow the remainder to be taken by private entry on conditions prescribed. This act contains the following provisos: "Provided that any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead en-

try, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions; provided further, that said lands were subject to entry under the public land laws at the time of their withdrawal." Chapter 214, Acts 1884.

The right to interpose a plea on equitable grounds in an action of ejectment is clear, provided the matter set up in such plea will authorize the defendant to enjoin in a court of equity the judgment, should one be recovered against him. The facts alleged in such plea must not, however, make such a defense as is available to the defendant in the common-law action, as the court in such case will be justified in refusing to allow the plea to be filed, or in striking it out if filed. *Dickson v. Gamble*, 16 Fla. 687; *Spratt v. Price*, 18 Fla. 289; *Walls v. Endel*, 20 Fla. 86; *Johnston v. Allen*, 22 Fla. 224. Does the plea set up any defense, and, if so, is it available to the defendant under the general issue in an action of ejectment? A patent in due form of law, sufficient on its face to convey the title to the land therein described, and purporting to have been issued by the proper officers of the government, must at least be regarded as *prima facie* valid in actions at law. Whether such a patent can be impeached in a proceeding at law, as distinguished from a suit in equity, and, if so, under what conditions it can be done, has given rise to considerable judicial discussion in the courts of this country. The case of *Polk v. Wendal*, 9 Cranch, 87, if not the first, is the leading case on the subject in the supreme court of the United States. Without going into a discussion of the various cases on the subject since that time, it may be stated that when patents purporting to have been issued under authority of the United States government are shown to have been issued without authority of law, as in cases where the land undertaken to be conveyed had never been subject to its control and disposition, or, if so, had been withdrawn from sale when the patent issued, or had in fact never belonged to the government, such patents are void, because the officers issuing them had no authority at all to make the grant. In such cases the patents are absolutely void, and their invalidity may be shown as a defense in an action at law for the possession of the land. *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, and authorities cited; *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258; *Foss v. Hinkell*, 78 Cal. 158, 20 Pac. 393; *Wilcox v. Jackson*, 13 Pet. 498. If the patent is not absolutely void, but voidable, then it seems direct proceedings will be required in a proper case, and on proper proceedings, to have the patent declared void. In *Johnston v. Towsley*, 18 Wall. 72,—a bill in chancery to cancel a patent where two had been issued for the same land,—the general doc-

trine that, when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others until reversed in a direct proceeding, was referred to, and it was said: "That the action of the land office in issuing a patent for any of the public land subject to sale by pre-emption or otherwise is conclusive of the legal title must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." It was also said in the same case: "On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the government have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle." In *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, it is said, after referring to several cases discussing the legal effect of a patent regularly issued, that "it need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection could be taken to it on these grounds at any time, and in any form of action. In that respect the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale." The case of *Porter v. Bishop*, 25 Fla. 749, 6 South. 863, holds that in entries under the United States homestead laws, where only questions of fact, or mixed questions of law and fact, are involved, the decision of the secretary of the interior thereon is final; but that where, by misconstruing the law, the officers of the land department have withheld from a party his just rights, or where misrepresentation and fraud have been practiced, necessarily affecting their judgment, the courts may, in

a proper proceeding, interfere, and refuse to give effect to their action.

The action of the land office in disposing of land subject to sale under any law regulating the disposition of the public domain is conclusive of the legal title so far as an inquiry into all matters connected with the issuance of the patent extends; and such patent is also conclusive in equity until set aside in a proper proceeding on the ground that the land officers have misconstrued the law, or that their judgment has been so affected by misrepresentation or fraud as to deprive a party of his just rights.

The supreme court of the United States clearly holds, as we understand it, that, if the land patented was not under the control and subject to disposition of the land office, the patent is void, and its invalidity may be shown in an action of ejectment to recover the land by virtue of the patent. The act of congress of 1872 authorizing the issuance of the Valentine scrip provides that patents may issue for it for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, whether surveyed or not, in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform when surveyed to the general system of the United States land surveys. The plea alleges that the land sued for and entered with Valentine scrip was situated within Ft. Brooke military reservation, at Tampa, and at the time of said entry and the issuance of said patent to plaintiff's grantor the land was within the jurisdiction of the war department of the United States, and not within the land department. It is also alleged that the patent was in fraud and violation of the acts of congress and of the rights of the war department, and was void; but this allegation of fraud must be taken as referring to the issuance of the patent when the land was within the jurisdiction of the war department, and not subject to the control of the land-office department. As an independent allegation of fraud, it would be nothing but a legal conclusion of the pleader. There is also an allegation that when the entry was made and the patent issued defendant was in possession of the land, and that it was not then, or at the time of filing the plea, unoccupied and unappropriated public land, as specified by the act of congress authorizing the location of land with Valentine scrip. The allegation that the land was not unoccupied public land is based upon the alleged fact that defendant was in possession; but the further allegations that the land was situated within Ft. Brooke military reservation, and at the time of the entry and issuance of the patent was within the jurisdiction of the war department, and not within the land department, are sufficient, in our opinion, to show, if true, that the land officers had no authority to permit the land to be entered with the Valentine scrip. The act of

congress in force up to July 5, 1884, authorized a transfer of the land by the secretary of war to the land department, under certain conditions; and the patent alone would afford prima facie evidence that the proper transfer had been made before the issuance of the patent. The allegations of the plea, if true, negative such fact, and show that the land was still under the control of the war department when the patent was issued. Under such circumstances the land officers had no authority to issue the patent, and under the rule above announced it would be void, and subject to attack in an action at law. The allegation that when the patent issued the land had not been surveyed, and the entry was made upon tracts less than the subdivisions provided for in the United States land laws, does not aid the plea. The scrip referred to was authorized to be located upon any unoccupied and unappropriated public land, not mineral, whether surveyed or not; but the survey, when made, is required to conform to the general system of United States land surveys. If the land was not under the control of the interior department, as alleged, the land officers had no authority over it, and their action in undertaking to dispose of the land was void. If it were shown that the land office had authority to dispose of the land, a question would arise as to whether or not the matter of surveys belongs exclusively to that department. *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203; *Knight v. Ass'n*, supra. Conceding that the defendant was in a condition to attack the patent, all the available defense sought to be set up by the equitable plea could, in our judgment, be relied upon as a legal defense under the general issue, and the court did not err in refusing to allow such plea to be filed.

So far we have considered the plea on the theory that the defendant was shown to be in a situation to attack the patent on the ground that it was void. He bases his right to the land on a settlement and occupancy of the land under the act of congress of July 5, 1884, and his right to make a homestead entry; and it will be observed that the rights given to the settler in the first proviso in this act is coupled with a further proviso that the land was subject to entry under the public land laws at the time of their withdrawal. The actual occupancy of the land by the defendant is alleged, as well as his right to make a homestead entry and to enter the land; but there is no distinct allegation that the land was subject to entry under the public land laws at the time of its withdrawal.

The question of defendant's right to attack the patent is involved in the further questions presented on the trial under the general issue, and we will consider it in connection with them.

On the trial a patent for the land described in the declaration to Louis J. Brush, bearing date September 13, 1882, was offered in evidence by the plaintiff, and objected to by the

defendant, but the objection was overruled, and the patent admitted in evidence. There was no error in admitting the patent. It recited that it was issued upon a location of the land in the district of lands subject to sale at Gainesville, Fla., with scrip issued by virtue of the act of congress in 1872, in favor of Thomas B. Valentine, and was in due form. The patent was at least prima facie evidence of a good conveyance of the land, and, in the absence of anything to impeach it, should have been admitted in evidence. A deed from Brush and wife, conveying the land to plaintiff, was then introduced without objection.

Defendant offered as documentary evidence certified copies of what purport to be official communications between the secretary of war and the secretary of the interior, commencing in 1860, in reference to Ft. Brooke reservation at Tampa, and also the approvals of the president of the United States, in 1877 and 1878, of the request of the secretary of war in reference to said reservation. The purpose for introducing this evidence was to show that the land described in the patent was a part of the military reservation of Ft. Brooke, at Tampa, when the patent was issued. On objection of plaintiff the documentary evidence was excluded, and defendant excepted. Defendant then testified that he was a native-born citizen of the United States, and the head of a family, and offered to show that he settled upon the land in question prior to the issuance of the patent, and was actually occupying said land on the 1st day of January, 1884, and continued to occupy it up to the date of the act mentioned, and that his settlement and occupancy of the land was for the purpose of entering it under the homestead laws of the United States. The record shows that some evidence offered by defendant to show his occupancy of the land was admitted, but it also shows that the court excluded most of the testimony offered by defendant on this point. There was no effort to show that defendant had ever obtained any certificate of entry of the land from the land office, or that he had any deed or paper evidence of title of any kind to the land from any source whatever. Testimony was offered tending to show that in July, 1883, defendant made some effort to make an application at the local land office for the land, and also consulted a party as to how he should proceed to make the application, and did in fact make an affidavit that he was residing upon Ft. Brooke reservation, before a judge, and forwarded it to Washington. The circuit judge refused to admit testimony offered by defendant to show occupancy of the land either before or subsequent to January 1, 1884, for the purpose of entering it under the homestead laws or otherwise, and the rulings of the court rejecting such evidence were excepted to by the defendant. This testimony offered by the defendant and

ruled out by the court was objected to, among other grounds, because the defendant had not shown that he was in a situation to attack the patent offered in evidence by the plaintiff. Without considering the other grounds of objection to the testimony, or the views of the circuit court in passing thereon, we think the objection mentioned was good, and it is decisive of the entire defense sought to be interposed by the defendant. There is doubt whether the documentary evidence offered by the defendant shows that the particular lots of land described in the declaration were embraced in Ft. Brooke reservation when the patent was issued, but, without going into either the competency or relevancy of this evidence, we do not see how the defendant can call in question the validity of the patent on the showing he made.

The rights given to the settler of any part of a military reservation by the act of July 5, 1884, were upon the condition that said land was subject to entry under the public land laws at the time of their withdrawal. There was no showing made or offered to be made that the Ft. Brooke reservation at Tampa was ever subject to entry under any of the public land laws when it was withdrawn for a reservation. If it had never been subject to such entry, the defendant could acquire no rights by virtue of the act mentioned to enter the land under the general laws, as congress had not secured to him such right by said act in providing for the disposition and sale of military reservations. At most he was an occupier of lands of the United States without any right of entry, and without any authority of law. We have been unable to find any authority to sanction the view that a mere trespasser upon public land has the right to question the legality of a patent issued by the United States land officers. The case would be entirely different if a settlement should be made upon public land subject to entry under the provisions of law, and we find cases holding that inchoate rights acquired under such an entry will be protected even against a patent issued in violation of such a settler's rights. In the case of *Doolan v. Carr*, *supra*, which was an action of ejectment, and in which the right to attack a patent issued for the land in question was recognized, it appears that the defendants had entered upon the land under a claim of pre-emption settlement, and had made and subscribed declaratory statements of intention to pre-empt the land, and presented them to the register of the proper land office, but they were refused on the ground that the land had been patented to a railroad company. The land was not subject to disposition by the land office when the patent was issued, being then embraced in a Mexican grant, but had been transferred to the interior department, and was subject to entry when the pre-emption claim was made. *Land Co. v. Ebblisor*, 52 Minn. 312,

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54 N. W. 91. In the case before us there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by homestead entry, or that the defendant had acquired any right, inchoate or otherwise, to enter the land. The defendant's claim is not shown to have been in privity with the government's title in any way; and his adverse holding, under the showing made, places him in the attitude of a mere trespasser upon the land. As such we do not think he can be heard to question the legality of the patent issued by the land office. The case of *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. 601, involving the validity of a patent under a placer mine claim, decides that, as the title in the veins of mineral lands known to exist, and not claimed or referred to in the patent, remains in the United States, the patentee had no right to dispossess one in peaceable possession of such veins, whether the latter have any title or not. An examination of the case will show that it did not involve the admission of proof to invalidate a patent, but whether the vein or lode, the subject of controversy, was included in the boundaries of the claim as located on the surface and extending vertically downwards, if known to exist when the patent issued. In *Cooper v. Roberts*, 18 How. 173, a defendant in possession of land without any title or valid right to acquire one, set up as one defense to a patent issued by the state of Michigan for the land that the officers of the state violated a statute in granting the land after it was known, or might have been known, to contain minerals, and it was said by the court that, "without a nice inquiry into these statutes to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known, or might have been known, to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue. The officers of the state of Michigan, embracing the chief magistrate of the state, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land, to which her title is attached." It was held in *Doll v. Meador*, 16 Cal. 295, that a patent not void upon its face cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title. *Foss v. Hinkell*, *supra*, holds that a settlement by one as pre-emptor on land in compliance with the laws of the United States with right to make the entry is in privity with the United States, and can question the validity of the issuance of a patent to a third party for the land. Vide, also, *Railroad Co. v. Purcell*, 77 Cal.

89, 18 Pac. 896, where it was decided that a mere possession of public land does not give any right as against the government, or prevent it from disposing of the land as it pleases. The defendant not being in a situation to call in question the patent issued to plaintiff's grantor, the court did not err in excluding the evidence offered for such purpose.

This conclusion is also decisive of the questions presented here on the giving and refusing to give instructions to the jury. The plaintiff was entitled to recover the land sued for on the showing made, and the court did not err in refusing to give the charges asked by the defendant. There was no testimony before the jury to authorize the charges requested by the defendant and refused.

No objection was made to the introduction of the deed from Brush, the patentee, to the plaintiff, and it is not necessary to consider any questions arising under this conveyance.

There is only one other assignment of error which we deem it necessary to refer to in this opinion, and that is, the court erred in refusing to permit defendant to introduce the original record of a deed from the plaintiff to Walter B. Clarkson for the land in dispute. The purpose in offering this deed in evidence was to show that the plaintiff did not have title to the land at the time of trial. The original record book was objected to because the original deed was not accounted for, and the record offered was not a certified copy of the deed, so as to permit the introduction of a copy in lieu of the original deed. The court refused to permit the original record from the record book to the read in evidence. The constitution (article 16, § 21) provides that deeds and mortgages which have been proved for record, and recorded according to law, shall be taken as prima facie evidence in the courts of this state without requiring proof of execution, and that the certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as prima facie evidence thereof, and of its due execution, with like effect as the original, when duly proved, provided it be made to appear that the original is not within the custody or control of the party offering such copy. Under this provision a duly-recorded deed would be prima facie evidence in the courts of this state without proof of execution, and a certified copy of such duly-recorded deed would likewise be prima facie evidence, provided it is made to appear that the original is not within the custody or control of the party offering the copy. But it is entirely clear that the provision referred to does not authorize the introduction of the original record as evidence of the existence and execution of the original deed. The court did not err in refusing to allow the original record of the deed to be read in evidence on the objections made.

It is our opinion that the judgment appealed from in this case should be affirmed on the record before us, and it will be so ordered.

McNEILL et al. v. McELROY, Marshal.
(Supreme Court of Mississippi. May 7, 1894.)

MANDAMUS—FAILURE TO COLLECT TAX.

A petition for a mandamus directing a town marshal to collect unpaid taxes, which alleges the corporate existence of the town, and its power to levy taxes; that a levy and assessment had been made according to law, and a copy thereof placed in the hands of the marshal then acting; that respondent was a duly elected and qualified marshal; that a part of the taxes remained uncollected, and that respondent refused to collect same, or any part thereof,—is not demurrable.

Appeal from circuit court, Newton county; A. G. Mayers, Judge.

Application by R. S. McLaurin, district attorney, on information of G. H. McNeill and others, for a peremptory mandamus to S. M. McElroy, marshal of the town of Newton, directing him to collect unpaid taxes. A demurrer to the petition was sustained, and petitioner appeals. Reversed.

R. S. McLaurin, district attorney, on information of G. H. McNeill et al., taxpayers of the town of Newton, Miss., filed his petition before the circuit judge in vacation, praying for a peremptory mandamus to S. M. McElroy, marshal of said town, directing him to collect the unpaid taxes of said town which had been duly levied by the board of mayor and aldermen. The petition sets out the corporate existence of the town of Newton, and its power to levy taxes for city and school purposes, and alleges that a levy and assessment had been made according to law; that the marshal then acting, when a copy of the assessment had been placed in his hands, had proceeded to collect the taxes as levied; that at a regular election legally held in said town, respondent, McElroy, had been elected marshal, and had qualified as marshal of said town; and that a part of the taxes levied remained uncollected, and that respondent refused and failed to collect same, or any part thereof. Respondent demurred to the petition, and the demurrer was sustained, the petition dismissed, and complainants charged with the costs. Relator then asked leave to amend his petition, which was denied, and he appealed.

S. H. Kirkland, for appellant.

PER CURIAM. We have not been favored with any views in support of the judgment in this case, and not being able, unaided, to discover why an answer to the petition for mandamus should not be required, we reverse the judgment, overrule the demurrer, and remand the cause for an answer to the petition.

(71 Miss. 968)

TRICE v. WALKER.

(Supreme Court of Mississippi. April 23, 1894.)

PROPERTY SUBJECT TO EXECUTION — CLAIMS OF THIRD PERSONS.

1. Personal property held under an unsatisfied deed of trust, the condition of which has been broken, is not liable to execution on a judgment against the grantor.

2. On trial of the right to personal property seized under an execution, the court charged that, though the judgment debtor turned the property over to the claimant, yet if claimant paid nothing for it, nor gave any credit on account, such transfer could not avail against creditors of the debtor. *Held* error, as the failure to enter credit for the price was evidential only, and not conclusive of the nature of the transaction.

3. The issue being whether the property seized was liable to execution, an order allowing claimant to amend his affidavit setting up a lien on, instead of title to, the property, cannot prejudice the judgment creditor.

Appeal from circuit court, Monroe county; Newnan Cayce, Judge.

W. B. Walker, as administrator of the estate of H. B. Gillespie, obtained judgment against C. S. Bates, and, under an execution, levied on personal property. J. M. Trice filed an affidavit claiming the property. The issue was tried, and judgment was rendered for the judgment creditor, and J. M. Trice appeals. *Reversed*.

On the trial the plaintiff proved by the deputy sheriff that the property was found on the French place, in the possession of Bates, and some declarations made by Bates that the property was his. There was some evidence to the effect that Trice had testified in a prior suit that the property in dispute belonged to him. The evidence for the claimant was to the effect that Bates had rented a place from one French for the year 1890, and transferred his lease to J. M. Trice, who rented a part of the land back to Bates, and that Trice furnished Bates and his hands supplies during that year, and that the two mules, Hattie and Alice, had been sold to Bates on credit; that he had failed to pay for them, and had resold them to Trice two years before the levy was made, but there was no money paid to Bates for the mules, and no entry was ever made on Trice's books, crediting Bates with the value of the mules. The affidavit, as originally made by Trice, claimed the property as owner. After the evidence was all in, claimant moved the court for permission to amend his affidavit so as to conform to the facts, which was granted. Claimant then made and filed an affidavit asserting a lien on all the agricultural products, as landlord of Bates, and a lien on the two mules by virtue of a trust deed on them. The sixth and seventh instructions given by the court below are as follows: "(6) The court charges the jury that if Trice only had a claim on the two mules, Alice and Hattie, by reason of an unsatisfied deed of trust on them, and did not own the mules, then the jury will find for the plaintiff as to said mules, Alice

and Hattie, and assess their value at what the testimony shows them to be worth. (7) The court charges the jury that although they believe from the testimony in the case that Bates turned the mules, Alice and Hattie, over to Trice, yet if Trice paid Bates nothing for them, in any manner, nor gave him any credit for them, such transfer cannot avail against the creditors of Bates, and the jury will find for the plaintiff, and assess the value of the mules at what they are shown by the testimony to be worth." There was a verdict and judgment for plaintiff in execution for the two mules, Hattie and Alice, and the farm products, valued at \$513. Claimant's motion for a new trial was overruled, and he appealed.

E. O. Sykes and Clifton & Eckford, for appellant. W. B. Walker, Calhoun & Green, and E. H. Bristow, for appellee.

CAMPBELL, O. J. The sixth and seventh instructions for the plaintiff are erroneous, and should not have been given. The sixth is wrong, because, if Trice had an unsatisfied deed of trust on the mules (and such deed was produced in evidence, and condition was broken), they were not properly seized under the execution. The seventh is wrong, as calculated to mislead by conveying the idea that if what Trice had testified as to Bates having surrendered the mules to him at an agreed price was true, still, if no money was paid for them, and no credit given for them, the title of the mules did not pass to Trice. If the transaction was as Trice testified, the nonpayment of money or the failure to enter the proper credit for the price agreed on did not prevent the title of the mules from vesting in Trice. Failure to make any entry of credit was evidential only, and not conclusive.

Whether the amendment allowed, and made by Trice, in his affidavit, during the trial, was properly permitted, is immaterial. It was unnecessary, and seems to have been very hurtful to him who made it, for it enabled his adversary to discredit him before the jury, probably. The issue was not changed by the new affidavit. It was whether the articles seized were liable to the execution, not whether Trice had title or a paramount lien which entitled him to hold them, except as that bore on the question, were the articles leviable? If Trice had no title or lien, and the plaintiff failed to show the liability of the property to his execution, the issue would be found for the claimant. In this case, as presented by the record, the property was liable to the execution, unless title was in Trice, or he had a lien paramount to that of the judgment creditor, which prevented the seizure of the property. But an amended affidavit was not necessary to enable Trice to avail of a superior lien, if he had one, on the agricultural products, coupled with the right of possession for the satisfaction of the lien. *Wolfe v. Crawford*,

54 Miss. 514. We do not say that Trice had such a lien, for the evidence as to his relation to the land on which they were produced raises an interesting series of questions, not necessary to be discussed now, and left for future consideration. But we do say that under *Butler v. Lee*, 54 Miss. 476; *Wolfe v. Crawford*, Id. 514; and *Helm v. Gray*, 59 Miss. 54,—there was no necessity for the amendment made, and that the rights of the parties could be worked out without any amendment of the affidavit; and for that reason it is immaterial whether the Code of 1892, § 4425, applies or not. That section introduces into section 1774 of the Code of 1890 the clause, "or to have a lien on," so as to expressly authorize one who does not own, but has a lien on, property, to interpose a claim. As stated, this right existed before, and the provision was perhaps unnecessary. In view of the fact that no change was made in the law, as to this, further than the insertion of the clause mentioned, it is suggested that the sole purpose was to declare the law as it was settled before. It may have an effect beyond this, which is not now apparent. It certainly gives the right to a mere lienor to interpose a claim, regardless of possession or the right of possession; and, if necessary, the courts must supply the omission to make any change in the statute, to correspond to that made, if any. Reversed and remanded for a new trial.

(71 Miss. 498)

MAYNARD v. COCKE.

(Supreme Court of Mississippi. Jan. 1, 1894.)

VENDOR'S LIEN ON CROPS.

In a deed of land, a vendor's lien was reserved, and notes were given for interest on the unpaid price, the deed providing that "said interest notes shall be considered as rent notes, and a landlord's lien is retained for the collection of same." The owner of the land rented it to a tenant. Held to create an equitable lien on the agricultural products, which the holder of the note might enforce by collecting from the tenant enough of such products to pay the interest notes as they fell due.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Action by George F. Maynard, guardian, against J. L. Cocke for money had and received. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

In December, 1888, Mrs. M. C. Maynard bought a tract of land in Coahoma county, Miss., from W. F. Rozelle, for \$7,000, and paid \$2,500 cash, and executed her note for the balance of the purchase money, payable December 1, 1893, bearing 10 per cent. interest, payable annually, giving her four notes for \$450 each, payable December 1, 1889, 1890, 1891, and 1892, respectively. Rozelle executed his deed conveying the land to Mrs. Maynard, reserving a vendor's lien to secure the purchase money and interest. Mrs. Maynard died in November, 1890, testate, devising all her property, real and per-

sonal, to her three children, who were minors, and appointed appellant, G. F. Maynard, her executor, who was afterwards appointed guardian for the children. The deed from Rozelle to Mrs. Maynard was lost, and was never recorded. In December, 1890, W. F. Rozelle executed a deed conveying this land to the heirs and devisees of Mrs. M. C. Maynard, which deed recited that a deed had formerly been executed conveying the land to Mrs. M. C. Maynard, which had been lost before it was recorded. This deed contained the following statement: "It was expressly agreed and understood in said deed [the deed to Mrs. Maynard], executed, as aforesaid, by me on the 17th day of December, 1888, that a vendor's lien was retained for the payment of said notes, and that the said interest notes should be considered as rent notes, and a landlord's lien had and retained for the collection of the same; and this deed is made in lieu of said lost deed, containing the same covenants and agreements." All the notes—the principal note and the interest notes—were transferred to appellee, J. L. Cocke, by Rozelle. Appellant, as guardian, leased the land for three years at an annual rental of \$800. The lease began in January, 1891. The rent notes were made payable to George F. Maynard, guardian. Appellee, J. L. Cocke, collected from the tenants on the place enough of the cotton raised on the place to pay the interest note due December 1, 1891,—\$450. This suit was brought by appellant to recover from appellee the amount thus collected from the tenant. A jury was waived, and the cause was tried before the court. From a judgment for the defendant, plaintiff appealed.

Fitzgerald & Maynard, for appellant. D. A. Scott, for appellee.

WOODS, J. The novel and most interesting legal question which is argued with much learning and ability by counsel for the respective parties is this: Can the dual relations of vendor and vendee and landlord and tenant subsist between the same parties, where the vendee has received from the vendor an absolute conveyance to the lands sought to be charged with rent? This inquiry is the key to an entrance upon a field of legal inquiry which has not yet been judicially explored, and whose boundaries have not yet been ascertained and declared, so far as the research of learned counsel, supplemented somewhat by our own, discloses. But this untried problem is not really presented in this controversy. Counsel has taken the words too literally, and has overlooked the spirit of the contract of the parties. We are not to fetter our investigation by mere words, or peculiar forms of words. Through these we must look to ascertain the intention of the parties. They are the vehicles only by which we are transported in our search for the true intent of the parties, and the real meaning of their contract. The calling of

that rent which is not rent does not make it such, but we should endeavor to construe the contract in such manner as to effectuate the intention of the parties, if that be ascertainable, and give vitality to every part of it, if possible.

The true view of the real intention of the parties is this, in our opinion, viz. for the payment of the interest notes given by the grantee to his vendor, a security in the shape of an equitable lien upon the agricultural products to be grown upon the premises conveyed was created; and this is absolutely free from objection, from any point of observation. In this aspect, the appellee has a complete defense to the action brought against him for moneys had and received, as this suit is, practically. It is in its nature an equitable action, and the equitable lien of appellee was properly set up as a defense to the appellant's demand. The appellee had already, before suit was brought, resorted to the security afforded by his equitable lien, and had received satisfaction of his debt; and all this he was entitled to show, in successful defense of the action brought against him. Affirmed.

(71 Miss. 614)

GIBSON-MOORE MANUF'G CO. v. MEEK.
(Supreme Court of Mississippi. Jan. 1, 1894.)

ACTION FOR WAGES—PLEADING.

Plaintiff alleged that defendant hired him for one year at \$10 a week; that without any fault of his he was discharged; that defendant was indebted to him for the time he contracted at \$10 a week. Held sufficient to support a verdict in plaintiff's favor.

Appeal from circuit court, Monroe county; Newnan Cayce, Judge.

Action by John H. Meek against the Gibson-Moore Manufacturing Company for wages due, and for breach of contract of hiring. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Meek sued appellant in the circuit court, on a contract of employment. The declaration avers that in February, 1891, defendant contracted with plaintiff to pay him \$10 per week for one year beginning March 2, 1891; that plaintiff began work as per contract, and continued to work until August 8, 1891, when he was discharged by defendant, through no fault of his own; claiming that defendant was indebted to him for the time he contracted at the rate of \$10 per week. Defendant demurred to the declaration—(1) because, under the form of action adopted by plaintiff, the measure of damages is not the sum agreed upon for the whole term, but only such damages as the plaintiff sustained; (2) because plaintiff seeks to recover for the whole time of the employment, when the declaration discloses that he was discharged in the middle of the term, and the suit is to recover for the unexpired term, when no services were rendered for any part of said term; (3) because

plaintiff does not show that he used reasonable diligence to obtain like employment; (4) because, under the form of the action, the suit is premature, for the declaration shows that the court has no jurisdiction of the amount really due. This demurrer was overruled. Plaintiff then filed the plea of non assumpsit, upon which a trial was had, resulting in a verdict and judgment for plaintiff for \$111, from which defendant appealed, assigning for error, among other things: "The court erred in rendering a judgment against defendant, which in this cause, and in view of the cause of action and the pleadings, could not be warranted or supported by any conceivable amount of competent evidence. The court did not have jurisdiction."

Sykes & Bristow, for appellant. Houston & Sykes, for appellee.

CAMPBELL, C. J. The fine argument of the learned counsel for the appellant might have prevailed half a century ago, when form was often of more importance with courts than substance; but happily that era has passed, never to return. Now substance is what the courts of this state look to. We have no forms of action. Every action is on the case, and one need only state a case in concise and intelligible language, containing sufficient matter of substance for the court to see that he has a meritorious cause, and his declaration will be sufficient. This declaration states the facts entitling plaintiff to recover, and was good on demurrer. The declaration purports to be in debt, under the common-law system of pleading, while the plea is non assumpsit, which entitled the plaintiff under that system to judgment nil dict. He did not get judgment that way, but by a verdict, and, finding no error, the judgment on the verdict is affirmed.

HONEA v. BOARD OF SUP'RS OF MONROE COUNTY.

(Supreme Court of Mississippi. Jan. 8, 1894.)

LIMITATIONS—CLAIMS AGAINST COUNTY.

A claim against a county will be barred by the statute of limitations where an action is not brought thereon within six years after it is rejected by the commissioners.

Appeal from circuit court, Monroe county; Newnan Cayce, Judge.

Action by R. A. Honea against the board of supervisors of Monroe county on claims rejected by the county commissioners. Judgment for defendant, and plaintiff appeals. Affirmed.

In February, 1866, the board of police of Monroe county made an order authorizing the president and clerk of the board to issue warrants to the amount of \$15,000, and declared that these warrants should be receivable for all dues to the county. This scrip was issued and circulated as money in that county. At the April term, 1871, the board,

recognizing that this scrip was issued without proper authority, entered an order by which the holder of it should, within 30 days from the publication of the order, present the same to the clerk, who was directed to take it up, and issue the warrants of the county in lieu of same. One T. S. Hampton, who was keeper of the poor in said county, was the holder of \$1,532 of this scrip, which he surrendered to the clerk, and received warrants therefor. In 1867, warrants were issued, in pursuance of an order of said board, for the payment of the salary of the probate judge, amounting to \$700. All these warrants were assigned to R. A. Honea, for valuable consideration. This is a suit brought in the circuit court of Monroe county by appellant to recover said amount from the county. There are five counts in the declaration,—the first, to recover \$2,132.50 for money expended by plaintiff for use and benefit of defendant; second count, to recover \$1,022.50 for valid claim assigned to plaintiff by T. S. Hampton, for which claim the county gave Hampton certain paper known as "county scrip," for which the county afterwards gave an invalid warrant; third count, for \$410, on the same ground; fourth and fifth counts, to recover \$700 balance due T. H. Davis for services as probate judge for the year 1867. To the first count, defendant pleaded the general issue and invalidity of claim and three and six years' statutes of limitation; to the second and third counts, pleas denying the validity of the original claims and the statutes of limitation after rejection of the claims; and to fourth and fifth counts, the three and six years' statutes of limitation. On the trial, plaintiff testified that in 1878, while he was treasurer of Monroe county, he paid certain invalid warrants, based on the claims sued on, but overlooked them in his settlement with the county. He afterwards discovered them, and employed counsel to collect them. They tried to get the board to levy a tax to pay them, but failed. They presented the warrants to the board in 1884. That he employed other counsel in 1893, who presented the claim to the board in February of that year. The account presented to the board in 1893 is as follows: "Monroe Co. to R. A. Honea, Dr. To amt. due, as per statement and bill of particulars below, \$2,132.50." The statement or bill of particulars referred to is a history of how plaintiff came into possession of the warrants. No itemized account of the original claim was filed. Plaintiff then introduced certain orders of the board to show the validity of the claims and the record showing the presentation and rejection of the claims in 1893. Several witnesses were introduced who testified as to the validity of the original claims. It was admitted that the board of police had destroyed the scrip and the vouchers for which the scrip was issued, and that \$700 of the salary of T. H. Davis had never been paid. Defendant then introduced

an order of the board of April 8, 1884, stating that R. A. Honea presented that day certain warrants, and, there being a doubt as to their validity, a committee was appointed to investigate as to their payment. Another order was introduced showing that certain warrants held by Honea were ordered registered. Some other orders of the board of April, 1884, meeting were introduced, tending to show a presentation of these claims at that time, when E. H. Bristow was introduced, and testified that he was counsel for the board in 1884, and that counsel for plaintiff then asked that warrants be issued for the original claims. In rebuttal, G. J. Buchanan testified for plaintiff that he represented plaintiff before the board in 1884, and that they only asked that new warrants be issued for the old ones, or a seal be placed on the old warrants. There were a verdict and judgment for defendant, and, plaintiff's motion for a new trial being overruled, he appealed.

Houston & Reynolds, for appellant. Sykes & Bristow, for appellee.

CAMPBELL, C. J. It appears to us from this record that Mr. Honea had a meritorious claim against the county, on which he might have recovered, if he had not delayed so long as to be barred by the statute of limitations, which has been pleaded by the county, and must avail to preclude recovery. The distinction attempted to be made between the claims sued on and those presented to the board of supervisors in 1884, and payment of which was then refused, is too unsubstantial to be recognized. The whole subject-matter was before the board, and dealt with by it, in 1884, and the statute of limitations was then set in motion against the claim in whatever form it might afterwards be presented. It is immaterial whether the evidence of Mr. Bristow was properly admitted or not. The record of the board of supervisors is amply sufficient without any aid or explanation to show that the claims sued on, in substance, if not in the precise form now sued on, were then presented, considered, and rejected as claims to be paid. Affirmed.

(71 Miss. 240)

CARTER v. BRANDY et al.

(Supreme Court of Mississippi. Jan. 8, 1894.)

ATTACHMENT—SALE OF LAND OF NONRESIDENT—BOND.

Section 1902, Code 1880, and section 491, Code 1892, provide that, where a decree in attachment proceedings is rendered by default against a nonresident debtor, complainant shall give security after the decree, and before any proceedings are taken to satisfy it, to restore the estate, if so ordered, on the debtor's answering within two years. *Held*, that a sale without giving such security was void.

Appeal from circuit court, Lee county; Newnan Cayce, Judge.

Ejectment by John A. Carter against Hay-

wood Brandy and another. Judgment for defendants, and plaintiff appeals. Affirmed.

In January, 1891, Carter Bros. & Co. filed a bill in the chancery court of Lee county, setting up that G. W. Barrett, who owed them about \$2,000, conveyed to one G. B. Oliver a stock of merchandise, of the value of about \$3,500, for the purpose, on the part of both Barrett and Oliver, to defraud, hinder, and delay creditors. That the debts were made in the ordinary course of trade. That Oliver was a non-resident, and owned in this state the stock of goods which was in the hands of Dulany & Sloan, and the lands in controversy. The prayer of the bill was for an attachment in chancery to be served on Dulany & Sloan for the purpose of holding the stock of goods owned by Oliver, and for publication for Oliver. An attachment was issued and served as prayed for, and publication was properly made for Oliver. The bill was dismissed as to Dulany & Sloan; and, Barrett and Oliver failing to answer, decrees pro confesso were taken against them, and afterwards made final. The court held that Oliver was indebted to Carter Bros. & Co. to the amount claimed, and condemned the lands attached to be sold to pay said debt. From this decree, Barrett appealed, and Dulany & Sloan made application to join in the appeal. On the appeal the court affirmed the decree of the lower court as to Barrett, and dismissed the application of Dulany & Sloan. See *Barrett v. Carter*, 69 Miss. 593, 13 South. 625. The lands condemned by the decree were afterwards sold, and the appellant herein bought the same, and instituted this action of ejectment for the lands in the circuit court against Brandy, tenant in possession. J. H. Allen, landlord, being admitted to defend, pleaded the general issue; both parties agreeing to claim through G. B. Oliver as the common source of title. The cause was, by agreement, tried before the court without a jury. The plaintiff, relying upon his deed in the chancery proceedings, offered in evidence the chancery proceedings, and his deed thereunder, in the case of Carter Bros. & Co. v. G. B. Oliver et al. Defendants then moved the court to exclude all plaintiff's evidence, and for a judgment for defendants. The grounds for the motion were: Because the debt attached for in this chancery case was not the character of debt for which attachment would lie; because no bond was given under section 1902 of the Code of 1880, or section 491 of the Code of 1892, which provide that where a suit of attachment is issued against a nonresident debtor, and the summons is served by publication, and a decree rendered without the appearance of the absent debtor, the court, before any proceedings to satisfy said decree, shall require the complainant to give security to abide such further orders as may be made to restore the estate, on the debtor's answering

within two years. The motion was sustained by the court, and judgment given for the defendants, from which plaintiff appealed.

J. A. Blair and Clayton & Anderson, for appellant. W. M. Cox and Clifton & Eckford, for appellees.

CAMPBELL, C. J. The circuit court rightly held that the execution issued on the decree, and by virtue of which the sale and conveyance were made under which the plaintiff claimed title, was void for want of authority to issue it, without the security required by section 1902, Code 1880, and section 491, Code 1892. This security is something required to be given after decree. It is not part of the decree, and the fact that in this case a direction for a special writ was improperly included in the decree does not make applicable the rule denying the assailability, collaterally, of a decree. The decree was to be made, and afterwards, "before any proceedings to satisfy said decree," the court was to require the prescribed security. The writ of venditioni exponas in this case was void, not being issued by order of the court, after decree, and requirement of security as prescribed. In order to divest the title of an absent defendant, brought in by publication, and not appearing, there must be conformity to law. Affirmed.

(71 Miss. 590)

MAYO v. EQUITABLE LIFE ASSUR. SOC.

(Supreme Court of Mississippi. Jan. 15, 1894.)

DOMICILE—DISTRIBUTION OF ESTATE—CONFLICT OF LAWS.

1. W. was born in Virginia; went to Tennessee to seek employment, remaining one year; went to Mississippi, where he remained about a year; returned to Tennessee, where he stayed one month; and then, on account of sickness, returned to Virginia, where he died. *Held*, that his domicile was in Virginia.

2. While in Mississippi, W. insured in defendant company, the policy being payable in New York, and left in Mississippi for safe-keeping. *Held*, that the proceeds of the policy were distributable under the laws of Virginia, the place of his domicile.

Appeal from chancery court, Lowndes county; T. B. Graham, Chancellor.

Action by J. P. Mayo, administrator of the estate of W. A. Wright, against the Equitable Life Assurance Society of New York. From a judgment revoking his letters of administration, plaintiff appeals. Affirmed.

W. A. Wright was born and reared to manhood in Bedford City, Va., where his father and family still reside. In 1889 he left Bedford City, and went to Knoxville, Tenn., where he engaged in the drug business, as clerk, and remained there one year, when he removed to Columbus, Miss., under a contract of employment for one year. While in Columbus he obtained three policies of insurance on his life in the Equitable Life Assurance Society of New York, aggregating \$5,000. In September, 1891, said Wright left

Columbus, Miss., for Memphis, Tenn., where he had secured employment for a year, with a right to terminate the contract on one month's notice. After living in Memphis about one month, his health began to give way, and he again sought employment in Columbus, Miss., writing his former employer first, and then another drug firm in Columbus, asking for situations. Pending his negotiations for employment at Columbus he took sick, and left Memphis for Bedford City, Va., reaching there December 26, 1891. In four days afterwards (December 29, 1891), he died, leaving no will and no estate, except the life insurance policies. These policies were payable to the heirs and assigns of William A. Wright. Under the laws of Virginia, they were payable to his father, J. M. Wright, his mother being dead. Said J. M. Wright was insolvent, and was largely indebted to the Bank of Bedford, of which bank Robert S. Quarles had been appointed receiver by the courts of Virginia. The policies of insurance had been left in the safe of a friend in Columbus by W. A. Wright, and were there at the time of his death; but though sent to Virginia, at the request of his father, a few days after his death, they were brought back at once to Columbus, Miss., that they might be administered under the laws of Mississippi. John P. Mayo, at the request of Wright's relatives, was granted letters of administration in the chancery court of Lowndes county, and proceeded to administer same by giving proper proof of the death of Wright to the insurance company. In the meantime, Robert S. Quarles, receiver of the Bank of Bedford, had instituted proceedings in the courts of Virginia to prevent the payment of these policies to J. M. Wright, and sought to have them appropriated to Wright's indebtedness to the bank, which had been reduced to judgment. The insurance company made response to Mayo, administrator, that before receipt of proof of death it had been served with an injunction, granted by the judge of the corporation court of the city of Roanoke, Va., prohibiting it from paying said policies to the said Mississippi administrator, or the father, brother, and sister of decedent, until further order of said court. The Mississippi administrator was not made a party to this suit. Therefore, he, in March, 1892, instituted suit in the circuit court of Lowndes county, Miss., against the Equitable Life Assurance Society of New York, for the amount of the policies, and recovered a judgment by default for the full amount thereof. The company afterwards sued out an injunction and supersedeas, and restrained the further proceedings of the said administrator to collect the judgment. The insurance company then agreed that, if the Virginia claimants would submit to the jurisdiction of the Mississippi courts, they would pay the money into the courts of Lowndes county, Miss., in order that the respective rights might be determined. The Virginia parties (Quarles, re-

ceiver, and W. H. McGhee, administrator appointed in Virginia) agreed to submit their claim to the Mississippi courts, whereupon the insurance company paid the money into the chancery court of Lowndes county, Miss., and by interpleader made all the parties (J. P. Mayo, administrator of Wright in Mississippi; W. H. McGhee, administrator appointed in Virginia; and R. S. Quarles, receiver of the Bank of Bedford) defendants. The cause was heard on bill, answers of all the defendants, depositions, and exhibits. The chancellor, finding that the decedent, W. A. Wright, was not domiciled in Mississippi; that he had no place of residence here, no property, owed no debts here, and had no legatees or creditors or debtors here, revoked the letters of administration of J. P. Mayo, administrator appointed in Mississippi, and ordered the proceeds of the policies paid to the Virginia administrator, said administrator having fully complied with the laws of this state entitling foreign administrators to receive funds in this state. From this decree, Mayo, administrator appointed in Mississippi, appealed.

Humphries & Sykes, for appellant. Wm. Baldwin, for appellees.

WOODS, J. If the deceased ever acquired a domicile in Mississippi, he certainly lost it again. He came to Mississippi to fulfill a business engagement, which, by its express terms, was to continue for a fixed period, and at the termination of that period he left this state, as he had come into it, in pursuit of a wider field of usefulness and larger wages. There is no satisfactory evidence that he intended to return to Columbus. The case, on all its disclosed facts, and on the inferences springing from those facts, seems to be this: The young man was moved by a twofold purpose in his engagements at Knoxville, at Columbus, and at Memphis. He was hunting a suitable field for success in his profession, and he was trying vainly to find this field in a climate which would give him health. He remained a year—perhaps longer, by a few months—in Knoxville, diligently engaged in his professional work. He changed his field at the end of that time to Columbus, under a contract of employment for one year; and then, still hunting a wider theater and better compensation, he took up his chosen calling in Memphis. Here the insidious disease that preyed upon him made such ravages upon strength and health that, after less than four months' labor in his last field, he gave up the pathetic and heroic struggle, and went home to Virginia to rest, where, four days after his arrival, he entered into his everlasting rest. It may be doubted if the domicile of his origin was ever renounced; but, if it was, it must be held that he, in turn, abandoned the respective domiciles of choice acquired in Knoxville, in Columbus, and in Memphis, and, by reverter, took up his domi-

cile of origin again. We are constrained to say that young Wright's domicile, at the date of his death, was not in Mississippi.

Were the policies of insurance personal property situated in this state, and their proceeds distributable under our laws? We are constrained to answer negatively. There is nothing in this case to make it exceptional, and the general rule that the situs of choses in action follows the person of the owner prevails. These policies are, by the terms of the contract, payable in New York. The insurer is a corporation of that state, and domiciled there. The assured, at the date of his death, in Virginia, had no domicile in Mississippi. The policies of insurance were mere evidences of debt, and were not, and had never been, money employed in any business in this state. The deceased had no estate in Mississippi, and these policies were not evidences of debts that had accrued, as is incident to a business conducted in this state. They were simply left in the safe of his Columbus employers on the departure of the deceased from Columbus for his untried scene of labor in Memphis. They had been deposited there, then taken out for safe-keeping, and they were merely left there for further security. *Speed v. Kelly*, 59 Miss. 47; *Jahier v. Rascoe*, 62 Miss. 699. We would have been pleased to declare a different conclusion. The anxious purpose of the unselfish youth to provide for his younger brothers or sisters, and his labors and self-denials to accomplish his noble resolve, and the tragic result of the lofty struggle, powerfully and pathetically appeal to us; but the path of duty and the way of human sympathy lie widely apart in this pitiful case, as is often found in real life. The decree of the chancery court must be affirmed.

(71 Miss. 630)

NATCHEZ BLDG. & LOAN ASS'N v. SHIELDS.

(Supreme Court of Mississippi. Feb. 19, 1894.)

BUILDING AND LOAN ASSOCIATIONS—USURY.

A member of a building and loan association who paid 32 per cent. premium for a loan, and 6 per cent. per annum on the amount thereof, and who voluntarily made a settlement, receiving credit for 72-100 of the premium paid, and his share of the profits, cannot complain that the transaction is usurious, as he received his share of the interest paid by all the members.

Appeal from circuit court, Adams county; W. P. Cassidy, Judge.

Action by J. G. Shields against Natchez Building & Loan Association to recover interest paid. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Appellee, Shields, owning six shares of stock in the Natchez Building & Loan Association, of the par value of \$200 per share, applied for a loan of \$1,200 in March, 1889, and bid 32 per cent. premium, and was granted the loan. He received the difference between the value of his stock—\$1,200—and the

32 per cent. premium bid, or \$816. To secure said loan, Shields pledged his stock, and executed a trust deed on realty, conditioned for the payment of "the aforesaid debt or principal sum of twelve hundred dollars, together with lawful interest." Appellee, after he had been a borrower for 3 years and 10 months, paid in full all the association claimed he owed it, and withdrew. In addition to \$288 paid in monthly installments of \$6 per month, appellee paid 6 per cent. interest, per annum, in monthly installments, on the whole \$1,200, throughout the period of 3 years and 10 months. On withdrawing, he was allowed the following credits: Dues at \$6 per month for 48 months, \$288; a return of his pro rata of the premium, \$228; and his pro rata share of the profits, \$28.25,—making a total credit of \$544.65,—and paid the association the difference between the \$1,200 which had been charged to him, and this credit, or \$655.35. Soon after this settlement, appellee requested appellant to refund the 6 per cent. per annum interest he had paid on the premium. Appellant refused to do this, and appellee brought this suit to recover same. On the trial of the cause, the above facts were shown by the secretary of the building and loan association, S. Meyer, the charter and by-laws of the association, the deed of trust executed by Shields, and extracts from the corporate books, showing a statement of Shields' account and settlement of same. On this evidence, appellant asked for a peremptory instruction, which the court refused, and a peremptory instruction given to find for the plaintiff. From verdict and judgment accordingly, defendant appealed.

T. Otis Baker and Nugent & McWillie, for appellant. E. E. & G. M. Brown, for appellee.

WOODS, J. As matter of fact, the appellee paid less than 10 per cent. per annum interest on the amount of money actually advanced or loaned to him. His contract, most unfavorably construed for appellant, required the payment of lawful interest on the amount of his bid; the record shows that he finally paid less than lawful interest on the sum really received by him. It is difficult to conjecture where any claim of usury can be tenably planted. But, independently of this, the appellee, on repaying his loan and withdrawing from the association, voluntarily made the settlement plainly shown in the record, and this he did with full knowledge of all the facts. In this voluntary settlement he made no mistake of fact; he has received subsequent enlightenment of law, as he now supposes. In this voluntary settlement, made with his eyes wide open, he received 72-100 of the premium bid by him, which was returned as unearned, and he received his share of all the profits made by the association during his membership, and while enjoying

the money loaned him; and these profits embraced his ratable part of all interest paid by all borrowing members, himself and others. In that settlement, he took as his own his part of all interest, now supposed to have been usurious, and yet holds it. A peremptory instruction for defendant should have been given. Reversed and remanded.

(71 Miss. 676)

Ex parte PATTERSON.

(Supreme Court of Mississippi. Feb. 19, 1894.)

HABEAS CORPUS—RETURN OF WRIT—PLACE OF HEARING.

Code, § 2237, which provides that, when a writ of habeas corpus is granted on the application of any person in custody before conviction, the writ shall be made returnable in the county in which the offense is alleged to have been committed, unless so doing will interfere with the holding of a term of court, is directory, and not jurisdictional, and does not prohibit the hearing on such a writ in another county, unless the question to be determined is the legality of relator's detention.

Appeal from circuit court, Copiah county; W. P. Cassidy, Judge.

Application by J. K. Patterson, Jr., for a writ of habeas corpus, was denied, and he appeals. Reversed.

Patterson killed one Bud Williamson in Simpson county, Miss., and then surrendered to a justice of the peace, and was by him admitted to bail. Subsequently he was indicted, arrested, and confined in jail in Simpson county. While there, he applied for a writ of habeas corpus, and a hearing was had before Chancellor Conn, the chancellor of the district of which Simpson county forms a part. This hearing upon the merits of the homicide resulted in remanding the prisoner to jail. Afterwards he was, by order of the circuit judge, sent to the jail of Copiah county, an adjoining county, but not in the same circuit-court district where he has since been confined. By reason of long confinement, the health of the prisoner became impaired, and physicians advised him that continued imprisonment would imperil his life. Thereupon he brought this, his second, petition for bail, alleging as his reason therefor his serious illness. This petition was presented to Judge Chrisman, circuit judge of the district in which Copiah county is and petitioner was confined; and, because of his own sickness, this judge made the writ returnable before Judge W. P. Cassidy, circuit judge of still another circuit-court district.

Section 632, Code 1892, reads thus: "Judges may Alternate, etc.—Judges of the circuit court may alternate and make temporary changes of their circuits whenever the public interests may require." Section 2229 of the Code is: "By Whom Granted.—The writ of habeas corpus may be granted by a judge of the supreme court, or a judge of the circuit or chancery court, in term time or in vacation, returnable before himself or another judge." Section 2230 of the Code is: "How Obtained.

—Application for a writ of habeas corpus shall be by petition, in writing, sworn to by the person for whose relief it is intended, or by some one in his behalf, describing where and by whom he is deprived of liberty, and the facts and circumstances of the restraint, with the ground relied on for relief; and the application shall be made to the judge or chancellor of the district in which the relator is imprisoned, unless good cause be shown in the petition to the contrary." Section 2237 of the Code is: "Where and When Returnable.—The writ of habeas corpus shall be returnable forthwith, or on a particular day within a reasonable time, and at a place to be named by the judge granting the writ. But when granted by a circuit judge or chancellor, on the application of any person in custody, before conviction upon a criminal charge under the laws of this state, the judge or chancellor shall cause the writ to be made returnable at a convenient place in the county in which the offense is alleged to have been committed, unless so doing will interfere with his holding of a term of court."

"On the return day of the writ, before Judge W. P. Cassidy, sitting to try the writ at Hazlehurst, in Copiah county courthouse, came the district attorney, R. S. McLaurin, of the district, and for the county where the crime had been committed, and before trial of the indictment, and moved to dismiss the hearing of the petition and the writ—First, because the petition shows that the relator is held for trial for the commission of a crime in Simpson county, and the writ should have been returnable in that county, and before the judge or chancellor of the district in which that county is; and, second, because the judge had no jurisdiction to try the cause, he being out of his district, and the petitioner not showing any cause why the circuit judge or chancellor of his own district could not try it." This motion the judge sustained, and the petitioner appealed.

Robt. Lowry, for appellant. Frank Johnston, Atty. Gen., for the State.

WOODS, J. The construction of section 2237, Code 1892, made by the learned judge who declined to hear the relator's petition on its merits, was too literal, and consequently too narrow. This section is directory merely, and not jurisdictional. It seems clear to us that its application is to be confined to cases on habeas corpus in which the merits are to be gone into and an examination of witnesses had as to the legality of the relator's detention. It is framed with reference to convenience,—the convenience of the state, the relator, and the witnesses. It was not designed to cover cases like the one at bar, where the dangerous ill health of the prisoner is the sole ground on which the application rests. The convenience of the state, the prisoner, and the witnesses (almost necessarily medical men, residing at the place of the

prisoner's confinement) will be secured by a hearing at the place of detention. Indeed, any other course might be impracticable. If the prisoner were really dangerously ill, his removal to another county would, in most cases, result in his death, and this we are not to suppose the law contemplates. We repeat, the statute is directory only, and not jurisdictional, and the power and authority of the circuit judge to hear the application in Copiah county were complete. *Reversed.*

ANDERSON v. LOUISVILLE, N. O. & T. RY. CO.

(Supreme Court of Mississippi. April 9, 1894.)

CARRIERS—FAILURE TO DELIVER FREIGHT.

In an action against a carrier for the non-delivery of goods, defendant proved that, after the lapse of some months, the goods were found at the shipping point, and there offered to plaintiff, who refused to take them. It was shown that some of the goods were damaged. Plaintiff proved the value of the goods when shipped. *Held*, that plaintiff was entitled to some damages.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Action by Belle Anderson against the Louisville, New Orleans & Texas Railway Company to recover damages for the nondelivery of goods shipped. Judgment was rendered in justice's court for plaintiff. Defendant appealed to circuit court, which rendered a judgment in its favor, and plaintiff appeals. *Reversed.*

In October, 1889, Henry Anderson, the husband of appellant, Belle Anderson, delivered to the Louisville, New Orleans & Texas Railway Company, at Clarksdale, Miss., a box of household goods, to be shipped to appellant at Memphis, Tenn., receiving a bill of lading for same. The goods did not arrive at Memphis, and after several months' delay, without getting, or hearing from, the box, Belle Anderson filed her suit in a justice of the peace court to recover the value of the contents of the box, \$113.10, and damages, \$35; filing an itemized account of the contents of the box with said officer. From a judgment for plaintiff, defendant appealed to the circuit court. The defense of appellee in the circuit court was that the goods had been found and offered to plaintiff, at Clarksdale, Miss., in good condition, and that plaintiff refused to receive them. It was shown that the box of goods was so found and offered to plaintiff, but some of the goods were shown to have been damaged. Plaintiff offered to show that the delay in getting the goods returned was so great that she was forced to buy other goods to replace them, but the court would not admit this evidence. Plaintiff proved the value of the goods, as shown by the itemized account, and that the items were in the box when delivered to the railroad company. The court gave a peremptory instruction to find for the

defendant. Plaintiff's motion for a new trial was overruled, and she appealed.

Butt & Butt, for appellant. Mayes & Harris, for appellee.

CAMPBELL, C. J. The peremptory instruction to find for the defendant should not have been given, for, manifestly, the plaintiff was entitled to recover something; and so the learned counsel for the defendant in this court evidently think, for they seek not to vindicate the action of the circuit court, except by insisting that there was no cause of action stated and lodged with the justice of the peace before whom the suit was begun. But this is a mistake as to the facts. A scrutiny of the record shows that an account, itemized, was filed with the justice who began the suit, and has this entry on it: "Filed for suit, Dec. 28, 1889. [Signed] E. G. Robertson, Justice of the Peace." He seems to have been succeeded in office by one Van Bibber, who made this entry on the account: "Filed February 21, 1890. J. W. D. Van Bibber, Justice of the Peace." It is obvious that the written statement of the cause of action was merely transposed in the transcript of the case, and, were this court to permit that to prevent a reversal of the erroneous action of the circuit court, it would be unworthy of the just and eloquent tribute lately paid to the court, for its disregard of useless forms, by one of the learned counsel who in this case has made this point. *Reversed.*

MOBILE & O. R. CO. v. BYNUM.

(Supreme Court of Mississippi. April 9, 1894.)

RAILROAD COMPANIES—OVERFLOWING LANDS.

In an action against a railroad company for overflowing plaintiff's land, it appeared that the line of the railroad ran north and south, and the stream flowed in a northeast direction, and that plaintiff's land lay to the west of the railroad, near where it crossed the stream; that deposits of the nature of those complained of were found on both sides of the railroad; that such deposits had submerged fence rails four or five feet high; that there had been a gradual filling up of valley and stream on both sides; and that the valley had been raised by natural causes. *Held*, that it was error to refuse to give a peremptory instruction for defendant.

Appeal from circuit court, Alcorn county; Newnan Cayce, Judge.

Action by J. M. Bynum against the Mobile & Ohio Railroad Company to recover damages for obstructing a waterway and overflowing land. Judgment was rendered for plaintiff, and defendant appeals. *Reversed.*

Dr. J. M. Bynum lives in the town of Rienza, Miss., and owns several lots in said town. The Mobile & Ohio Railroad, running north and south, passes on the east side of these lots. There is a natural water course or creek running in a northeasterly direction near these lots, and crosses the rail-

road east of them. For several years deposits of sand and drift have been made by this stream on these lots. The declaration alleges that the Mobile & Ohio Railroad track runs by or near plaintiff's lots; that said railroad crosses a natural water course, which also runs through or near said lots; that defendant failed to provide a sufficient or proper passageway for the water where the creek crossed its track, and has improperly constructed its trestles for the free passage of the water, and has negligently failed to remove obstructions in said waterway at its roadbed, and has failed to construct sufficient and necessary ditches or channels to prevent the obstruction of said waterway and the consequent overflow of said lots; that, by reason thereof, the channel of said waterway has filled up with sand, causing an overflow of water that would naturally seek an outlet through said channel, and, by reason of its overflow, sand and trash is deposited on plaintiff's land, to plaintiff's damage \$1,000. Defendant pleaded the general issue. Defendant's theory of defense was that on account of the clearing and cultivation of the land above the railroad and town, on the stream, for several miles, these deposits were made by natural causes, entirely independent of the railroad track and beyond its control. A peremptory instruction asked by defendant was refused. There was a verdict and judgment for plaintiff for \$355, and costs.

J. M. Boone, for appellant. Inge & Burge and E. S. Candler, Jr., for appellee.

WOODS, J. The evidence offered by the appellant showing the condition of the valley east as well as west of the railway embankment is not controverted. The civil engineer Farrar shows quite clearly that the level of the valley east and west of the line of the railroad has been raised alike and by natural causes. The overflow and deposit are found alike on both sides of the railroad. The witness Parker, who lives, and has for many years lived, east of the railroad, testifies that there is, and for some years past has been, a great and growing deposit of sand in the valley east of the railroad. The extent of these overflows and deposits in the east valley is demonstrated by the submergence of the fence posts, by the sandy deposits, which a few years ago stood four or five feet above the ground. There has been a gradual filling up of the valley and the stream on both sides of the railroad, and this elevation on the east side is wholly independent of the presence of the railroad's line. The overflow and the deposits of sands are on both sides of the line of railway embankment, and are not attributable to the construction of the railroad at all. This, in substance, is the unchallenged evidence of the company, with its conclusions based thereon. On this uncontroverted evidence,

it is certain that the filling up of the whole valley is the direct result of the operation of natural causes. The sands and deposits generally have elevated the valley east as well as west of the railroad, and quite independently of any agency on its part. The filling with sands of the immense ditch cut by the railroad from side to side of its right of way, and its prompt filling again with sand after an overflow or two, is a physical demonstration of the elevation of the valley east as well as west of the railroad. The prompt filling, by sands deposited in overflows, of the long ditch cut by the father of the witness Walter Williams, affords striking support to the evidence offered by the railroad company on this point. If the evidence of the civil engineer was true,—and there is nothing in conflict with it, but much corroborating it,—there was no liability upon the railroad company for the injuries complained of, and the peremptory instruction prayed by the appellant should have been given. Reversed and remanded.

(71 Miss. 737)

BARR v. LEWIS.

(Supreme Court of Mississippi. April 9, 1894.)
COMMISSIONER TO SELL LAND—LIABILITIES—LIMITATIONS.

1. B. was appointed by the probate court commissioner to sell land, and took a note as part payment, and gave it to his attorney for collection, who turned it over to S. for collection. S. collected it, but did not account for it. B. died. *Held*, that his estate was liable for the amount of the note.

2. Section 2694, Code 1890, provides that, when a right of action is in a guardian, the time during which limitations run against him shall be computed against the minor. The right of action accrued in 1876. The guardian died in 1879. Plaintiff became of age in 1890. *Held*, that the claim was not barred where no right of action was in any guardian after the adoption of said section.

Appeal from circuit court, La Fayette county; Eugene Johnson, Judge.

"To be officially reported."

Action by L. L. Lewis against Mrs. A. J. Barr, administratrix of the estate of R. W. Black, on a claim against the estate. Section 2694, Code 1890, provides that, when "a right of action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested." Judgment for plaintiff, and defendant appeals. Affirmed.

The cause was tried by the judge, a jury having been waived. The following agreed statement of facts was read in evidence: "It is agreed in this case that Mrs. Lewis, the mother of plaintiff, was the daughter of Samuel B. Wright, and that she died prior to the death of Sam B. Wright, leaving plaintiff her sole heir at law. It is further agreed that plaintiff reached his majority in 1890, and that during his minority his father, W.

H. Lewis, was his guardian; that said W. H. Lewis died in August, 1879; that R. W. Black was by the chancery court of La Fayette county appointed commissioner to sell certain land belonging to the estate of S. B. Wright; that he did sell said lands for \$1,977, half cash and balance on credit, to J. Jacobs; that the cash payment was paid over to the heirs of S. B. Wright, according to the order of the chancery court; and that the note for the deferred payment of \$988.50 was, by said Black, placed in the hands of H. A. Barr for collection; and that afterwards, at the instance of one of the beneficiaries in said note, Barr turned the note over to H. M. Sullivan, an attorney at law, for collection, and that said note was collected by Sullivan of Jacobs on the 20th day of April, 1876, and that plaintiff was entitled to receive one-third of same; that the defendant is the administratrix of the estate of R. W. Black, appointed as such August 1, 1876; that R. W. Black died July 21, 1876, and was in ill health when he put the note in the hands of H. A. Barr, and went to Texas for his health, whence he came back, and was confined to his bed until his death." Plaintiff then introduced from the collection book of H. M. Sullivan the following account with R. W. Black, commissioner: "R. W. Black, Commissioner. Apr. 20th, 1876, by amt. received of J. Jacobs, \$1,008.25; to paid T. H. L. Wright, \$328.66; to paid Mrs. H. Alford, \$328.66." Plaintiff then produced list of claims probated against the estate of H. M. Sullivan, which showed that this claim was not probated, and read the decrees and orders of the chancery case referred to. Upon this evidence there was a judgment for plaintiff for one-third of the amount of the note of \$988.50, with interest at 6 per cent. from April 20, 1876, and from this judgment Mrs. Barr appealed.

H. A. Barr, for appellant. Stone & Lowrey, for appellee.

CAMPBELL, C. J. True, the act of Barr, the attorney to whom Black had intrusted the claim for collection, in surrendering it to Sullivan, did not bind Black, and his estate cannot be charged by reason of that; but the legal obligation which rested on Black in his lifetime to exercise reasonable diligence and vigilance in looking to his attorney for this claim, which he had committed to him for collection, and exacting an account of him, was devolved by law on his administratrix, as his representative, who was bound to perform this duty, and is liable for its neglect, in her representative capacity, and on that ground Black's estate is answerable for this debt, if it is not barred by the statute of limitations. If any is applicable, it is the six-years statute of limitations. It is not applicable, because the death of Black, and the delivery of the note to Barr, and by him to Sullivan, and the collection of the money, all occurred in 1876; and, since the wholesome

provision contained in section 2694 of the Code of 1880, there has not been a right of action in an executor, administrator, guardian, or other trustee, so far as the record shows, so as to bring the case within its just terms, and for that reason it cannot be applied to the case, so as to stop the running of the statute of limitations.

The right of action to charge Black or his estate for account of his responsibility in the matter accrued to the guardian of the minor J. L. Lewis, and that guardian died in 1879; and under that Code there was a right of action in the minor to whom the fund belonged, and the statute of limitations did not apply to him; and this right of action, which accrued under the Code of 1871, continued subject to that Code, unless a bar accrued before suit brought under the Code of 1880, as provided by section 2692 of that Code, and, as already stated, a bar did not accrue by virtue of section 2694 of that Code, for the reason that the right of action is not shown to have been in any trustee for him, and therefore that section does not apply. That section had no existence as law until November 1, 1880, and it does not affect this case, because of the absence of the conditions designated by it, to wit, legal title or right in action of a trustee for the minor, who might and should have asserted his right to the money. Without section 2694 of the Code of 1880, it is indisputable that J. L. Lewis, the quondam minor, was not barred of his right of action when this suit was instituted. This appears by many decisions in this state. Affirmed.

Response of Court to Suggestion of Error.

The sickness and absence and inability and death of Black, and the fact that the money did not come to his hands or the hands of his lawyer, and that no negligence or dereliction of duty, while he lived, is imputable to him, do not in any manner affect the question of legal liability of his estate. He certainly incurred the liability of a trustee in becoming commissioner and acting as such, and did not acquit himself by giving the note to Barr for collection. His duty was to look after the matter, and hold his attorney to his legal responsibility, and, when he died, this duty devolved on his administratrix, who was charged with the responsibility of her intestate as to all past acts. She should have looked to Barr, and held him accountable for the note, and he, in turn, could look to Sullivan or his estate. The fact that she may not have known of the matter until this suit was instituted makes no difference as to the right of the complainant, as the suit was not barred by limitation, as shown in the opinion, and therefore it is to be considered as if she had timely notice of all the facts. It would be gratifying to us to see responsibility fixed where it ultimately belongs, but the complainant is undoubtedly entitled to the decree obtained, on the plainest legal rules;

and our regret that the burden does not at once fall where it seems ultimately to belong furnishes no reason for denial of the unmistakable legal right of the complainant to resort primarily to the estate of Black, and let its representative seek redress where it should be obtained.

(71 Miss. 819)

NELSON v. LAWSON et al.

(Supreme Court of Mississippi. April 9, 1894.)

STATUTE OF FRAUDS—SALE OF STANDING TIMBER—PART PERFORMANCE.

N. bought from plaintiff, by verbal agreement, standing timber. After cutting what he wanted, he paid \$100 to plaintiff, and sold to defendants the balance of the standing timber. Held that, as the contract between N. and plaintiff was void under the statute of frauds, the same could derive no validity from the payment to the plaintiff, as such payment was an execution of the contract only to the extent of the timber cut.

Appeal from circuit court, Tunica county; R. W. Williamson, Judge.

Action in replevin by A. J. Nelson against Lawson & Lesser to recover possession of cross-ties, etc. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

The writ was levied on the staves and cross-ties which were bonded by defendants, who pleaded not guilty, and claimed that appellant, in 1892, sold to Nelson & Perry, who were sawmill men, all the oak timber on certain quarter section of land owned by appellant, for \$100, which amount they paid him, and that appellee Lawson purchased the right to cut what had not been used by said Nelson & Perry from them for \$57; and that this amount had been paid. Both sales were verbal. All the staves and cross-ties sued for were made from timber cut by defendants from the land of plaintiff. Plaintiff and his agent, J. K. Baney, testified that they positively prohibited defendants from cutting any timber from plaintiff's land, but they continued to cut. This is not denied. Plaintiff admitted that some negotiations passed between himself and Nelson & Perry looking to a purchase by them of the ash and oak timber on his land, but the trade was not concluded as to whether it was to be paid for by the thousand or in lump, and they cut the timber, and a settlement was had between them, in which Nelson & Perry paid him for \$100 worth of the timber for what they had cut. He said he did not sell the oak timber on the whole land. Defendants showed that they purchased the right to cut all the oak timber on the land from Nelson & Perry, and introduced said A. J. Nelson and R. W. Perry to show the trade between them and plaintiff. The admission of the testimony as to the verbal contract of sale from plaintiff to Nelson & Perry of the standing oak timber, and from Nelson & Perry to defendants, was objected to when offered, but was admitted by the court. When the testimony was concluded, plaintiff

moved to exclude the testimony of A. J. Nelson and R. W. Perry, and the rebutting testimony thereto as to the verbal contract between them and plaintiff, in which it was claimed they had purchased the growing timber on the land. This motion was overruled. Plaintiff then asked for a peremptory instruction, which was refused. There was a verdict and judgment for defendants. Plaintiff's motion for a new trial was overruled, and he appealed.

W. A. Percy, for appellant. Lowe & Cochran, for appellees.

CAMPBELL, C. J. The doctrine that the invalidity of a contract under the statute of frauds cannot avail after the execution of the contract has no place in this case. Even according to the version of the contract between Nelson and Nelson & Perry given by the latter, it had been executed only to the extent of cutting what trees they wanted, and removing and paying for them; and the right they could convey by a sale of trees standing on the land, and not felled, when they paid Nelson, depended on what right they had by their verbal contract for the trees. It is conceded to be law that, if the contract was executory, it conferred no right, because not in writing. Harrell v. Miller, 35 Miss. 700. That it was not executed as to trees standing on the land when Nelson was paid is clear, and they could not assign a greater right than they had by their void contract for the growing trees. Even if they paid for all, as they contend, they got no right to them further than the contract was fully executed. It was not executed as to any trees not felled by them. Reversed and remanded for a new trial.

(71 Miss. 417)

ADAMS, State Revenue Agent, v. FRAGIA-COMO.

(Supreme Court of Mississippi. Oct. 30, 1893.)

FINE FOR SELLING LIQUOR—REMISSION BY LEGISLATURE—CONSTITUTIONALITY—REPEAL OF ACT—EFFECT ON EXISTING RIGHTS.

1. Const. art. 4, § 100, which provides that no obligation or liability of any person, etc., "held or owned" by this state or levee board shall ever be remitted, released, or postponed by the legislature in any way, nor shall such liability or obligation be extinguished except by payment thereof into the "proper treasury," nor shall such liability or obligation be "exchanged or transferred" except on payment of its "face value," does not prevent the legislature from absolving a person from liability to pay a fine imposed for selling spirituous liquors, as the word "liability," as here used, cannot be construed to include such penalty.

2. Act Feb. 2, 1890, § 2, authorizing actions by revenue agents, against persons selling liquors without a license, to recover the privilege tax, was repealed by Code 1892, c. 116, which did not provide for saving existing rights. Held, that another provision of the Code saving "existing rights," which did not take effect until several months later, did not preserve actions for the sale of liquors prior to the passage of the repealing act.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by Wirt Adams, state revenue agent, against L. Fragiacommo. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Williamson & Potter, for appellant. Calhoun & Green, for appellee.

COOPER, J. In the year 1891, the appellee carried on the business of a retailer of vinous and spirituous liquors without having obtained a license, and, for so doing, was, under the provisions of section 2 of the act of February 24, 1890 (Acts 1890, p. 6), civilly liable to the state for the highest amount he should have paid for such privilege, which was the sum of \$1,500. On the 2d day of June, 1893, the appellant, as revenue agent of the state, brought this suit to recover said sum. The defendant demurred to the declaration as stating no cause of action, which demurrer was sustained, and the plaintiff appeals. As we have heretofore held, in the case of *State v. Order of Elks*, 69 Miss. 895, 13 South. 255, the act of February 24, 1890, entitled "An act to amend the revenue law," was repealed by chapter 116 of the Code of 1892, which chapter became of force on April 2, 1892, and contains no provision for saving pending suits or existing rights. The effect of this decision is sought to be obviated by counsel in the present case, on the following grounds:

First, it is said that though chapter 116 of the Code contains no saving clause, and became operative on April 2, 1892, it was part of an entire Code, adopted at one and the same time; and since, by section 4 of the Code, the provision is made saving all former rights, this, when it became operative (November 1, 1892), had the effect of preventing from that time the destructive operation of chapter 116. The sufficient answer to this construction is that section 4 only preserves existing rights, and cannot create one. But, failing to sustain this position, counsel insist that by virtue of the act of February 24, 1890, the appellee was liable to the state to an amount equal to the highest he should have paid for the privilege of retailing, and that it was not competent for the legislature, either directly or indirectly, to absolve him from such liability, because of section 100 of the constitution, which declares that "no obligation or liability of any person, association or corporation, held or owned by this state or levee board, or any county, city or town thereof, shall ever be remitted, released or postponed or in any way diminished by the legislature; nor shall such liability or obligation be extinguished, except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged or transferred, except on payment of its face value: but this shall not be construed to prevent the legislature from providing by gen-

eral law for the compromise of doubtful claims." It must be admitted that this section of the constitution is not happily or clearly expressed, and presents difficulty of interpretation and construction. Unless the word "liability" be read as pleonastic, containing no meaning not conveyed by the word "obligation," it is difficult to limit the scope and effect of the section, for it is a word of broad import, and far-reaching in what it does or may contain. All persons who have violated the criminal laws of the state are "liable" thereto,—some to punishment, it may be, by death; others by imprisonment; and others by subjection to fines or penalties. In *U. S. v. Ulrich*, 3 Dill. 532, Fed. Cas. No. 16,594, a statute provided that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of supporting any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." Counsel for the accused contended that these words could refer only to civil proceedings, and could not be construed as continuing responsibility for criminal acts committed under a statute after its repeal; but Judge Miller, in delivering the opinion of the court, said: "Without attempting to go into a precise definition of each of these words, it is my opinion that they were used by congress to include all forms of punishments for crime; and, as strong evidence of this view, I found, during the progress of the argument, and called the attention of counsel to, a section which prescribed fine and imprisonment for two years, wherein congress used the words 'shall be liable to a penalty of not less than one thousand dollars, * * * and to imprisonment not more than two years.' Moreover, any man using common language might say, and very properly, that congress had subjected a party to a liability, and if asked, 'What liability?' might reply: 'A liability to be imprisoned.' This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word 'liability' is intended to cover any form of punishment to which a man subjects himself by violating the common laws of the country." The word "liability" has no precise technical meaning, and therefore it must be assumed that it was used by the framers of the constitution either in its popular meaning or in the same restricted and limited sense.

To begin with, then, we find a word of the broadest significance, and we, at once, ask, "How shall it be interpreted?" The primary maxim for interpretation is to read it to mean what it is commonly understood to mean. Having done this, we must then consider whether we have, in this way, approached to or departed from the intention of the makers of the law. If we find that,

by the use of this rule of construction, we are getting away from the scheme or plan and meaning of the lawmakers, common sense admonishes us to lay aside the rule, which is a means and not an end, and resort to other and different methods of inquiry, restricted always by the principle that the meaning of the law is to be discovered within and from its language, and not from extraneous sources of information. These extraneous matters may throw light on the language employed, but can serve only to illumine, and not to destroy, the writing as the exponent of the will of the lawgiver. The mere statements, if it were possible to enumerate them, of the infinite ways by which the citizen comes under liability to the state, and the forms of such liability, would challenge and refute the correctness of an interpretation of the word "liability," as here used, which would withdraw from the legislature all power as affecting those who have become subject thereto. Liability for violation of statute or common law; liability to fine, penalty, or forfeiture; liability in tort, and by contract, express or implied; liability for acts willfully, negligently, or unintentionally done, and for omitting to act when action is made a duty; liability for the civil, and, in some instances, for the criminal, act of an agent or servant,—all come within the literal meaning of the language used. But it is entirely certain that no such purpose was within the contemplation of the convention which framed and put in force our organic law. It was dealing in reference to a known evil, and its purpose was to use such language as should make effectual the prohibition it imposed. The principal form in which that evil existed was in reference to delinquencies by persons charged with the collection, custody, and disbursement of public moneys, and who were, by law, required to give bond for the faithful discharge of such duties. Under the constitution of 1869, the delinquent officer was rendered ineligible to hold any office of profit or trust in the state. But experience had shown that this disability imposed no sufficient restraint, and that it was not at all unusual to have appeals made to the legislature by the sureties on official bonds for authority to make compromises with the state, counties, and municipalities of known, acknowledged, and fixed defaults of this character. In one instance an acknowledged defaulter for public moneys secured the enactment of a law by which a compromise was authorized, and, it having been effected and executed, he was "vindicated," in the language of the day, by being triumphantly returned as a member of the next succeeding legislature. It was against the power to compromise claims of this character that the prohibition was principally aimed, but its language was so chosen as to include cases of pecuniary obligations of other classes. A careful scrutiny of the language of the en-

tire section shows that the universality of the word "liability" was intended to be restricted, or perhaps it is more accurate to say that the word cannot be read in its full sense without doing violence to the purpose of the section as a whole. In the first clause of the section it is declared that "no obligation or liability of any person, association or corporation, held or owned by the state," etc. Now, although, in a sense, the state may be said to hold or own a liability to which a person, association, or corporation may be subject, these words are suggestive that the convention intended by the words "obligation" or "liability" such obligations or liabilities only as fall within the class which are ordinarily spoken of as "held" or "owned." In the next clause we find the words "obligation" and "liability" transposed: "Nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury." Now, the strength of the contention that the convention intended to cover liabilities of all characters rests upon the rule that, having used the word "obligation," the broader and more general word "liability" was added, and that, to give the word any function to perform, it must be held to mean something not included in the word "obligation." Prima facie, the use of different words implies a legislative purpose that a different meaning shall be attached to them; but no rule of construction can be sound which fails to recognize that there may be, and often is, a change of phraseology without a change of meaning, and, when this appears, the mere change of the language is considered insignificant. *End. Interp. St. § 881*, and authorities. If, therefore, the words "obligation" and "liability" are used interchangeably throughout the law, the inference is that no contrast was intended. But, going further, we find the declaration to be: "Nor shall such liability or obligation be extinguished, except by payment thereof into the *proper treasury*." The words which we here italicize are perfectly applicable as applied to the class of fixed and certain claims, but would be wholly inapt in reference to a large class of those falling under the general word "liability." The next clause is of still more significance: "Nor shall such liability or obligation be exchanged or transferred except on payment of its face value." "Such liability or obligation" means, of course, the "obligation or liability" referred to in the first clause of the statute; and these, it is declared, shall not be exchanged or transferred except upon payment of its (their) face value. We must assume that these words were employed in the sense in which, and with reference to those things to which, they are almost universally applied. A liability which is the subject of exchange and transfer, and which has a face value, would unquestionably fall within the meaning of the word "obligation;" and we are, from the face of the sec-

tion alone, led to the conclusion that the words "obligation" and "liability" are used in substantially the same meaning, and that the latter word was employed *ex industria*, rather than for the purpose of giving an entirely new turn and phase to the meaning of the section. Nor can it be denied that the effect of the construction contended for by appellant would be of far-reaching and appalling consequences. The general course of legislation having no direct reference to the subject of the obligations of citizens to the state and its political municipalities would be seriously, and perhaps, in some instances, fatally, impaired. We cannot now conjecture all the limitations it would impose, but the present appeal illustrates one class which we cannot believe it was the purpose of the convention to withdraw, in any degree, from legislative control. The universal rule is that the repeal of a statute destroys all mere rights which rest entirely and alone on its provisions,—those which are created and conferred by it; and the argument of this case rests entirely upon the proposition that because, under the statute, a liability existed against the appellee which would be destroyed by its repeal, the legislature is deprived of power over the subject so far as to effect the existing liability. Aside from the restriction on legislative action, the section operates equally upon the levee board, and upon the counties and towns of the state, and, if construed according to contention of counsel, would disable not only the state, but all its subdivisions, from making any concession or agreement in reference to very many subjects as to which it may be of the very highest importance that the power should exist. As a litigant, the state or any corporation named would be precluded from conducting its suit with that freedom of action which is often thought to be invaluable in the progress of litigation. No agreement of counsel, however honestly made, no concession, no compromise, the effect of which would be to diminish or postpone the demand asserted, would be conclusive, and therefore none would ever be accepted. From a consequence such as this the mind shrinks and retreats. A change so radical and serious can only be believed to have been contemplated when the language used is clear and unambiguous, and sufficient to impel to but one conclusion. Such, in our opinion, is not the character of the section of the constitution we are called on to construe, and we therefore hold that, in relation to the matter now under consideration, the legislative power is not restrained. **Affirmed.**

(71 Miss. 867)

SNODGRASS et al. v. NOLAN.

(Supreme Court of Mississippi. March 12, 1894.)

DISMISSAL OF APPEAL.

Before an appeal has been perfected by filing the appeal bond, a motion by appellee to v.1580.no.20—51

docket and dismiss the same, under Code 1892, § 4355, will not be granted, there being no appeal pending.

Appeal from chancery court, Yazoo county.
"To be officially reported."

Appeal by Owen Snodgrass and others from a judgment in favor of James H. Nolan, administrator. On motion by appellee, Nolan, to docket and dismiss the appeal. Motion denied.

R. Bowman, for appellee.

CAMPBELL, C. J. An appeal has been taken to the supreme court, within the meaning of section 4355 of the Code of 1892, when it has been perfected, and not before. A party may pray an appeal in open court, and obtain an order therefor, or may petition the clerk for an appeal; but that is not taking an appeal, where the law requires more to perfect it. That is a step in the process of taking an appeal, and nothing more. It may be abandoned. It affects nobody. Of itself, not accompanied by the bond required, it effects nothing, and may be disregarded. Motion denied.

(46 La. Ann. 1247)

STATE v. LOUIS. (No. 1,291.)

(Supreme Court of Louisiana. June 15, 1894.)

DEFECTIVE COUNT IN INFORMATION — SHOOTING WITH INTENT TO MURDER — PROCEEDING BY INFORMATION — SUFFICIENCY.

1. The accused was charged in an information with robbery in one court, and shooting with intent to murder in another court. A general verdict of guilty was found against him. After conviction, he interposed a motion in arrest of judgment. After hearing upon this motion, the prosecutor entered a *nolle prosequi* as to the first count, and the court sentenced the accused under the good count.

A Defective Count.

The verdict embraced the two counts of the information, and, although the first count was vicious, the verdict is not disturbed as to the count that is good.

2. The effect is the same as if the vicious count had been quashed as defective. The accused was sentenced under the good count.

Surplusage.

3. The defendant was charged in the second and good count with shooting with intent to murder, under circumstances other than those mentioned in section 790 of the Revised Statutes. The robbery charged in the bad count was surplusage in so far as related to the second and good count.

4. The accused was not prosecuted under section 790 of the Revised Statutes. The information was framed under section 791 of the Revised Statutes, and complies with the requirements of that section.

(Syllabus by the Court.)

Appeal from district court, parish of Ascension.

Peter Louis was convicted of shooting with intent to murder, and appeals. **Affirmed.**

R. N. Sims, for appellant. J. P. Madison, Dist. Atty., for the State.

BREAUX, J. The information filed in this case, in two counts, charges that "one Peter Louis, late of the parish of Ascension, on the 24th day of September, 1893, upon Liberto Cosico, feloniously did make an assault; and him, the said Cosico, in bodily fear and danger of his life then and there feloniously did put; six dollars of the money, chattels, and goods of the said Liberto Cosico from the person and against the said Liberto Cosico, then and there feloniously did steal, take, and carry away, contrary to the form of the statute of Louisiana in such cases made and provided, and against the peace and dignity of the same; and the said district attorney aforesaid, who prosecutes, as aforesaid, in the 20th judicial district court in and for the parish of Ascension, gives the court here to understand and be informed that said Peter Louis, aforesaid, late of said parish, at the same time and place, having, as aforesaid, assaulted and robbed said Liberto Cosico, did then and there, with force and arms, in said parish and within the jurisdiction of said court, willfully, feloniously, and of his malice aforethought, shoot one Liberto Cosico, in the peace of the state then and there being, with a dangerous weapon, to wit, a pistol, with the intent the said Liberto Cosico then and there, feloniously, willfully, and of his malice aforethought, to kill and murder." The accused was tried, and found guilty. From a sentence condemning him to be imprisoned in the state penitentiary at hard labor during 20 years, the accused prosecutes this appeal. In his motion in arrest of judgment, the defendant averred that the first count of the information does not set forth the commission of a crime; that a prosecution under section 809, Rev. St., is wholly inconsistent with a prosecution under 791, Id., under which section the state has declared. After this motion in arrest of judgment had been submitted to the court for decision, the state entered a nolle prosequi as to the first count of the information, and sentence was thereafter passed upon the accused, as to the second count.

In an assignment of error filed before this court, the defendant, through counsel, submits the following points: First. That the withdrawal of the first count eliminated from the crime charged the essential ingredient of robbery, and he could not be sentenced under section 791 of the Revised Statutes. Second. That the verdict and sentence are ultra vires, null, and void because defendant could not be held to answer to an information charging him with shooting with intent to murder in the perpetration of a crime of robbery; that the state could proceed against him on such a charge only by indictment.

A Defective Count and a Good Count.

All the grounds, briefly stated in the order presented, are: First. That the state could not enter a nolle prosequi as to the defective

count, and sustain application for sentence on the remaining count. The defendant pleaded to the information without calling on the prosecutor to elect, and without motion to quash. He was found guilty on each count. The first, being vicious, was abandoned; the second remained. The charge in the first count was treated as surplusage, and withdrawn. It being separate and distinct from the good counts it could be quashed, and the accused sentenced under the good count. Mr. Wharton, in his work on Criminal Evidence (page 138), says: "All unnecessary averments may, on trial or arrest of judgment, be rejected as surplusage if the instrument would be good on striking them out." This court has approvingly quoted this section as applying to the quashing of vicious counts. *State v. Brown*, 35 La. Ann. 1058. The effect, in this case, of entering a nolle prosequi as to the vicious count after a general verdict of guilty is the same as if the vicious count had been quashed. The text writers upon the subject and jurisprudence unite in announcing that a bad count may be quashed without affecting the prosecution under the count not vicious. If an indictment contains a good count, a motion to quash should, as to it, be overruled. *State v. Snow*, 30 La. Ann. 403; *Whart. Cr. Pl.* § 394; 1 *Bish. Cr. Pr.* 764.

Surplusage.

Second. The defendant urges that the nolle prosequi as to the bad count carried with it the essential ingredient of robbery, found in the second count, and that, in consequence, he could not be sentenced. We have not discovered the merits of this point. The section under which the information was framed provides that "whoever shall shoot * * * with intent to commit murder, under any other circumstances than those mentioned in the preceding section, shall on conviction suffer imprisonment at hard labor or otherwise for not less than one nor more than twenty-one years." Rev. St. § 791. Shooting with intent to murder under other circumstances than those mentioned in section 790 of the Revised Statutes is the crime charged in the information, and of which the accused was pronounced guilty. Robbery is not one of the ingredients of the crime for which the accused was sentenced, and the "robbery" set forth in the bad count was surplusage, in so far as related to the second and good count.

The Section of the Revised Statutes under Which the Information was Framed.

Third. That the second charge, which has direct reference to the first charge, of robbery, comes within the provisions of section 790 of the Revised Statutes, and the prosecution for that crime is limited to indictment (Const. art. 5), and is not possible by information. The second count—i. e. the good count—contains a mere reference to the

charge in the first or bad count. In setting aside the first count, the charge of robbery was eliminated altogether. It is no part of the gravamen of the second count, and the reference to it was properly treated by the trial judge as mere surplusage. He was not charged with "lying in wait," nor with robbery, and therefore was not prosecuted under section 790, requiring presentment or indictment by grand jury. He was presented under section 791, and found guilty of shooting, with intent to murder, under other circumstances than those mentioned in the preceding section,—a crime which may be charged by information of the prosecuting officer.

The foregoing are the grounds urged to reverse the proceeding of the district court. They do not establish that error has been committed on account of which the appeal should be reversed. Judgment affirmed.

(46 La. Ann. 1250)

ROSS v. ENAUT et al. (No. 1,297.)

(Supreme Court of Louisiana. June 16, 1894.)

SUPREME COURT—APPELLATE JURISDICTION—RECOVERY OF LAND—MORTGAGE FORECLOSURE—COLLATERAL ATTACK—LIMITATIONS.

On Motion to Dismiss the Appeal.

This case is within the jurisdiction of this court, being a suit against different persons who are interested in maintaining the title to a tract of land. A decree of nullity would affect the title of each. They are therefore interested alike, without regard to the extent of their respective claims.

Merits.

1. A mortgage was due to the "Consolidated Association of the Planters of Louisiana." The tutrix sued out an injunction against the foreclosure of the mortgage. The issues raised were decided against her. She had the right to stand in judgment. Her wards are concluded by the judgment, and, at their majority, are without right to reopen questions finally settled. "Status reipublice maxime judicatis rebus continetur."

2. Informalities of a sale are cured by the prescription of five years.

On Rehearing.

1. Proof establishing that plaintiff was divested of his title, subsequent to the sale of his property, by another, whose right to sell he disputed, having been admitted without objection, he cannot recover the property to which he no longer has title.

2. The value of the land involved, the revenues, and the improvements to be partitioned in case of judgment for plaintiff enter into consideration in determining jurisdiction.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

Action by Charles H. Ross against L. Enaut and others. Judgment for plaintiff, and defendants appeal. Reversed.

Boatner & Lamkin and Potts & Hudson, for appellants. Gunby & Sholars, for appellee.

BREAUX, J. The action was instituted to recover one-fourth interest in a square of

land in the city of Monroe. The late James Hart bequeathed this square to the plaintiff, his mother, and his two sisters. He, plaintiff, alleges that on the 20th of January, 1881, his mother, individually, sold to Annie E. Livingston a part of the square; that on the 5th day of February, 1893, the sheriff sold the remainder of the land to the Consolidated Association of the Planters of Louisiana, under an order of seizure and sale issued on a pretended 12-months bond executed by his mother in the suit of the Consolidated Association et al. v. James W. Mason et al., filed November 23, 1870, to enforce a mortgage against the entire property left by Hart, which proceedings were enjoined by Ben Hart and J. W. Locke, executors of James Hart; that on the 17th June, 1876, by way of compromise, the executors and his mother, as principals, executed this pretended 12-months bond in favor of the Consolidated Association of the Planters; that there was no advertisement, and no adjudication, of the property, and the bond was a conventional agreement, on which process of law could not issue, so as to bind third persons; that on 30th April, 1881, the Consolidated Association caused an order of seizure and sale to issue, as if it had been a 12-months bond with vendor's lien, under which the sheriff seized the property, and finally sold it to that association on February 5, 1883; and that subsequently the association sold the land to Richard Sinnott. The defendants interposed peremptory exceptions of res judicata and estoppel, in which they allege that the questions and issues raised had been decided in the suit of plaintiff, acting through his tutrix and legal representative. This exception was referred to the merits. In their answers they set forth their grounds of defense, and especially plead that the action to annul the sale assailed is barred by the prescription of five years. The facts are that on the 17th day of April, 1830, the "Consolidated Association of the Planters" secured a loan, by mortgage, on a tract of land adjacent to Monroe, containing the part de non alienando. In course of time it became the property of Dr. John Calderwood, who sold to James Hart, subject to the mortgage. The Consolidated Association brought suit against the original mortgagor, and against James Hart, the possessor, to enforce the mortgage. The defendant Hart filed a peremptory exception in that suit, on the following grounds: That the land was not accurately described; that the mortgage was in the French language, and therefore not the notice required. Hart having died, his executors were made parties to the suit, and, contradictorily with them, a judgment was obtained for the sum due, and recognizing the mortgage. The judgment was affirmed on appeal. In execution of the judgment, the property was seized. It failed to sell for cash, and was readvertised for sale on 12 months' credit. When about to be

sold, the sale was enjoined by the executors of James Hart's estate, and by Mrs. Bracy, the tutrix of plaintiff. The injunction was dissolved. The evidence that a sale followed the dissolution of the injunction consists principally of recitals in a 12-months bond, given by these parties, for the price. After the statement in the bond that the price was \$1,896.97, with legal interest, it is declared that the purchasers were the last and highest bidders of the property mortgaged, and that the property was seized to satisfy an execution issued in the suit entitled "The Consolidated Association of the Planters v. J. W. Mason et al., No. 800," which, after complying with all the "forms of law, was on the 17th day of June, 1874, offered for sale on a credit of twelve months, and adjudicated to said Locke and Hart's executors and Louisa C. Bracy, wife of S. L. Bracy." This bond is dated the 17th day of June, 1876. This property was seized. The sale was enjoined by plaintiff's mother and tutrix, who alleged in her petition for the injunction that she, personally and as tutrix, owned the property under the terms of the will of the late James Hart; that the bond was not a 12-months bond, but a mere conventional agreement; that, preceding the execution of the bond, no sale had been made. The sheriff and the bank answered. After trial, judgment was pronounced for the latter. From the judgment plaintiff having appealed, this court decided "that a party signing a 12-months bond is not permitted, where execution issues thereon, under article 720, Code Pr., to arrest the writ on the ground that there was no seizure, advertisement, and sale of the property in the case in which the bond was furnished, the bond reciting that all the requirements of the law had been complied with. By signing the bond, the party has cured all the irregularities, if any existed,"—citing authorities. *Bracy v. McGuire*, 34 La. Ann. 997. The property, on the 3d day of February, 1883, offered for sale under the bond, was adjudicated to the Consolidated Association in satisfaction of its mortgage, and possession was taken by the purchaser. In February, 1883, Mrs. Bracy, individually and as tutrix of plaintiff, sued the warrantor of her title, and obtained judgment against him for \$5,000. She alleged that she had been evicted from the property. A compromise was effected between plaintiff in the case and her warrantor; the latter paid \$2,000, and the judgment obtained by the plaintiff against the warrantor was transferred in accordance with the terms of the compromise. The plaintiff in this case denies the signature to a letter of transfer of this judgment, purporting to be his.

Motion to Dismiss the Appeal.

The square involved in this suit has been divided into lots, belonging at this time to separate owners. As to two of the defend-

ants, plaintiff and appellee moves to dismiss the appeal, on the ground that the amount in dispute as to them does not exceed \$2,000. Each of these defendants traces his title to one author, and is interested in maintaining the sale assailed by the plaintiff. If nullity be decreed, it will have the effect of absolutely destroying each title. The value of the property involved in this case, in which each of the defendants is interested in maintaining the title, is of an amount within this court's jurisdiction. A similar question was determined in *Derbes v. Romero*, 28 La. Ann. 645. Multifariousness of suits is to be avoided, if consistent with reasonable interpretation of the law conferring jurisdiction.

Foreclosure of Mortgage.

The plaintiff and his colegatees received the property burdened with a mortgage. In the first suit filed to foreclose, the testator was the party defendant, and at his death the executors of his estate became defendants. Contradictorily with them, the Consolidated Association obtained a judgment decreeing that the property was sufficiently described and the registry legal.

Injunction.

Subsequently, the executors and plaintiff's tutrix, in an injunction, assailed the mortgage and alleged the irregularity of the proceedings. This injunction was dissolved, and judgment pronounced for plaintiff, maintaining the mortgage and ordering the property to be sold.

Sale.

At the offering that followed, plaintiff's mother and the executors became the adjudicatees. The property was not sold when offered for cash; it was readvertised for sale on 12-months bond, and it was at this sale that they,—plaintiff's mother and the executors,—became adjudicatees.

Twelve-Months Bond.

Some time after the year had elapsed, execution was issued on the 12-months bond for the purchase price. The mother of plaintiff, individually and as tutrix of her minor children, Charles H., Hattie, and Katie, sued out an injunction on grounds pleaded by plaintiff in the present action. This court, on appeal, maintained the legality of the 12-months bond and of the proceedings preceding the bond, and specially decreed that the adjudication under which the property passed from the ownership and possession of the bank's mortgage debtor to the purchasers, Mrs. Bracy and the executors, was legal. All the points now presented have been previously decided in suits of record. After the several decisions that must be held as conclusive upon those who were parties, the Planters Association became the purchaser, and the defendants now trace their titles to that purchase.

Minors' Interest.

It only remains for us to determine whether the proceedings bind the minors at their majority; in other words, whether the tutrix had authority to appear and plead in their behalf. It does not admit of question that a minor can be represented in judicial proceedings by a tutor acting for and in his name. The tutor has authority to sue and protect the interest intrusted to him.

Res Judicata.

It necessarily follows that the effect of *res judicata* extends to the minor thus represented. Ordinarily, if a tutor acts injudiciously in litigation in which his ward is interested, he is responsible, and must indemnify him for the loss thereby occasioned. If fraud and downright wrong are committed, to the minor's prejudice, they would vitiate the proceedings, and possibly not prove a protection to any title. Neither error nor fraud is suggested in the case at bar as having been committed by the tutrix, who sought to protect her minor children by invoking the aid of the courts to prevent the sale of property in which they had an interest. The court, in *Beard v. Morancy*, 3 Rob. (La.) 121, summarily disposes of the question in a petitory action. We lay out of view the exception to the want "of authority in the tutor to institute this suit." The law regarding *res judicata* makes no distinction; the minor himself, "when represented, is equally bound by the authority of the thing adjudged, the sanction of which is founded in the safety of society itself." "*Status reipublicae maxime judicatis rebus continetur.*" *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 313.

The Tutrix Had the Right to Purchase.

With reference to possible prejudice resulting to the minor's interest in these proceedings, it is argued that the tutrix was without right personally to buy the property at the sale made in 1878. This, on the part of plaintiff, assumes that the tutrix personally had no interest in the property,—an error of fact, for she was a *colegatee* of the plaintiff, and one of the joint owners. By Act Feb., 1841, No. 30, a tutor may purchase in the same cases as an executor, curator, or administrator; that is, when she is a partner in community, or an heir or legatee. There was no conflict of interest. It is also urged in argument that the plaintiff is not concluded by the appearance of his tutrix in these suits, for the reason that there was a conflict of interest, and that action should have been left to the under tutor. There was a joint, and not an antagonistic, interest between the tutrix and the minors. She is a debtor personally, and as tutrix defended the cases, and sought to escape from payment of the debt in their interest and in her own. Her interest and duty were not at all at variance.

Suit after Eviction for Value of Property.

Having been evicted, after judgment, she accepted the inevitable, and instituted suit against the warrantor to recover the amount due her and her children because of the eviction. It was her right and duty to thus seek to protect their interest. She obtained a judgment against the warrantor for the value of the property from which they had been evicted, in April, 1884,—a few months prior to the majority of plaintiff. In her petition for the judgment, she admitted the legality of the proceedings for eviction. The judgment obtained remained unquestioned as to its legality.

Compromise.

Propositions of compromise between the creditor and judgment debtor were considered, and finally resulted in the acceptance by plaintiff's mother of an amount less than the face of the judgment obtained. The attorney who represented the warrantor testifies that in the settlement made he required that all the heirs who were minors at the time the suit was brought, who had arrived at the age of majority, should be parties to the settlement; that, in consequence, powers of attorney were obtained from the heirs absent, and the compromise effected. These powers of attorney are lost, and witnesses could not prove the full scope of the power conferred. Careful and respectable attorneys at the time thought it was sufficient, and the compromise was made. The name of plaintiff, with the names of his *colegatees*, is signed to a transfer of the judgment obtained, and the receipt states, "for valid consideration." The plaintiff, as a witness, denies the genuineness of the signature purporting to be his, and he adds that he does not think that it was written by his mother, who held his power of attorney. The mother was not called upon to testify in the case. We do not question the truthfulness of plaintiff's testimony regarding his signature to this receipt. The fact remains, that it may have been signed by one empowered to sign; that during many years the transaction was unquestioned. Third persons who are purchasers cannot be affected by these latent defects. They had the right to presume that the receipt was signed by the plaintiff. Granted all that is claimed in behalf of plaintiff in reference to the receipt, and leaving it out of consideration entirely, the plaintiff is confronted by the judgment obtained by his tutrix, and which she, after his majority, collected for his and *cocreditors'* account, and by the proceedings which led to the judgment; all admitting the validity of the eviction to which he had been subjected.

If Error was Committed, Tutrix was Responsible.

If the tutrix has committed an error, it would be, at most, of judgment, for which she would become responsible to the heirs,

for whom she acted in compromising a judgment obtained in her name, and which, in so far as third persons are concerned, has all the characteristics of unqualified acquiescence by the heirs.

Prescription.

The defendants plead the prescription of five years as curing all informalities connected with or growing out of any public sale made by any person authorized, as applying "whether against minors, married women or interdicted persons," Rev. Civ. Code, art. 3543. Contradictorily with the tutrix, authorized to represent her minor children, regarding the very property involved, and the title now assailed on the grounds now alleged by plaintiff, this court held, besides, "It would seem that the lapse of five years has rectified what irregularities may have existed." 34 La. Ann. 997 (already cited). The 12-months bond in question contains the declaration that the proceedings upon which it was based were regular. These declarations have been accepted as correct in a decision of this court. Subsequent to that decision, the tutrix, in her suit against the warrantor, judicially admitted that the property had been seized, advertised, and regularly sold. If there were irregularities, they are barred by the prescription pleaded. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that plaintiff's demand be rejected, at his cost in both courts.

McENERY, J., recuses himself, having been of counsel.

On Application for Rehearing.

Impressed by the earnest application of counsel for a rehearing, and the commendable zeal it manifests in behalf of his client, we have re-examined the voluminous transcript from cover to cover, and laid it aside convinced of the correctness of our decision, upon the points urged on the previous hearing. When the property in question was inherited by plaintiff's mother, sisters, and himself, it was subject to a mortgage; and a suit to foreclose that mortgage had been instituted against their testator, James Hart, who was in possession as owner. As one of the adjudicatees of the property, the mother of plaintiff, with the executors, executed a 12-months bond, and thereby each acknowledged his ownership in the proportion of one-third, i. e. plaintiff's mother, one-third, and the remainder for the estate, represented by the executors. A writ of *fi. fa.* having issued on the 12-months bond, the tutrix sued out an injunction, in which she alleged all the defenses pleaded by plaintiff in the suit at bar. The demand of the tutrix in the injunction proceedings was rejected. It was decreed that she was barred by the proceedings, and that the irregulari-

ties pleaded were closed by the bond. The property was sold contradictorily with the executors and the tutrix, and adjudicated to the Planters' Association, thereby completely divesting the executors and the tutrix from their ownership. If the executors had any claims in the property prior to this last sale, they were transferred to the adjudicatee. They were parties to the proceedings, and are bound by the adjudication. Since that sale, Mrs. Bracy, personally and as tutrix, and the executors, have no rights to the property. The property passed out of their possession and ownership. John Calderwood, the vendor to James Hart, being dead, suit was instituted by plaintiff's tutrix against the legal representatives of his succession (warrantors of the title). The plaintiff in that case recovered judgment against them as warrantors of the title. In a compromise, an amount was received in satisfaction of the judgment. The plaintiff executed a power of attorney, which was lost. He was of age at the date of the compromise. From the evidence, it is fair to infer that it was sent to his mother, to sign, as his agent, transferring the judgment obtained by her, as tutrix and personally, against the warrantor. The power of attorney was considered at the time as giving ample authority to the agent to effect the compromise. Regarding the signature to the transfer, still extant, the attorney representing plaintiff's mother testifies that he made a memorandum, at the time, of the fact that Mrs. Bracy had signed plaintiff's signature. There is sufficient affirmative proof of a power of attorney. The evidence relating to the signature was sufficiently direct as to render it incumbent upon him to introduce his mother as witness to disprove that she signed his name. If she signed plaintiff's name, as we have every reason to believe, from the evidence, that she has, the testimony admitted to prove the authority given in the power of attorney satisfies us that she was duly authorized. It therefore is proved that, with his consent, his (plaintiff's) mother and tutrix received the value of the property claimed by her for him, when he was a minor; in other words, through her, he accepted the eviction as legal and binding. It is urged that, in any event, as to one of the defendants, Hardin, we should change our decree; that he bought from Mrs. Bracy, personally, prior to the last sheriff's sale, and that he has not interposed the pleas of *res judicata* and estoppel in his separate defense in this case, and therefore cannot be benefited by those pleas filed by his codefendants. As a proposition of law, we agree with plaintiff's counsel in so far as relates to the plea of *res judicata*. It must be specially pleaded. But this proposition is not supported by the facts. As to the plea of estoppel, though not specially made, the defendant, in objecting to the admissibility of testimony, did urge the grounds, against admission, that

plaintiff was estopped. It is argued that Mrs. Bracy sold the lot to him prior to the last sale, and that in consequence she sold it at a time that there was an interest remaining in the estate of James Hart, testator. Without any objection whatever on the part of plaintiff, the defendant proved that, subsequent to her sale to him, the tatrix and her co-owners were divested completely of all title. The plaintiff is confronted with the last deed, which we cannot overlook, having been admitted in evidence without the least objection. An owner who allows proof admitted is bound by the proof. Plaintiff cannot recover property of which he has been divested. The plaintiff reiterates that the court is without jurisdiction in so far as relates to the defendant Hardin; that he held a title distinct and separate from that of his co-defendants. His title is as dependent upon the regularity of the proceedings as those of his codefendants. It is the same, save that he purchased prior to the sale to the Louisiana Association of Planters. After the divestiture by the effect of the last sale was proved, it was in all respects the same. He is therefore interested in all the proceedings from commencement to end. If this court had annulled the proceedings, his title would have been annulled. Moreover, this defendant claims his improvements, amounting in value to more than \$2,000. The plaintiff claims the revenues and the land of which the improvements are a part by destination. The value of these improvements and the rental value of the property are admitted. The pleading limits the claim for improvements to one-fourth. Had the judgment been affirmed, and the decree rendered in conformity with the pleading, a partition of these improvements would have been ordered, of property of value within the jurisdiction of this court. Rehearing refused.

(104 Ala. 297)

AMERICAN OAK EXTRACT CO. v. RYAN.

(Supreme Court of Alabama. June 21, 1894.)

SALE—ACTION FOR PRICE—INSTRUCTIONS.

1. In an action for the price of wood under an alleged contract whereby defendant agreed to take from plaintiff wood delivered on the bank of the T. river, defendant to furnish a barge on which to load the wood, and plaintiff to load it, if plaintiff complied with the contract, but defendant failed to furnish a barge, and the wood was burned without plaintiff's fault, plaintiff could recover.

2. An instruction withdrawing from the jury the consideration of a disputed question of fact is erroneous.

3. In an action for the price of wood to be delivered at a convenient point on the bank of the T. river, defendant to furnish a barge, on which plaintiff was to load it, where defendant testified that he stated that the time in which a barge could be furnished would depend on circumstances, and that when the wood should be so placed he would furnish a barge as soon as circumstances would permit,

a charge that there was no evidence that it was part of the contract that the river was to be in such a condition as to permit a barge to be landed where the wood was placed is erroneous.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by F. M. Ryan against the American Oak Extract Company. There was a judgment for plaintiff. Defendant appeals. Reversed.

This was an action brought by the appellee, F. M. Ryan, against the American Oak Extract Company, to recover an amount, alleged to be due the plaintiff for 50 cords of wood, under a contract, alleged to have been made with the defendant. There are four counts in the complaint. The first is on an account, alleged to be due on the 1st day of October, 1891. The other three are on a contract, not differing, except that each is fuller in its statement than the preceding one, but each the same in substance and effect. The first and second were demurred to, and the demurrers were overruled. Afterwards the third and fourth were added, by leave of the court, and these were demurred to also, and the demurrers were overruled. The gravamen of the complaint is, that on or about the 12th of August, 1892, the plaintiff, F. M. Ryan, and J. J. Ryan entered into a contract with the defendant, whereby it was agreed that defendant would take from plaintiff and John J. Ryan 50 cords of wood at the price of \$2.50 a cord if they would deliver said wood at a convenient point on the bank of the Tennessee river, in Morgan county, the defendant to furnish a barge, on which the wood was to be loaded, and plaintiff and said John J. Ryan were to load said wood upon said barge. It is averred, that after said contract was made, said John J. Ryan sold to the plaintiff all the right and interest he had in said contract, made as aforesaid with the defendant; that plaintiff cut said 50 cords of wood, and placed it at a convenient place on the bank of the Tennessee river, in all respects as he has contracted to do, and notified defendant that said wood had been cut, and where it had been placed on the bank of said river, and requested defendant to send a barge for it, as it had contracted to do; but defendant failed and refused to send a barge on which to load said wood, and failed and refused to take and receive said wood, and to furnish a barge for the same, and the wood was destroyed and lost to the plaintiff, whereby he was damaged \$125, for which he sues. A demurrer was interposed to these counts and overruled. The defendant then pleaded to the second, third, and fourth counts of the complaint, setting up, "that, if it ever made any such contract as alleged in the complaint, at the time plaintiff claims to have demanded of it, a barge, on which said wood was to be loaded, the Tennessee river, upon which said barge was to be floated, to the point where said 50 cords of wood is alleged to have been placed, was too low to permit the furnishing of said barge

by the defendants for the purpose of loading said wood until after the said wood had been destroyed; that the barge was to have been furnished, if furnished at all, from the works in New Decatur, Ala., by defendant, and that, by reason of the low stage of the water in said river, it was impossible for defendant to furnish said barge; that by said alleged contract, the barge was to be furnished only in the event the condition of the river should be such that the said barge could be floated at and after that time, and the plaintiff should notify the defendant that he had as much as 50 cords of wood at some point on the Tennessee river, to be loaded on said barge." The plaintiff demurred to specified parts of said special pleas, which was overruled. Thereupon the plaintiff replied to said pleas in substance,—the first replication denying the allegation that plaintiff was to furnish and load said wood on the barge only in the event and when said river was in such condition as that the barge could be floated thereon; second, that defendant refused to take said wood and furnish said barge, on the ground that it had no such contract, and thereby waived its plea of inability to place said barge on the Tennessee river on account of the condition of said river, if such condition was in the contract; third, that after the plaintiff had fully performed his contract with defendant, he notified defendant that the wood was ready to be loaded on a barge, and requested defendant to furnish a barge, but defendant declined to furnish one, upon the express ground that the works of defendant were shut down for repairs, and defendant said nothing about the river being in such a condition that a barge could not be placed for said wood thereon, or that said river was at low water. Wherefore plaintiff avers that defendant waived any condition in the contract, if there was any such condition therein, exonerating defendant from placing said barge at said point, or taking said 50 cords of wood, as is averred in the complaint. On this replication issue appears to have been joined. To the original and amended complaints the defendant also pleaded that the allegations of said complaint are untrue.

The evidence tended to show that a few days prior to the 14th of August, 1892, one E. M. Russell had a conversation with J. J. Ryan, who was a brother of plaintiff, in which said Ryan requested him (Russell) to see the managing agent of the defendant, and to ascertain from him whether he (Ryan) could sell the defendant some chestnut oak wood, and what it was paying for it; that on the morning of the 14th of that month, at the breakfast table at the tavern in Decatur, he (Russell) met Harvey Lewis, the secretary and general manager of the defendant, who, as was shown, had the right to contract for the purchase of wood for defendant, and said to him that he had a friend in the country, who desired to sell to

the defendant some chestnut oak wood; that he asked said Lewis what the defendant was paying for it, and Lewis replied, "\$2.50 per cord"; that whenever his friend would place upon the bank of the river as much as 50 cords or 100 cords, at a convenient place where a barge could be landed for the purpose of loading, and would notify him, that he would have their steamboat drop a barge down where it could be loaded thereon; that he did not remember positively whether he stated the name of the party desiring to sell the wood or not, but his best recollection was that he told him it was Mr. Ryan; but Mr. Lewis testified that his best recollection was that the name of the party was not given. Russell also testified that, according to the best of his recollection, nothing was said about the stage of the water in the Tennessee river having anything to do with the ability of defendant to place the barge upon which the wood was to be loaded, and that Lewis told him that when the wood was loaded upon the barge the defendant would pay \$2.50 per cord therefor; and he immediately notified Ryan of the terms and conditions of Lewis' offer. There was no conflict in the evidence as to plaintiff's having delivered the 50 cords of wood at a place on the river known as "Simpson's Field," in Morgan county, about six miles above Somerville; that he had bought out his brother's interest in the wood, and became sole owner of it, before it was all delivered; and that the delivery was made about the 1st day of October, 1891. The plaintiff testified that on the 2d of October, 1891, he went to the works of the defendant, and saw Mr. Lewis, and told him the wood was ready for the barge, and requested him to have one put where the wood was, so that it could be loaded thereon; that Lewis, at first, did not admit anything about the contract, but, after the witness reminded him of the conversation he had with said Russell, in reference to the wood, he then acknowledged the conversation, and said he remembered all about having had it, but stated that defendant could not furnish a barge for the wood; that it had stopped its works for repairs; but he said nothing about the river being too low to place a barge at the place plaintiff had corded the wood. He also testified that the wood lay on the banks of the river where he had corded it, from the 1st of October to the 5th of November, 1891; that four or five weeks after he first saw Lewis and notified him of the delivery of the wood, and requested him to furnish the barge, the wood was destroyed by fire, and he then went to Lewis and demanded pay for the wood; that Lewis refused to pay for it, denied having made a contract for it, or to furnish a barge; that this was the first time Lewis had denied making a contract after he had been reminded of the conversation with said Russell; that in the first conversation he had with him, he admitted the contract, and said he was sorry he could not

comply with it; but that the works had shut down, and he could not take the wood. He said nothing about the river being too low for defendant to put a barge where the wood was. The witness, Lewis, testified for the defendant that he remembered the conversation with said Russell, and his account of it was that Russell asked him what he was paying for wood, and he told him they were paying \$2.50 per cord, delivered upon a barge; that Russell said to him that he had a friend who had some wood he desired to sell, and in the conversation he told him he could not furnish a barge immediately upon being notified; that the time within which one could be furnished would depend upon circumstances; that there was no contract between him and Russell, but the simple statement by him to Russell that defendant would take wood at \$2.50 per cord when placed upon the bank of the river where it could be reached by a barge, and that, if the wood should be so placed, and the defendant notified, it would place a barge upon which the wood was to be loaded, as soon as circumstances would permit; that from the 25th of August to the 25th of November the river was too low to permit the running of defendant's boat and barges thereon, and that by reason of the stage of the water in the river the defendant could not have placed a barge at the point where plaintiff is alleged to have corded the wood, at any time between the 1st of October and the last of November following. He further testified that he told the plaintiff that it was impossible for the defendant to furnish him a barge to load the wood on, even if defendant had a contract for the wood, because the river was too low to permit the running of the boat and barges belonging to defendant; that he never admitted to the defendant, in any conversation, that he had made a contract for the purchase of this wood, and never stated to him that the only reason he could not furnish a barge was because defendant's works had closed down for repairs. He also stated that he only had a casual conversation with said Russell at the breakfast table, was not making and did not make any contract, and did not say to Russell that the barge would be furnished only on condition the river was in such a boatable condition as would enable defendant to place a barge where the wood was. The evidence as to the stage of the water in the river at the time plaintiff demanded a barge was in conflict; that of plaintiff showing that there was an abundance of water to admit of placing a barge at the place requested, and that of defendant that it could not have been done.

The court, at the request of the plaintiff, gave the following written charges to the jury: (1) "If you believe from all the evidence that defendant contracted with plaintiff and J. J. Ryan to take fifty cords of wood at \$2.50 per cord, and that defendant would furnish a barge to load it upon, and

you further find that J. J. Ryan sold or surrendered his interest in said contract to plaintiff, and that plaintiff complied with the contract so made, if you find it was made, and you further find that defendant broke the contract by failing to furnish the barge, and you find that the wood was burned up without the fault of plaintiff, then, if you believe these facts, if facts they be, the plaintiff is entitled to a verdict." (2) "I charge you as a matter of law that if the plaintiff placed the wood on the river bank on or about the 1st of October, 1891, and notified defendant on or about the 2d of October, 1891, that the wood was so placed, and that the wood stayed there four or five weeks after October 2, 1891, then, if you believe this, I charge you as matter of law, defendant had a reasonable time to remove said wood." (3) "I charge you, gentlemen of the jury, that there is no evidence before you showing that it was a part of the contract (if a contract was made) that the Tennessee river was to be in such condition as to permit a barge to be landed where the wood was put." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges, requested by it: (1) "I charge you, gentlemen, that under the proof in this case there was no contract between the plaintiff and the defendant." (2) "If you believe the evidence, your verdict must be for the defendant."

There was judgment for the plaintiff, and the defendant appeals. The assignments of error are founded upon the rulings of the court upon the pleadings and proof.

D. W. Speake, for appellant. O. Kyle, for appellee.

HARALSON, J. 1. There was much pleading in this case, and to go through with it all to vindicate the rulings of the court thereon, would be tedious and unnecessary. It is sufficient to say, we find no errors of which the appellant can complain.

2. Let the following principles governing this case be first stated: "The doing of a thing pursuant to an offer may be both an acceptance and performance. If one makes an offer to another, or to all persons in general and does not withdraw it while the other person in the former case, or any one in the latter, goes forward and does the thing, such performance carries with it an acceptance of the offer; and the person who made it must pay or do what he promises." Bish. Cont. §§ 329, 330.

3. "In unilateral contracts, it is often, if not generally the case, that acceptance of the offer is only to be inferred from the performance of the consideration. If this is performed in accordance with the terms of the offer, a contract is thereby formed without notifying the offerer of the intention to perform, or of the completion of the per-

formance." 1 Pars. Cont. 492, note 1, and authorities. So too, it has been held, that if one offers to another to do something, if that other will do something else, and the party to whom such offer is made acts upon it, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer by the party offered, before proceeding to carry it out, is unnecessary. *Bank v. Watkins*, 154 Mass. 387, 28 N. E. 275; 1 Pars. Cont. 493; 3 Am. & Eng. Enc. Law, 847, and authorities cited.

4. Where a contract does not specify a particular time for its performance, the presumption is, that the parties intended performance within a reasonable time. And this is sometimes a question of fact, and at others, one of law. When it depends on facts extrinsic of the contract, which are matters of dispute, it is a question of fact; but, when it depends upon a construction of a contract in writing, or upon undisputed, extrinsic facts, it is matter of law. *Cotton v. Cotton*, 75 Ala. 346; *Howard v. Railroad Co.*, 91 Ala. 269, 8 South. 868.

5. The evidence for the plaintiff tended to establish the allegations of his complaint, and that of defendant to establish its plea. If defendant proposed, and the plaintiff performed, as is averred, and that, within a reasonable time, the offer and performance constituted a binding executed contract. Making application of the foregoing principle, we hold that charge No. 1 given at the request of the plaintiff, is free from error. It proceeds upon the hypothesis, that if the plaintiff complied with the contract, if one was made, whatever it may have been, and the defendant broke it, by failing to furnish the barge, and the wood was burned without fault of plaintiff, plaintiff was entitled to recover, which is a correct statement of the law.

6. In charge numbered 2, the court erred in withdrawing from the jury the consideration of the disputed fact of the stage of the water in the river, at the time of plaintiff's alleged performance of the contract,—if they should believe that one was entered into, and this was a part of it,—and whether or not it had reasonable time, after notice of the delivery of the wood, to send a barge for and receive it, before it was destroyed.

7. Charge 3 was erroneous. There was evidence on the part of the defendant, which tended to show that it was a part of the understanding between the parties—if as a matter of fact there was a contract between them—that the river was to be in such a condition as to permit a barge to be landed for the wood. The witness, Lewis, testified, that in his conversation with Russell—on which the plaintiff counts to establish his contract, but which the defendant denies did establish one—he told him, "that the time within which a barge could be furnished would depend upon circumstances," that he further said to him, "that defendant would pay \$2.50

per cord, when placed on the bank of the river, where it could be reached by a barge, and that [when] the wood should be so placed and the defendant notified, it would place a barge upon which the wood was to be loaded, as soon as circumstances would permit." If this was the correct version of the understanding, the stage of the water in the river necessarily entered into the consideration of the time when the barge was to be furnished. There was no error in refusing the two charges requested by defendant. Reversed and remanded.

(102 Ala. 101)

EZELL v. STATE. (No. 698.)

(Supreme Court of Alabama. Feb. 13, 1894.)

HOMICIDE—JURY—SUMMONING—GROUND OF CHALLENGE—COMPLETING JURY—CHARGING ON EVIDENCE—MURDER IN THE SECOND DEGREE.

1. Act Feb. 21, 1887, § 3, providing that in Montgomery county the jury list shall be selected from the male residents between 21 and 60 years old, and section 13, repealing Code 1876, § 4732 (Code 1886, § 4299), which requires the jury list to be selected from householders and freeholders, and all other laws inconsistent with the act, repeal for such county Code 1886, § 4331, declaring it ground for challenge in a criminal case that the person has not been a resident householder or freeholder for a year. *Coleman and Head, JJ.*, dissenting.

2. Under Act Feb. 21, 1887, § 10, providing that if, in a capital case, a jury be not made of those summoned and who appear, the court shall draw from the jury box enough names to complete the jury, it is error to draw such names before the list of those summoned and appearing has been exhausted.

3. Under proviso to Act Feb. 21, 1887, § 10, that, should a juror drawn to complete the jury, after the list of those summoned and appearing has been exhausted, reside more than two miles from the courthouse, the court may, in its discretion, excuse him, it cannot pass over or excuse any one living at a less distance.

4. A motion to reject *A. J. McCullough* and *W. L. Smilie* as jurors should be granted where their names are set forth in the notice of the venire served on defendant as *A. J. McCudough* and *W. L. Smile*.

5. The fact that a sheriff supposes or knows that a person whose name appears on the venire is exempt or disqualified as a juror does not excuse his failure to summon him, the questions of exemption and qualification being for the court.

6. It is error for the court to charge that the evidence shows that defendant is guilty of murder.

7. Under Code 1886, § 3725, declaring "willful, deliberate, malicious, and premeditated killing" murder in the first degree, a charge that murder in the second degree is the unlawful killing with malice aforethought without the premeditation and deliberation of murder in the first degree, is correct.

Appeal from city court of Montgomery; *Thomas M. Arrington, Judge.*

Charles Ezell was convicted of murder, and appeals. Reversed and remanded.

The bill of exceptions, after reciting that, on the case being called, both parties announced "Ready," then proceeds: "The court instructed the sheriff to proceed to draw the jury, but before a single name had been

drawn from the hat the defendant moved the court to quash the venire upon the following ground: That on the list of the jury served on the defendant the names of A. J. McCullough, W. L. Smille, W. F. Wilson, and S. A. Wood, which were on the original venire, and who had been summoned by the sheriff, did not appear, but that the names on the said list were A. J. McCudough, W. L. Smile, M. F. Wilson, and S. A. Woods. The court, after inspecting the said list served on said defendant, overruled said motion, and refused to quash the venire, but as to said S. A. Wood the court made the order herein-after set out. The defendant then and there excepted to the overruling of the said motion. The court then ordered the name of S. A. Wood to be taken from the hat, and to be struck from the list, and ordered the board of jury commissioners to bring the jury box into court, whereupon Charlie Allen, one of the jury commissioners, brought the jury box into court, and the court instructed the said Charlie Allen to open the jury box. The defendant objected to the jury box being opened. The court overruled the objection, and the defendant excepted. The court then drew several names from the jury box (three men whose names were drawn resided within two miles of the courthouse), laying all the names drawn aside. The defendant objected to the court's laying aside the names drawn, because the juror living within two miles of the courthouse whose name was first drawn should be the juror summoned. Thereupon the court asked the deputy sheriff which of the names was first drawn, whereupon the deputy sheriff replied that J. M. McDonald's was the first name drawn. The court then ordered the sheriff to bring J. M. McDonald into court. The defendant objected, the court overruled the objection, and the defendant duly excepted. J. M. McDonald was brought into court. The court then ordered the sheriff to serve the defendant with the name of J. M. McDonald. The sheriff wrote the name of J. M. McDonald on a small slip of paper, and handed it to the defendant. The defendant objected to the service of the said J. M. McDonald's name at this time, because the name was irregularly drawn, and moved to quash the venire because he had not been served with a complete list of the jurors summoned to try his case before the day set for the trial thereof, as required by law. The objection and motion were overruled, and McDonald's name was placed in the hat with the names of the other jurors, and the defendant duly excepted. The name of W. L. Smille being drawn from the hat, the defendant moved to quash the venire, because on the list of the jury served on the defendant the name of W. L. Smille did not appear, but said name on said list was W. L. Smile. The court, after inspecting said list served on the defendant, overruled said motion, and defendant excepted. The defendant then moved

the court to strike the name of W. L. Smille from the list, and summon another juror in his stead. The court overruled the motion, and the defendant excepted. The sheriff then proceeded to draw the jury. The name of Gracie Niblett was drawn from the hat. The state announced, 'Satisfied.' The defendant challenged the said Gracie Niblett for cause, on the ground that he was neither a freeholder nor a householder. The defendant showed by the juror's own testimony that he was neither a freeholder nor a householder. The court refused to allow this as a challenge for cause. The defendant excepted to such ruling, and challenged the said juror peremptorily. The name of W. C. Parks was then drawn from the hat, and announced by the deputy sheriff, 'Not Found.' The defendant objected to the sheriff's return, upon the ground that W. C. Parks was found by the sheriff, but was not served with a summons. The defendant introduced Sheriff Waller, who, being duly sworn, testified 'that he had found and seen W. C. Parks, but did not serve the summons upon him, because he [the sheriff] thought Parks was too old and deaf to serve on a jury, but that he did not have the jury summons, and was not engaged in summoning the jury in this case, which work was done by his deputy, B. C. Young, who had the summons in his possession, and summoned the jury.' The state introduced B. C. Young, a deputy sheriff, who, being duly sworn, testified that he had the list of jurors for the purpose of summoning them, and did summon all the jurors who were summoned, but he did not summon the said Parks because he did not find him. That he knew old man Parks, but did not know that his name was W. C. Parks, and had no idea that the summons was intended for him, as he knew that he was too old and deaf to serve on a jury, and did not look for him, because he had heard that he was too old and deaf to serve on a jury. And the state also introduced in evidence the return of the sheriff showing that W. C. Parks was not found. Thereupon the defendant moved to quash the venire upon the ground that the order of the court directed the sheriff to summon seventy-five (75) jurors, including the regular panel, and that the sheriff had failed to comply with the order. The motion was overruled, and the defendant excepted. The sheriff was directed by the court to lay aside the name of W. C. Parks, and to proceed with the drawing, to which action of the court the defendant excepted. By this time 11 jurors had been selected. The state had made eight peremptory challenges and the defendant twelve. The name of A. J. McCullough was drawn. The state announced, 'Satisfied,' and the defendant challenged him peremptorily. The court refused to allow the defendant this peremptory challenge, and placed the said McCullough on the jury, the defendant not challenging the said McCullough for cause, to which action of the

court the defendant excepted. After twelve jurors were selected, and before sworn, and the venire not having been exhausted, the defendant objected to going on to trial and to the jury, upon the ground that he had been forced to select a jury from less than fifty jurors, twelve of the jurors summoned being out on another jury. The court overruled the objection, and the defendant excepted."

The testimony for the state tended to prove that on the night of the murder, Hester Ezell, the deceased, and her husband, Charles Ezell, the defendant, quarreled; that, after quarreling, he left the deceased, and went to his house, and returned in a short while with a gun, which was unloaded; that the defendant and the deceased again commenced to quarrel, and they went in the direction of what is known as "the old chimney," near the city of Montgomery; that later they were seen going in the same direction, but were not then quarreling; that the next morning the deceased was found lying between the river and the "old chimney;" that she was not dead, but unconscious, and had three severe wounds on her head, produced by blows from a blunt instrument, either two of which were sufficient to cause death; that lying near were the broken lock and stock of the gun which Charles Ezell had; that, after living several hours without regaining consciousness, she died from the wounds above mentioned. The state introduced in evidence the confession of the defendant, made two or three days after the killing, in which, after stating the circumstances, he admitted that he struck the deceased on the head with the stock of his gun, and broke the stock. The defendant testified as a witness in his own behalf, and his testimony was, with the exception of a few details, substantially the same as was his confession introduced in evidence by the state. The two portions of the court's general charge which were separately excepted to by the defendant are copied in the opinion. The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe that the defendant struck the deceased in passion, they cannot find him guilty of murder. The presence of passion precludes the presence of malice. They cannot exist in the same mind at the same time, nor can the same act be the outgrowth of both at once. If the defendant struck in passion, there was no malice." (2) "If the jury have a reasonable doubt that the killing was done in the heat of passion, they cannot find the defendant guilty of murder." (3) "The jury cannot, under the indictment in which the defendant Charles Ezell is accused, find him guilty of a higher crime than murder in the second [degree]."

Hill, Roquemore & Rogers, for appellant.
Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. It has long been the general law of this state that only freeholders and householders of the county are competent to do jury duty. Hence it was ground of challenge for cause if the person offered for such service was neither a freeholder nor a householder. But the act "to more effectually secure competent and well-qualified jurors in the county of Montgomery," has, it is contended, changed that rule, so far as that county is concerned. Act approved February 21, 1887 (Sess. Acts, p. 190). In section 3 of that act it is declared that the jury commissioners shall select the "jury list" from "the male residents of the county over twenty-one and under sixty years of age." The presiding judge held that the qualification of "freeholder or householder" was no longer requisite for jury service under the statute, and to this ruling defendant excepted. We refer also to act approved December 4, 1888 (Sess. Acts, p. 139); Sess. Acts 1892-93, p. 917.

Our attention has been directed to *Iverson v. State*, 52 Ala. 170, as being opposed to these views. Some expressions found in the majority opinion in that case, if considered without reference to the state of the statutes on which they were pronounced, give a seeming support to this contention. But the statutes were entirely different from those which must control the question we have in hand. This will be made plain by a brief reference to the statute law as it existed before, and when the statute which gave rise to that discussion was enacted, December 31, 1868. Sess. Acts 1868, pp. 550, 551. Who were competent grand and petit jurors, and the mode of selecting them, before and up to the enactment of that statute, had been made known by sections 4062, 4063, Code 1867. Section 4062 declared who should be placed on the list from which the selection was to be made, namely, "all the householders and freeholders residing in" the county. From this list it was made the duty to select "the names of such persons as may [should] be thought competent to discharge the duties of grand and petit jurors for the county." Section 4063 directed what county officers should make the selection, announced certain disqualifications, and declared the rules and principles by which the officers should be governed in making the selections. It in no sense impaired the force of section 4062, which prescribed that householders and freeholders should constitute the list from which the selections should be made. Now, the act approved December 31, 1868, amended section 4063 of the Code of 1867, and by constitutional provision repealed that section as it theretofore existed. It made no reference whatever to section 4062 of that Code. It enacted an additional qualification for jury service,—they must be "registered voters." The statute itself shows that there was no intention to abrogate or dispense with any qualifications section 4062

had prescribed that jurors should have. The decision of the majority of the court in Iverson's Case need not be and is not assailed. We state what we think was the true ground to rest it on, namely, that the purpose of the amendatory statute was, not to dispense with any former qualifications of jurors, but to require an additional one. Had the legislature intended to give the statute a larger operation, they must needs have amended, not only section 4063 of the Revised Code, but section 4062 as well. This they did not do.

The jury law for Montgomery county, approved February 21, 1887 (Sess. Acts p. 190), has very different provisions. It does not refer to any section of the Code, and does not express any intention to amend or repeal any former law, save in its last section (18). It declares "that section (4732) four thousand seven hundred and thirty-two of the Code of Alabama, and all other laws and parts of laws, general and special, conflicting with the provisions of this act, be, and the same are hereby, repealed; but all laws now in force in relation to jurors, their drawing, selecting, or qualification, not in conflict with this act, are hereby continued in full force and effect." Now, what is section 4732 of the Code of 1876, the Code of our statutes which was of force when the jury law of Montgomery county was enacted, February 21, 1887, and which section was thereby repealed in express terms? It is the same section verbatim which is numbered 4062 in the Code of 1867, 4732 in the Code of 1876, and 4299 in the Code of 1886. It is the section which makes it the duty of the sheriff "to obtain biennially a list of all the householders and freeholders residing in his county, from which list must be selected" the grand and petit jurors, so that the law requiring that the list from which jurors are selected shall be householders and freeholders is expressly repealed, so far as Montgomery county is concerned. This leaves Montgomery county without directions as to the classes of persons from which jurors shall be selected, save as said act of February 21, 1887, prescribes rules. The statute of February 21, 1887, created a board of revenue for Montgomery county, and constituted it a board of jury commissioners. The sheriff, judge of probate, and clerk of the circuit court are relieved of all duties in obtaining a list, selecting suitable persons for jury service, and drawing juries, alike grand and petit. These duties are transferred to the board of jury commissioners. Sections 3, 4, and 5 of the act contain the directions. Section 3 commands "that said commissioners, at such meeting, shall select from the male residents of the county, over twenty-one and under sixty years of age, the names of all such persons, not exempt from jury duty, as, in their opinions, are fit and competent to discharge the duties of grand and petit jurors, with honesty, im-

partiality and intelligence." Sections 3, 4, and 5 then proceed to declare the further duties of the jury commissioners in preparing lists of the jurors selected, in drawing juries for the several courts from the list of "male residents of the county," etc. The words "freeholders and householders" are nowhere mentioned in the statute; and section 4299 of the Code of 1886 being, as we have shown, expressly repealed as to Montgomery county, it follows that those qualifications cease to be essential to the eligibility of jurors in that county.

We apprehend that under the act we are construing—February 21, 1887—no one will deny that "the male residents of the county [Montgomery] over twenty-one and under sixty years of age" constitute the body of persons from which the jury list must be selected. The statute, in terms, says so. There is no statute in existence, applicable to Montgomery county, which declares that they must be freeholders or householders. It follows that residents of the county, who are neither freeholders nor householders, will, in the nature of things, be drawn as jurors. They are competent for all jury service, and are eligible to be placed on juries in all cases. Throughout their entire service, either in selecting the jury list or drawing juries for the courts, or for any special service, the jury commissioners, and all others charged with the duty of drawing juries, are without authority to dictate as a qualification that the persons drawn shall be freeholders or householders. If the service proposed be that of grand juror, or the trial of a civil cause, no one can be heard to object to or to challenge for cause any resident of the county who may be offered, on the ground that he is neither a freeholder nor a householder. Can we hold that a person who is eligible to be placed on the jury list of Montgomery county cannot be objected to for cause when tendered as a grand juror or as a juror in a civil case, yet may be challenged for cause in a criminal prosecution, on a ground which does not authorize the court or the jury commission to strike or withhold his name from the jury list or panel? We hold that in the repealing clause of the act of February 21, 1887, not only is section 4299 of the Code of 1886 repealed in and for Montgomery county, but also the first ground of challenge enumerated in section 4331 in the same Code. This, because that ground of challenge conflicts with the later enactment. The city court did not err in disallowing the challenge of the juror Gracie Niblett for the cause assigned. He was a competent juror under the statutes applicable to Montgomery county.

When the court rejected S. A. Wood as a juror because his name did not appear on the list of the venire which had been served on the defendant, the presiding judge proceeded at once to supply his place by drawing another name from the jury box, and placing

it in the box or hat from which the jury was to be completed. This was done before the panel had become exhausted, and the defendant excepted to this action. There was also a question raised as to the duty of the court to take for this service, to be offered for acceptance or rejection, the first name drawn of a person who resided within two miles of the courthouse. This particular duty or service is provided for in the proviso to section 10 of the act approved February 21, 1887 (Sess. Acts, p. 195). Its language is, "that if at the time appointed for the trial of the capital case a jury should not be made of those summoned and appear, the court shall draw from the petit jury box a sufficient number of names to complete said jury; provided, that should any juror so drawn reside more than two miles from the court house, the said juror may, in the discretion of the presiding judge, be relieved from attendance on said trial." This provision of the act of 1887 has never been changed. The drawing in this case to supply the place of the juror Wood, misdescribed in the notice served on the prisoner, was premature. Such drawing is not authorized, unless there is a failure to complete a jury of 12 from those who are summoned and who appear. It cannot be known there will be such failure until all the names are drawn from the box or hat, and the panel in that way exhausted. Nor does the statute give the presiding judge authority to pass over or excuse any competent juror whose name may be drawn, unless such person "resides more than two miles from the court house." In drawing the juror at the time it is shown to have been done in this case the city court erred. The statute should be conformed to. *Murphy v. State*, 86 Ala. 45, 5 South. 432; *Steele v. State*, 83 Ala. 20, 3 South. 547. Fearing our silence might be misinterpreted, we will add that the names of the jurors Smalley and McCullough appear to have been so imperfectly set forth in the notice of the venire served on the defendant that defendant's motion to reject them should have prevailed. This, however, would not necessarily lead to a quashal of the venire.

The record is not very clear as to the reason why the juror W. C. Parks was not summoned. If it was because he was supposed, or even known, to be exempt or disqualified, that was not sufficient excuse for the sheriff to fail to summon him. That was a question for the court to consider of. In the charge to the jury the court said: "So far as the evidence appears, it is murder; it is murder beyond all doubt. His own counsel do not claim he is not guilty of murder." In *Cooley*, Const. Lim. (6th Ed.) 392, that great jurist employs this language: "A judge is not justified in expressing his convictions to the jury that the defendant is guilty under the evidence adduced." Murder, with us, has different degrees. If coun-

sel, in argument, should concede the client's guilt of the offense charged, and only contend for a mitigation of the crime to the less heinous degree, we do not doubt the right of the court to repeat to the jury what counsel had admitted. Beyond this the court should not go. As shown in the record, the court erred in giving this charge.

The court also charged the jury as follows: "Murder in the second degree is the unlawful killing of another with malice aforethought, without the premeditation and deliberation of murder in the first degree." There can be no question that the facts hypothesized in this charge would constitute murder in the second degree. Any homicide which would be murder at common law, if not attended by all of the aggravating circumstances enumerated in our statute as constituting murder in the first degree, is murder in the second degree. Code 1886, § 3725. "Willful, deliberate, malicious, and premeditated killing" constitutes one species of murder in the first degree, under our statutory classification. To come within this class, all of these properties or qualifying adjectives must be found to have coexisted. *Mitchell v. State*, 60 Ala. 28. The absence of any one of them, unless necessarily implied in the facts proved and found to exist, would reduce murder to the second degree. Hence the absence of "premeditation and deliberation," as asserted in the charge, or the absence of either of them, would reduce the offense to the second degree. So the absence of willfulness and maliciousness, or either of them, unless, as we have said, necessarily implied in the facts found, would have the same effect. In charging on the subject we are considering, it would be well to state all the qualifying adjectives, for the absence of any one of them reduces the homicide below the grade of murder in the first degree, unless it falls within one of the other classes of murder in the first degree, such as poisoning, lying in wait, etc. But, as we have said, the charge asserts a correct proposition of law. If there was apprehension it might mislead, an explanatory charge might have been asked. The charges asked for defendant were, each of them, rightly refused. Reversed and remanded.

COLEMAN, J. (dissenting). The defendant was indicted and tried for murder, and convicted of murder in the first degree. The question of importance is whether it was good ground for challenge that the juror Niblett was neither a freeholder nor householder. Section 4331, subd. 1, of the Criminal Code provides that "it is good ground for challenge by either party—1. That the person has not been a resident householder or freeholder of the county for the last preceding year." It is conceded in argument that, unless this provision is repealed by special act for Montgomery county, the trial court erred in refusing to allow the defend-

ant to challenge the juror for cause. The act of February 21, 1893 (Acts 1892-93, p. 917), and the act of December 4, 1888 (Acts 1888-89, p. 139), and Act 1886-87, p. 190, are not materially different, so far as they bear upon the question under consideration. Section 3 of the act of 1886-87 enacts "that said commissioners, at such meeting, shall select from the male residents of the county over twenty-one, and under sixty years of age, the names of all such persons, not exempt from jury duty, as in their opinion are fit and competent to discharge the duties of grand and petit jurors, with honesty, impartiality and intelligence," etc. The act of 1888-89, *supra*, was amendatory of the act of 1886-87; but in no way altered the foregoing provision. The act of 1892-93, *supra*, seems to be an independent act, complete of itself. It makes no reference to any other act or law, either general or special, and the first section was evidently copied from section 3, *supra*, of the act of 1886-87. Neither of the two later acts undertakes to legislate upon the right of challenge, or prescribe or regulate the ground of challenge. It is not pretended that section 4331, subd. 1, of the Code, *supra*, is expressly repealed, but the contention is that the provision quoted from section 3 of the act of 1886-87, *supra*, by implication repeals subdivision 1 of section 4331, *supra*; that the two are inconsistent with each other, and that to allow subdivision 1 to stand as ground for challenge would defeat the clear legislative intent of the act of 1886-87. We do not assent to this contention. The established rule of construction of statutes does not favor the repeal of statutes by implication. Unless there is that repugnancy or inconsistency that in executing one violence is done to the other, the two must stand; and it cannot be said that the statutes bear this relation to each other when there are different fields of operation for both. It cannot be doubted that the legislature is fully empowered to prescribe the qualification of grand and petit jurors, and it is equally within its constitutional authority to prescribe grounds of challenge for cause for both parties and peremptory challenges. Suppose the act of 1886-87, with proper caption to cover this provision, after providing, as it does in section 3, "that the commissioners shall select from the male residents of the county over twenty-one and under sixty years of age, the names of all such persons, not exempt from jury duty, as, in their opinion, are fit and competent to discharge the duties of grand and petit jurors," etc., had expressly declared that all the grounds of challenge for cause enumerated under section 4331 shall apply to trial of cases under the act, would any court hold that the provisions were so repugnant and inconsistent that both could not stand? Suppose the statute for Montgomery county had been enacted as a general law, and substituted for section 4299 of the Code (4732 of

the Code of 1876), could it be contended that such amendment repealed section 4331 of the Code, which relates only to challenges for cause? Would it not be clear that, while the legislature enlarged the body of persons from whom jurors were to be selected to such persons residents of the county between 21 and 60 years of age as, in the opinion of the commissioners, were fit and competent, yet it preserved to persons on trial for a capital offense the right, at their option, to be tried only by a jury possessed of certain prescribed qualifications? The juror thus selected might be competent to be put upon a party, and the cause of challenge might be waived, but, if the party saw proper to demand a jury of householders or freeholders, the law accorded to him the right. It is in the exercise of the same legislative power and upon like principle that the law allows a certain number of peremptory challenges, notwithstanding the juror may possess every statutory qualification. We think it manifest from reading section 10 of the act of 1886-87 that it was the intention of the legislature to preserve and continue in force all the grounds of challenge for cause contained in the general law. The last clause of that section is in the following words: "In addition to the challenges for cause, allowed by law, the defendant shall have the right to peremptorily challenge twelve such jurors, and the state eight of them." Here we find an express change of the general law as to the number of peremptory challenges, but a positive, unmistakable recognition of the "challenges for cause allowed by law." Section 4331 is as follows: "Challenge for Cause. It is good ground for challenge by either party—1st. That the person has not been a resident householder or freeholder of the county for the last preceding year. 2d. That he is not a citizen of Alabama. 3d. That he has been indicted within the last twelve months for an offense of the same character as that with which the defendant is charged. 4th. That he is connected by consanguinity within the ninth degree or by affinity within the fifth degree (computing according to the rules of civil law) either with the defendant or the prosecutor, or the person alleged to be injured. 5th. That he has been convicted of a felony. 6th. That he has an interest in the conviction or acquittal of the defendant, or has made any promise or given any assurance that he will convict or acquit the defendant. 7th. That he has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict. 8th. That he is under twenty-one, or over seventy years of age. 9th. That he is of unsound mind. 10th. That he is a witness for the other party." Here are 10 enumerated statutory grounds for challenge, and they are none the less statutory because that some were grounds of challenge at common law. What argument can be presented that the first of the grounds for challenge was re-

pealed, and the second and third and fifth and tenth, as well as others, were not also repealed? The general qualifications of jurors and the statutory grounds for challenge are entirely independent of each other. In the Code they are under different headings and in different articles. Can it be said that the commissioners, in selecting "such persons * * * as in their opinion are fit and competent to discharge the duties of grand and petit jurors with honesty, impartiality, and intelligence," at the same time are authorized to determine challenges for cause; or that a person who, in their opinion, is fit for the duty of grand and petit juror, is not subject to the statutory challenges for cause? The act provides that the commissioners "shall select from the male residents of the county over twenty-one and under 60 years of age," etc. The statute says "from the male residents." The cause of challenge is that, if the person is not a "citizen" of the state, it is ground of challenge. Are we to hold that a mere resident, without regard to length of time of residence or citizenship of the state, is not subject to challenge for cause, with the positive enactment that he may be challenged for cause unless a citizen of the state and resident for 12 months? We know of no decision of a state court, and certainly no principle or decision at common law, which supports the proposition. The commissioners may, in their opinion, deem a person under an indictment for a similar offense "fit" to discharge the duties of grand and petit jurors. It may be, an indictment preferred by a grand jury composed in part of such persons under our statutes would be valid; but is the statutory ground of challenge for cause abolished which applies only to petit jurors summoned to try a capital case? It required no legislation to give a right to challenge *propter defectum* if the person summoned did not possess the legal qualifications. It was cause for challenge at common law, and is cause for challenge now, independent of statute. But when the legislature enacts certain statutory grounds as cause for challenge, applicable solely to petit jurors, it requires either a positive repeal of the act, or such regulation relating to the right of challenge which may be asserted at the trial as is inconsistent with the statute prescribing the grounds of challenge. Can it be said that the statute which authorizes the jury commission to select such male residents between 21 and 60 years of age as in their opinion are "fit" and competent to discharge the duties of grand and petit jurors,—a duty performed months, perhaps, before the trial,—without more, repeals the statute which gives the right of challenge to a petit juror to be asserted at the time of trial? It has been held from time immemorial that if a person is convicted by a jury composed of one or more persons not possessing the prescribed qualifications of jurors, as nonage, an alien, nonfree-

holder, that is no ground for setting aside the verdict, or for granting a new trial after conviction. *Reg. v. Sullivan*, 8 Adol. & E. 831; *Rex v. Sutton*, 8 Barn. & C. 417; *Wassum v. Feeney*, 121 Mass. 93; *State v. Jackson*, 27 Kan. 581; 1 Bish. Cr. Proc. § 932; *Rash v. State*, 61 Ala. 94. The enumeration of certain grounds of challenge in the statute in no way abolishes the common-law right of challenge for cause, or the right to challenge for cause secured by the constitutional provision "that the right of trial by jury shall remain inviolate." *Brazleton v. State*, 66 Ala. 97; *Smith v. State*, 55 Ala. 1; *State v. Marshall*, 8 Ala. 302. That a person was a member of the grand jury which preferred the indictment is cause for challenge, though not enumerated as a cause in the statute. *Birdsong v. State*, 47 Ala. 63. In Bishop's Criminal Procedure (section 852) it is said: "Not in all respects, it appears, are the disqualifying rules for grand jurors the same, or so strict, as for petit jurors." Whether at common law a freehold interest was a necessary qualification for a grand juror is not clear, but we think it is clear that at common law this was a ground for challenge for cause. 2 Hawk. P. C. c. 43, § 12, p. 572, also chapter 25, § 21, and the cases cited, support the proposition that the want of a freehold interest was ground for challenge for cause at common law. In the case of the *State v. Easter*, 30 Ohio St. 549, the court uses this language: "It is claimed by counsel that the qualifications of a grand and petit juror are the same. The position is not tenable. Both must be good and judicious persons; both must be electors. But there are other requisites for the petit juror, not necessary for the other. The various laws on the subject lay down quite a number of causes for which the petit juror may be challenged." The court then cites the statute prescribing the grounds of challenge for cause, just as we have done, and concludes: "It is obvious that this must apply to the petit juror who tries the case, and no other." The further argument of the court in that case is conclusive. The case of *Byrd v. State*, 1 How. (Miss.) 176, is additional authority. We regard the opinion of the court in both cases as fully sustaining our position. We cannot assent to the argument that a statute which authorizes the commissioners to select from the male residents of the county over 21 and under 60 years of age all such persons as in their opinion are fit and competent jurors, does or was intended in the least to alter the right of challenge secured by the constitution, the statute, or common law. We have numerous adjudications in our own court involving like principles.

Section 4299 of the Code of 1886 is the same as section 4732 of the Code of 1876, and is as follows: "It is the duty of the sheriff of each county to obtain biennially a list of all the householders and freeholders residing in his

county, from which list must be selected, as hereinafter provided, the names of such persons, as may be thought competent to discharge the duties of grand and petit jurors for the county." It will be seen that this statute prescribing the qualification of grand and petit jurors makes no reference to the length of time of residence in the county of the householder and freeholder. One who has resided any length of time in the county, who is a householder and freeholder, possesses the necessary qualifications for a grand or petit juror. The ground of challenge is (section 4331) that "the person has not been a resident householder or freeholder of the county for the last preceding year." No one has ever contended before that the section prescribing the qualifications of jurors repealed this right of challenge. Section 4299 makes no allusion to the age of the juror; all that is necessary is that he be a freeholder and householder of the county. The next section (4300) of the Code of 1886, which was section 4733 of the Code of 1876, provides that "no person must be selected who is under twenty-one or over sixty years of age." Notwithstanding the provision that no person over 60 years of age must be selected, it has been universally held in this state that, if a person over 60 years of age and under 70 years of age was drawn, such person was not disqualified, and not subject to challenge for cause. This was held in *Williams' Case*, 67 Ala. 183; *Spigener v. State*, 62 Ala. 382. In the *Williams Case* the decision rested upon the section of the Code which provides that 70 years of age was a ground of challenge, and that being over 60 years was not a disqualification. Another argument is found in the decisions of this court, and the universal practice under the general jury law of the state as declared by the act of 1886-87, p. 151 (Cr. Code, p. 131). Section 4732 of the Code of 1876 (4299 of the present Code) was expressly repealed (as was done by the Montgomery act), and we have in section 3 of that general jury law the following provision: "That said commissioners shall select from the male residents of the county, over twenty-one and under sixty years of age, who are householders or freeholders, the names of all such persons, not exempt from jury duty as, in their opinion, are fit and competent to discharge the duties of grand and petit jurors, with honesty, impartiality and intelligence;" and in section 9 of the act it provides that the petit juries shall be organized from the list thus selected. The only qualification for a grand or petit juror under this act is that he be a male resident, householder, or freeholder over 21 and under 60 years of age. By what process of reasoning can it be said that section 3 of the Montgomery act, which provides that the list shall be made up of residents of the county over 21 and under 60 years of age, repeals the statute by implication which declares that a person who has not been a resi-

dent householder or freeholder may be challenged for cause, and that the general law which we have cited does not have the same repealing effect? Under the general law the juror is competent if he be a resident householder or freeholder, without reference to length of time of residence, the ground of challenge being that he must have been a resident householder or freeholder of the county for the last preceding year. There is as much repugnance between the general law, which prescribes as a qualification only that the person be a freeholder or householder, and the statute, which declares he may be challenged for cause unless he has been a resident householder or freeholder for 12 months, as between the Montgomery county statute, which prescribes as a qualification that he shall be a resident of the county, and the cause of challenge on the ground that he is not a freeholder or householder. And yet it has never been questioned that this ground of challenge remained in full force under the general law. Argument upon argument might be made, but more is unnecessary. To hold contrary would overturn a vast array of decisions in this court, as well as that of other courts, and the principles of law universally recognized in text writers, some of which have been cited. The *Case of Iverson*, 52 Ala. 170, is a direct authority upon the very question at issue. We quote: "Although both statutes relate to some extent to the same subject-matter [the selection and qualification of jurors], yet each has a separate and distinct field of operation. One provides for a general annual selection of persons to serve as grand and petit jurors; the other prescribes the grounds of challenge for cause of jurors drawn for the trial of criminal cases only. One is general in its provisions; the other relates to a special class of cases." This is the principle upon which the decision rests, and is the true ground. It is a mistake to hold that the decision can be upheld on the ground that the act of 1868, amendatory of section 4063 of the Code, did not vary the qualifications of jurors as provided in another section of the Code. The amendatory act of 1868 has this provision: "Provided, that all the qualifications and restrictions with regard to competency and qualification in the selection of jurors as is now required by law in this section, shall be strictly observed by said officers." The opinion and conclusion in the *Iverson Case* rest upon the proper principles, and are sustained by authority and well-recognized principles to be applied to the construction of statutes. We have considered the question at some length because of the effect of the decision of the court upon the general jury law of the state. The act of the legislature of February 28, 1889 (Acts 1888-89, p. 77), amendatory of the general jury law of the state, has a provision precisely similar to section 3 of the Montgomery act; and, if the same rule of construc-

tion is to be applied to the general law of the state as given to the Montgomery act, that old landmark of the common law, which allowed as a ground of challenge for cause that the juror was not a freeholder or householder, which has been renewed and invigorated by statutory enactment, and carefully guarded by the decisions of this court from the organization of the state to the present time, will be utterly obliterated, and that by a rule of construction which, in our opinion, finds no support in principle or precedent. The law is well stated in 23 Am. & Eng. Enc. Law, p. 482, in the following language: "In the absence of any repealing clause [and there is none here] it is, however, necessary to the implication of a repeal that the object of the statutes as well as the subject be the same. If they are not, both statutes will stand, though they refer to the same subject." In my opinion, the majority of the court has failed to observe the distinction between a statute intended to prescribe the qualifications requisite for grand and petit jurors generally and a statute intended to apply to petit jurors solely, securing rights and privileges which a person charged with a capital offense, at the time he is put upon his trial, may assert at his option for his benefit and protection in relation to the special juror summoned for the particular trial. The objects and purposes of the two statutes are distinct, independent of each other, and there can be no conflict in their application. The challenge for cause should have been sustained.

HEAD, J., concurs in the reasoning and conclusion of this opinion.

(108 Ala. 8)

EZELL v. STATE. (No. 751).¹

(Supreme Court of Alabama. June 7, 1894.)

JURY—HOMICIDE—EVIDENCE—RECEIVING VERDICT—AMENDMENT.

1. A venire will not be quashed because a juror whose name has been drawn cannot be found.

2. On the night of the murder deceased and defendant (her husband) quarreled. Defendant had a gun in his hand. They were seen walking towards the place where deceased was found next morning. The lock and broken stock of the gun defendant had were found lying near her. Deceased had three wounds on her head, produced by blows from a blunt instrument, either of which was sufficient to have caused death. *Held*, that the gun was admissible in evidence, though it had been further broken between the time it was first picked up and the trial.

3. The jury's verdict was: "We, the jury, find the defendant guilty of murder in the first degree, and fix the penalty death." After the jury was discharged, and defendant removed from the room, the court, on motion of the solicitor, directed the jury to take their seats in the jury box, and insert the word "at" between the words "penalty" and "death." *Held*, that the original verdict was definite and legal, and that inserting the word "at" did not alter its effect.

¹ Rehearing denied.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Charles Ezell was convicted of murder, and sentenced to suffer death. He appeals. Affirmed.

The testimony for the state tended to show that on the night the said Hester Ezell was murdered she and her husband, the defendant, quarreled; that, after quarreling with the deceased, the defendant left her, and went to his house; that he soon returned, with a gun in his hand, which was unloaded; that the defendant and the deceased again began quarreling, and walked in the direction of what is known as the "old chimney", near the city of Montgomery; that the next morning the deceased was found, lying between the "old chimney" and the river; that she was not dead, but unconscious, and had three severe wounds on her head, produced by blows from a blunt instrument, any one of which was sufficient to produce death; that lying near her was the lock and broken stock of the gun which the defendant had had the evening before as they walked towards the "old chimney"; that the said Hester Ezell lived several hours after she was found, but never regained consciousness before her death. The defendant moved the court to quash the venire, on the ground that the court had erred in discarding the five names of the regular jurors returned by the sheriff as not found, and drawing five other names in their stead. The court overruled this motion, and the defendant duly excepted. Upon the examination of one of the witnesses, the state offered in evidence the gun which was found near the deceased the morning she was discovered. The defendant objected to the gun being introduced in evidence, and duly excepted to the court's overruling his objection. The facts pertaining to this ruling are sufficiently stated in the opinion, as are all the other facts pertaining to the questions reviewed by this court.

Hill, Roquemare & Rogers, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. This is the second appeal in this case. 15 South. 810. On this trial the appellant was convicted of murder in the first degree, and sentenced to suffer death. April 9, 1894, was set for the trial of the case, and the sheriff was ordered to summon 100 persons, including those summoned for the week beginning April 9, 1894, to serve as jurors in the trial of this case. Of the 36 persons drawn as regular jurors for the week beginning April 9, 1894, 31 were summoned, and as to 5 the sheriff's return showed they were "not found." To complete the number ordered by the court to be summoned as a special venire, there were drawn from the jury box 69 names, which, added to the regular jurors summoned for the week, completed the number to 100. This proceeding strictly conformed to the order of the

court, and complied with the statute. Of the 100 names drawn as a special jury 14 were returned "not found." The fact that a juror whose name has been drawn cannot be found is no ground for quashing a venire. It is unnecessary to cite authorities to this proposition. Prima facie, at least, the return spoke the truth.

The evidence showed that deceased "had three several wounds on her head, produced by blows from a blunt instrument, either of which would have been sufficient to have caused death." There was no error in admitting in evidence the broken gun found lying near the person or body of deceased. There was evidence tending to show that defendant and deceased were seen together going in the direction of where deceased was found, and defendant and deceased were quarrelling; that defendant had in his hand at the time the gun found near the body. The fact that in some way the gun had been further broken between the time when first picked up and when offered in evidence on the last trial was no sufficient cause for excluding it altogether. The gun was identified as the one found near the body. Its condition when first found was fully proven, and there was evidence tending to identify it as the gun in the possession of the defendant when last seen in company with deceased.

The jury returned their verdict in the following form, "We, the jury, find the defendant guilty of murder in the first degree, and fix the penalty death." After this verdict was received, and the jury discharged, and defendant had been removed from the court room, upon motion of the solicitor the court directed the jury to take their seats in the jury box, and they were permitted to insert in the verdict the word "at" between the words "penalty" and "death," so that the verdict would read "and fix the penalty at death." The verdict as first delivered by the jury and received by the court was neither irregular nor defective. It was complete, definite, and legal. There was no room to doubt the meaning and intention of the jury. The verdict declared the defendant to be guilty of "murder in the first degree, and fix the penalty death." Inserting the word "at" between the words "penalty" and "death" did not add to or alter its legal effect. If the verdict had been irregular or legally defective, it may be that, after it was received, and the jury discharged, and the defendant removed from the court room, such irregularity or defect, under the evidence, could not have been remedied by an amendment. Such is not the case here.

We find no error in the record. It appearing that the day fixed by the trial court for the execution of the sentence has passed, it is ordered that Friday, July 20, 1894, be, and is hereby, appointed as the day for the execution of the sentence as adjudged by the trial court. Affirmed.

(102 Ala. 128)

PARKER v. STATE.

(Supreme Court of Alabama. May 24, 1894.)

JURY—GROUND OF CHALLENGE—SUMMONING—REPEAL OF STATUTE.

Act Feb. 21, 1887, § 3 (Acts 1886-87, p. 190), providing that in Montgomery county the jury list shall be selected from the male residents between 21 and 60 years old, and section 18, repealing Code 1876, § 4732 (Code 1886, § 4299), which requires the jury list to be selected from householders and freeholders, and all other laws inconsistent with the act, does not repeal, for such county, Cr. Code 1886, § 4331, declaring it ground for challenge in a criminal case that the person has not been a resident householder or freeholder for a year. McClellan and Haralson, JJ., dissenting. Ezell v. State (Ala.) 15 South. 810, overruled.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Aaron Parker was convicted of murder, and appeals. Reversed.

The only questions which are considered on this appeal arise upon exceptions reserved to the rulings of the court in the drawing of a special venire for the trial of the defendant. The name of W. C. Parks was on the list of jurors furnished the defendant, and when drawn in the organization of the jury said Parks failed to answer. The defendant moved to quash the venire, and for a venire de novo, and in support of this motion introduced W. C. Waller, the sheriff of Montgomery county, who testified "that said Parks lived in the city and county of Montgomery, and that he (Waller) did not summon him because said Parks was too old and infirm to sit on a jury, being, in his opinion, 80 years old." The state introduced the return of the sheriff, showing that as to said Parks the list was returned "not found." There was evidence also introduced by the state that Waller, the sheriff, did not serve any of the jury summonses, but that they were served by B. C. Young, the deputy sheriff. The said Young testified "that he did not find W. C. Parks, and so returned to the clerk; that he knew 'old man Parks,' and knew where he lived, but he did not know that old man Parks was named W. C. Parks, and had no idea the summons was for him, as he knew he was too old to serve on a jury." The court then overruled the motion to quash the venire and for the venire de novo, and ordered the name of W. C. Parks to be set aside, and ordered the jury to proceed, and the defendant duly excepted to this ruling of the court. When the name of W. F. Wilson was drawn, he stated, on examination by the defendant, "that he was neither a householder nor freeholder of the county of Montgomery, and had not been such for the last preceding year." The state having accepted said juror, the defendant moved the court to permit said juror to be challenged for cause, on the ground that he was neither a householder nor freeholder of said county. The court refused to grant said motion, put said juror on the defendant,

and to this ruling the defendant duly excepted. These two rulings are the only ones reviewed by this court on the present appeal.

John G. Winter, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The same question comes before us in this case as that considered and adjudicated in the case of *Ezell v. State* (decided at the present term) 15 South. 810. In that case it was held by a majority of the court that section 3 of the special act for Montgomery county (Acts 1886-87, p. 190) repealed subdivision 1 of section 4331 of the Criminal Code, which declared it to be a good ground of challenge by either party "that the person has not been a resident householder or freeholder of the county for the last preceding year." We are of opinion that the decision in that case was erroneous. We adopt the conclusion reached in the dissenting opinion filed in the *Ezell* Case, and hold that the court erred in refusing to allow the juror to be challenged. The decision in the case of *Ezell v. State* is overruled, and the dissenting opinion filed in that case adopted as the opinion of the court in this case, upon the question under consideration. It was the duty of the sheriff to summon the juror Parks. The statute is mandatory. The court alone can pass upon the qualification of a juror after his name has been drawn from the jury box. Reversed and remanded.

McCLELLAN and HARALSON, JJ., dissenting.

(108 Ala. 25)

WOODLEY et al. v. STATE.

(Supreme Court of Alabama. June 7, 1894.)

CRIMINAL LAW—JOINT TRIAL—COMPETENCY OF WITNESS—JURY.

1. Where four persons are jointly indicted, and one pleads guilty and the other three not guilty, this operates as a severance of the indictment, and the right of any of such persons to demand that the four be tried jointly ceases.

2. The conviction and sentence of one of such persons does not render him incompetent as a witness against the others.

3. It is no objection to the venire from which a jury was drawn to try three of four persons indicted for the same crime that the jury which convicted the other was drawn from the same venire, as all the jurors were subject to challenge.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Joe, Aleck, and Wilson Woodley were convicted of murder in the first degree, and appeal. Affirmed.

The appellants, Joe, Aleck, and Wilson Woodley, were indicted, jointly with one Jim Calloway, for the murder of E. H. Grant. Upon the arraignment of the defendants the said Calloway pleaded guilty and the defendants not guilty. Thereupon a day was fixed for the trial, and an order was made by the court for 100 jurors to be summoned to try

the cases; the same list of names being served on each of the defendants in this case and on Calloway. On the day set for trial the said Calloway was tried first and alone, and these defendants, when their case was called, objected to going to trial without Calloway. This objection was overruled, and the defendants duly excepted. Before the drawing of the jury commenced, the defendants moved the court to quash the venire and for a venire de novo, upon the grounds: First, that if the plea of guilty made by Calloway worked a severance as to him, then each of the defendants was entitled to a separate venire from that of Calloway; and, second, that the venire served upon them contained the names of the jurors who had tried the said Calloway. The court overruled the motion to quash the venire, and the defendants separately excepted. After the conviction and sentence of the said Calloway, the state introduced him as a witness. The defendants objected to the said Calloway being examined as a witness, upon the ground that there had been no legal severance, he having been jointly indicted with them; but the court overruled this objection, and each of the defendants duly excepted. The testimony of the said Calloway, which was corroborated by other testimony, showed that he killed Mr. Grant as the result of a conspiracy entered into by him and the defendants. The defendants were convicted of murder in the first degree, and sentenced to be hanged.

John G. Winter, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The appellants were convicted of murder in the first degree, and sentenced to suffer death. With but two or three exceptions, the questions reserved for review were considered and disposed of in the case of *Ezell v. State*, 15 South. 818, which decision was rendered during the present week of court. The record shows that one Jim Calloway was indicted jointly with appellants; that, when the prisoners were arraigned, Jim Calloway entered a plea of guilty, and the appellants each pleaded to the indictment not guilty. A jury was then impaneled against the objection of Calloway, who claimed the right to be jointly tried with the appellants, and charged with the duty of ascertaining the degree of his guilt, and fixing his punishment, and upon the verdict of the jury the court pronounced the sentence of the law. The appellants were then put upon trial upon their plea of not guilty, and a different jury impaneled and sworn for their trial, against their objection. The ground of objection was that, having been jointly indicted with Calloway, they claimed the right to be jointly tried with him. Formerly a severance was a matter of discretion with the trial court. The statute now reads as follows (section

4451 of the Code): "When two or more defendants are jointly indicted, they may be tried, either jointly or separately, as either may elect." Under the literal wording of the statute, if two were indicted jointly, and one of the parties should elect to be tried jointly and the other separately, the trial court would be placed in a difficult position. The statute evidently intended to give any person indicted jointly with others the right to be tried separately, as he may elect. The manifest intention of the statute was to take from the court its discretionary power to grant or refuse a severance, and confer upon either defendant the right to be tried separately at his election. In the case of *Thompson v. State*, 25 Ala. 41, it was held that, "when several persons are jointly indicted for an assault and battery, and one of them pleads guilty, the other, who pleaded not guilty, cannot claim, as a matter of right, to be tried separately from him." If this principle be correct, then it follows that, when several are jointly indicted, and one pleads guilty and the others not guilty, and both pleas are entered, there is not a severance by operation of law. We have been unable to find any authority in support of the proposition as declared in the case of *Thompson*, supra. In the case of *Marler v. State*, 67 Ala. 55, Marler and one Redman were indicted jointly, and the latter was adjudged insane upon a separate trial of that issue. Subsequently Marler was arraigned and tried alone. It was held that there had been a severance of the cases of the two defendants. It is often the case in practice that one of two persons jointly indicted is ready for trial and the other not. If the court continues the case as to one, and the other is put upon trial, there is, of necessity, a severance. The defendant Calloway, when arraigned, voluntarily pleaded guilty to the indictment. This he had a right to do. By his plea of guilty he waived his right to be jointly tried with the other defendants. They could interpose no objection to his plea of guilty, and thereby prevent a severance. Suppose two were jointly indicted for grand larceny, and one enters a plea of guilty and the other not guilty. There is necessarily a severance by operation of law as to the one pleading guilty, for nothing remains to be done as to the one who pleads guilty but to pronounce the sentence of the law. As to the other, a jury must be impaneled to try the issue. The court did not err in holding that the plea of guilty by Calloway operated a severance. There is nothing in the rule adopted June 21, 1889, found in the preface to 86 Ala. and 6 South. which militates against this conclusion.

After sentence of the law was pronounced upon Calloway, he was a competent witness for the state against the other defendants. *Malachi v. State*, 89 Ala. 134, 8 South. 104; *South v. State*, 86 Ala. 117, 6 South. 52; *Henderson v. State*, 70 Ala. 23; 1 Bish. Cr. Proc. § 1025.

The fact that the venire served upon the defendants included the names of persons who served upon the jury that passed upon the issues submitted to them in the case against Calloway was not a legal ground for quashing the venire. Acts 1886-87, p. 180. Such persons, when their names were drawn, were subject to challenge for cause. This the court allowed in each instance of such drawing.

The judgment of the court is sufficient in form. There is no error in the record.

The day for the execution of the sentence having passed, Friday, the 13th day of July, is appointed, and the proper officer is charged with the duty of executing on that day the sentence of the law, adjudged by the trial court, upon each of said defendants. Affirmed.

(108 Ala. 37)

CALLOWAY v. STATE.

(Supreme Court of Alabama. June 7, 1894.)

CRIMINAL LAW—CONFESSIONS.

A confession made by defendant after he was told that whatever statements he made would be used as evidence against him is admissible in evidence against him.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Jim Calloway was convicted of murder in the first degree, and appeals. Affirmed.

The appellant was indicted, jointly with four others, for the murder of one Ed H. Grant. Upon his arraignment he pleaded guilty, while his codefendants pleaded not guilty. On the day set for the trial the defendant objected to being put upon the trial alone, and insisted upon being tried jointly with his codefendants. "The court stated that the plea of guilty by Calloway operated a severance as to him, and he must be tried alone." The defendant duly excepted to this ruling of the court. The rulings of the court upon the organization of the jury and the motions to quash the venire are the same as those in the case of *Woodley v. State*, 15 South. 820. The state introduced as a witness one Bolling Young, a deputy sheriff for the county of Montgomery, who testified that on Thursday night, after the killing of said Grant on Monday night, he went to the jail where the defendant Calloway was imprisoned, and took him from his cell in the jail, and carried him into the front room, and told the prisoner "that he (witness) would like to know what he knew about the killing of Mr. Grant." This conversation between Young and the defendant was had in the presence of Mr. Waller, the sheriff, whose testimony corroborated that of Young, and who also testified "that Young told the defendant that whatever statements he made would be used as evidence against him." Upon this predicate the court allowed the witness to testify as to the confession made by the defendant, and the fact that he had

shot and killed Mr. Grant. The defendant objected to this witness testifying to the alleged confession, on the ground that said confession was not shown to have been voluntary, and duly excepted to the court's overruling his objections.

Farnham & Crum, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The confessions of the defendant were shown to have been voluntary, and the court committed no error in admitting them. Upon the other questions raised by the record the judgment of the city court must be affirmed, on the authority of *Woodley v. State*, 15 South. 820 (at the present term). Affirmed. The time fixed by the city court for the execution of the sentence having passed, it is ordered that the sentence be executed by the proper officer, in manner and form as prescribed by law, on Friday, the 13th day of July, 1894.

(108 Ala. 380)

BERNHHEIM et al. v. HORTON.

(Supreme Court of Alabama. May 24, 1894.)

DEED—DELIVERY—EJECTMENT—EVIDENCE.

1. W. made a deed of land to B., an intended purchaser, and delivered it to his agent. B. failed to take the land, and the agent sold it to R., and delivered to him the deed to B. The latter indorsed on the deed, "We, B. * * *, do this day transfer the within deed to R." The deed was recorded, and R. took possession. While in possession, claiming the land, he mortgaged it to H., and afterwards conveyed it to H. in payment of the mortgage, and H. went into possession by a tenant. *Held* that, as the deed to B. was not delivered, H. did not have a legal title to the land.

2. In ejectment by H. against R. to recover such land, B. & Co. defended as R.'s landlords, and plaintiff claimed the right to recover on the ground of previous possession, as well as on his legal title. Defendants offered evidence that they purchased the land at sheriff's sale under an execution against B., and received a sheriff's deed; that they brought ejectment against plaintiff's tenant, and recovered possession, and were holding possession and claiming the land when plaintiff brought suit. Plaintiff was not a party to the suit by defendants against his tenant. *Held* admissible, since it showed defendants were in possession under color of title, which fact constituted a defense to plaintiff's right to recover on the ground of previous possession.

3. Since both plaintiff and defendants claimed through B., and were estopped to deny his title, and it appeared that, as between plaintiff and defendants, the latter acquired B.'s title by the sheriff's deed, such title must prevail, in ejectment, over the equity arising from R.'s purchase, and the mere transfer to him by B. of the deed from W.

Appeal from circuit court, Conecuh county; J. R. Tyson, Judge.

Action of ejectment by E. B. Horton against James Rose, in which H. W. Bernheim & Co. were permitted to come in and defend as Rose's landlords. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiff, defendants appeal. Reversed and remanded.

Farnham & Crum, for appellants. Stallworth & Burnett, for appellee.

COLEMAN, J. Appellee, Horton, sued one James Rose in the statutory action of ejectment to recover certain lands described in the complaint. Bernheim & Co., being the landlords of Rose, came in and defended. Both parties concede the legal title, at one time, was vested in Robert B. Witter. The plaintiff based his right to recover upon the following facts: Witter, through his agent, Feagan, for a consideration, agreed to sell the land in controversy to one Bethea, and in pursuance of said agreement, in the year 1886, signed a deed of conveyance of the land to the said Bethea, and delivered the same to Feagan, agent of the vendor, to be delivered to Bethea upon the payment of the purchase money. Bethea declined to comply with his agreement to purchase, and the deed was never delivered to him. Bethea never went into possession of the land, and at no time asserted title or interest in the same. One Rose then proposed to purchase the land at the same price, which proposition was accepted by Feagan. Rose paid Feagan the purchase money, who thereupon delivered the deed to Rose, which purported to convey the land to Bethea. Rose then took the instrument to Bethea, and obtained from him an indorsement thereon in the following terms: "Know all men by these presents, that we, Goodman Bethea * * *, do this day transfer the within deed to William H. Rose." This deed was recorded. Rose went into possession of the land, and while in possession, claiming it as his own, executed a mortgage on the land to the plaintiff, Horton, and subsequently surrendered possession and the land to the mortgagee, in payment of the mortgage debt. The settlement between Horton and Rose was not in writing. One Reynolds, by permission of Horton, was permitted to occupy the land as his tenant. This statement shows plaintiff's entire title, and upon which he recovered. It will be seen that he claims title through Bethea. The defendants Bernheim & Co., who were in possession by their tenant, Rose, offered to introduce proof of the following facts in defense of the action, which were excluded by the court: That they recovered judgment against Bethea, the named grantee in the deed, in the circuit court, upon which execution issued; that the lands were levied upon by the sheriff as the property of Bethea, and, after due notice, were legally sold to Bernheim & Co., and a deed in proper form executed to them by the sheriff; that they brought suit in ejectment against Reynolds, who was in possession, and recovered judgment against him for the lands, and, by virtue of a writ of possession, were put in possession of the same, and were holding and claiming them as their own at the time of the institution of the present action. Horton, the landlord of Reynolds, was

not made a party to the ejectment suit against his tenant, Reynolds. The defendants also claim title through Bethea. There are but two or three propositions of law involved in the case.

We think it clear that neither the plaintiff nor the defendants hold the legal title, and that it yet remains vested in Witter. No title passed to Bethea, for the deed from Witter was never delivered to him, and consequently none was sold by the sheriff; and certainly the legal title did not pass to Rose by the deed to Bethea, or by a mere transfer by Bethea to Rose. Plaintiff also claimed the right to recover on previous possession. An equitable title will not support the action of ejectment. *Hollingsworth v. Walker* (Ala.) 13 South. 6. The general rule is that, in ejectment, plaintiff must recover on the strength of his legal title, and not on the weakness of his adversary's title. To this general rule there is an exception, that prior possession is sufficient to sustain the action against a mere trespasser, but this exception does not extend as against a person in possession, claiming in his own right, under color of title. *Snedecor v. Freeman*, 71 Ala. 140; *Gullmartin v. Wood*, 76 Ala. 204; *Lucy v. Railroad Co.*, 92 Ala. 246, 8 South. 806; *Stephenson v. Reeves*, 92 Ala. 592, 8 South. 695; *Jernigan v. Flowers*, 94 Ala. 508, 10 South. 437. We are of opinion that, if the evidence offered by Bernhelm & Co. had been admitted, its tendency was to show that their possession was under color of title and claim, and that they were not mere trespassers. It was offered for this purpose, so that they might set up the outstanding title in Witter. Authorities supra.

The judgment against Bethea, and the judgment in the ejectment suit against Reynolds, to which Horton was not a party, could not be legal evidence against Horton, as affecting his title, unless held as a privy. *Hawes v. Rucker*, 94 Ala. 168, 10 South. 85. But when the plaintiff relied, not upon a legal title to recover, but simply upon his previous possession, which alone does not authorize a recovery in ejectment, except as against a bare trespasser, having no claim under color of title, the defendant may show, if he can, by legal evidence, the character of his possession, and under what right obtained. No definition of "color of title" can be given which will cover all cases, but we are clear in the proposition that a person who holds a sheriff's deed to land, in all respects in due form, and regular upon its face, and by virtue of such a deed recovers in ejectment the land from one in possession, and is placed in possession by an order of court having jurisdiction of the persons and subject-matter, has color of title, and cannot be said to be a bare trespasser. *Murray v. Doyle* (Ala.) 11 South. 797; *Sedg. & W. Tr. Title Land*, § 780.

This decision might be placed upon another principle. In ejectment the legal title

must prevail over an equity. As between Horton and Bernhelm & Co., both of whom claim through Bethea,—the one by his mere indorsement of the deed to Rose; the other, by sheriff's deed under execution sale,—both are estopped from denying the validity of the legal title of Bethea in this action. *Pollard v. Cocke*, 19 Ala. 188; *Smoot v. Lecatt*, 1 Stew. 590; *Sullivan v. McLaughlin*, 99 Ala. —, 11 South. 447. Bethea holding the legal title, as between Horton and Bernhelm, it was subject to levy and sale under execution. This title Bernhelm & Co. acquired by their purchase and the sheriff's deed. In a court of law it must prevail over any equity acquired by the purchase of Rose, and the mere transfer of the deed of Witter by Bethea to Rose.

The court erred in not admitting evidence of the judgment against Bethea, execution and sale of the land, and sheriff's deed to Bernhelm & Co. For the errors pointed out the case must be reversed. Reversed and remanded.

(108 Ala. 488)

DONEGAN v. DONEGAN.

(Supreme Court of Alabama. May 23, 1894.)

TENANCY IN COMMON—WHEN RELATION EXISTS—DEED TO HUSBAND AND WIFE—DIVORCE—NATURE OF ESTATE.

1. Where husband and wife acquire an estate by the entirety, and are afterwards divorced, they then become tenants in common.

2. Under the statute of Alabama, as it existed in 1870, vesting married women with the capacity of taking estates by moieties, a deed conveying property to husband and wife, without any declaration therein as to what their interest should be, creates the same estate as if the deed had been made before coverture.

Appeal from chancery court, Madison county; Thomas Cobb, Chancellor.

Action by Laura Donegan against James Donegan for partition of a certain lot. From a decree for plaintiff, defendant appeals. Affirmed.

The bill averred the marriage of the complainant and respondent in 1864, and that in December, 1870, they purchased the lot in question from one Darwin and wife; that on September 13, 1892, the complainant obtained a decree of divorce a vinculo matrimonii from the respondent; and that the lot conveyed to them cannot be equitably divided or partitioned without the sale thereof. The deed from Darwin and wife recited the receipt of the consideration from "James Donegan and wife," and conveyed the lot to "James Donegan and wife."

D. D. Shelby and S. S. Pleasants, for appellant. D. I. White and Tancred Betts, for appellee.

HARALSON, J. 1. The deed under which the parties to this suit hold the property sought to be sold for division, on the ground that it cannot be partitioned in kind, conveyed the property to the husband and wife,

without any declaration in the instrument, as to what their interest or tenancy should be. There is no doubt, that, under such a deed, at common law, the husband and wife acquired an estate, not as joint tenants, or tenants in common,—not one which they acquired by moieties, but by entirety. For a full discussion of an estate by entirety, with a collection of the English and American authorities on the subject, reference may be had to 1 Devl. Deeds, §§ 117, 118; Stew. Husb. & Wife, §§ 303-309.

2. But, there are two reasons why the complainant and defendant do not hold this property by entireties. After they acquired the property under the deed to them, in a proceeding instituted for that purpose in the chancery court for Madison county, the complainant was, on the 13th of September, 1892, by the decree of said court, regularly and legally divorced from the bonds of matrimony with the respondent. This destroyed the common-law fiction of unity—the two in one—of the two persons on which the doctrine of estates by entirety rested, and rendered them tenants in common. Stew. Husb. & Wife, § 309; Stew. Mar. & Div. §§ 441-444; Bish. Mar. & Div. § 716; Hinson v. Bush, 84 Ala. 368, 4 South. 410; Baggs v. Baggs, 55 Ga. 590, 591; Harrer v. Wallner, 80 Ill. 199, 204; Lash v. Lash, 58 Ind. 526, 528; Depas v. Mayo, 11 Mo. 316.

3. And, however it may be elsewhere, this court has decided, that such a conveyance, under the statutes of this state creating and regulating the separate estates of married women,—such as existed at the date of this deed,—creates the same estate in the parties, as if it had been made before the coverture; that being invested with the capacity of taking by moieties, the reason of the rule of the common law, that they should take by entirety,—per tout, not per my,—has ceased to exist. This doctrine, since first announced, has been recognized by repeated subsequent decisions. Walthall v. Goree, 36 Ala. 728; Sloan v. Frothingham, 72 Ala. 589, 603; Holt v. Wilson, 75 Ala. 59, 66; Whitlow v. Echols, 78 Ala. 209; Houston v. Williamson, 81 Ala. 483, 1 South. 193.

The only error assigned against the decree of the court below, insisted on in argument of counsel for the defendant is, that the complainant is not entitled to the relief granted, on the ground, that the deed, by which she and the defendant hold the property, created in them an estate by entireties, not subject to sale for partition or division. But, as we have seen, there is no error in the decree on that account, and it is affirmed. Affirmed.

(103 Ala. 537)

REEVES et al. v. BROWN.

(Supreme Court of Alabama. June 6, 1894.)

FORECLOSURE OF MORTGAGE—VENUE.

Under Code, § 3421, where a mortgagor resides in one county and the land mort-

gaged lies in another, the chancery court of either of such counties has jurisdiction of an action to foreclose such mortgage, and the complainant may elect in which county he will file his bill. Ashurst v. Gibson, 57 Ala. 586, and Harwell v. Lehman, 72 Ala. 345, followed. Bolling v. Munchus, 65 Ala. 558, distinguished.

Appeal from chancery court, Fayette county; W. H. Tayloe, Judge.

Bill by J. S. Reeves & Co. and others against John A. Brown to foreclose certain mortgages on land situated in Jefferson county, Ala. Defendant is a resident of Fayette county, Ala., in which the bill was filed. From a judgment sustaining a demurrer to the bill on the ground that the court of the latter county had no jurisdiction, complainants appeal. Reversed.

McGuire & Collier, for appellants.

HARALSON, J. 1. When a bill is filed for the foreclosure of a mortgage on real estate, which is situated in one county, and the mortgagor resides in another, under section 3421 of the Code, the chancery court of either district or county,—the one where the mortgagor resides, or the one where the real estate or a material portion thereof is situated,—has jurisdiction, and the complainant may elect, at his pleasure, in which of the two districts or counties he will file his bill. Ashurst v. Gibson, 57 Ala. 586; Harwell v. Lehman, 72 Ala. 345.

2. There is nothing in Bolling v. Munchus, 65 Ala. 558, as the learned chancellor seemed to suppose, which conflicts with the construction given this statute in the cases above cited. In that case, the mortgagor of the land the bill was filed to foreclose was a nonresident, in which case, the statute itself provides, that the bill must be filed "in the district where the subject of the suit, or any portion of the same is, when the cause of action arose, or the act on which the suit was founded was to be performed."

The court below erred in sustaining the demurrer to the bill. Reversed and remanded.

(103 Ala. 12)

McQUEEN v. STATE.

(Supreme Court of Alabama. May 24, 1894.)

HOMICIDE—FORMER ACQUITTAL OF FIRST DEGREE—PLEA—EXPLANATION OF EFFECT BY PROSECUTOR—DYING DECLARATIONS—INSTRUCTIONS—MURDER IN SECOND DEGREE—SELF-DEFENSE.

1. In a murder case, where defendant was indicted for, and pleaded a former acquittal of, murder in the first degree, in that on a former trial he was convicted of murder in the second degree, it was not reversible error for the prosecutor to confess such plea, and explain to the jury that defendant was then on trial for murder in the second degree only, and that they had nothing to do with the former trial, nor with the judgment of reversal of the supreme court, though it would have been better for the court to make such statement to the jury.

2. Where a person is mortally wounded, and declares that he is going to die, and asks that a doctor be sent for, it is not a valid objection to the admission of his declarations that his desires for a physician showed that he was not conscious of impending death.

3. It is not error to charge that "murder in the second degree is the unlawful killing of a human being without malice aforethought, but without deliberation and premeditation."

4. On a trial for murder in the second degree, it is not error for the court to correctly define to the jury murder in the first degree where he prefaces it by saying that he will do so, in order that they may better understand the meaning of murder in the second degree, but that defendant is not on trial for murder in the first degree.

5. It is not error to refuse an instruction correctly setting forth the essentials of self-defense where they are prefaced by the statement that if the jury are reasonably satisfied from the evidence that deceased, with another, threatened to take defendant's life, and these threats were communicated to him, and that, just before and at the time of the rencounter, deceased was making an attempt to carry out such threats, and, at the time of the rencounter, deceased sought the conflict, then defendant might act on such threats and the other evidence in the case, since such language is misleading.

6. A charge as to self-defense which, in referring to freedom from fault on the part of defendant in bringing on the difficulty, only requires that he should be "reasonably" free from fault, is properly refused.

7. Argumentative instructions are properly refused.

Appeal from circuit court, Butler county; J. R. Tyson, Judge.

Peter McQueen was convicted of murder in the second degree, and appeals. Affirmed.

For prior report, see 10 South. 433.

The indictment upon which the appellant was tried was for murder in the first degree, and, having been convicted at the former term of the circuit court of Butler county for murder in the second degree, the defendant pleaded an acquittal of murder in the first degree on this second trial. In response to this special plea, the bill of exceptions recites that "the solicitor for the state replied to this special plea, and stated to the jury: 'The state confessed the plea of former acquittal of murder in the first degree, by reason of his having been tried upon this indictment and convicted of murder in the second degree, and, after conviction here, he carried the case by appeal to the supreme court, where it was reversed, on account of the errors of law committed in the trial; that with that trial you have nothing to do, and it should not have any effect upon your verdict in this trial. The defendant is not now put upon trial for murder in the 1st degree, but comes before you in this trial upon no higher or graver charge than murder in the second degree, and you cannot inquire into this case for any higher charge than murder in the second degree and the lesser degrees of homicide contained in the charge. The defendant is entitled to a fair and impartial trial by you, and you cannot look to the fact of his former conviction in this court, nor to the reversal in the supreme court, for neither can shed light upon the evidence to come before you on this trial.' The defendant objected to above statements of the solicitor, and moved to exclude them from the jury. The court overruled the mo-

tion to exclude, and to this ruling of the court the defendant excepted."

Among other charges, the defendant requested the following, and separately excepted to the court's refusal to give each of them as asked: (D) "If the jury are reasonably satisfied from the evidence that Ab Chambers [the deceased], with another, threatened to take the life of defendant, and these threats were communicated to the defendant, and that, just before and at the time of the fatal rencounter, the deceased was making an attempt to carry out these threats, and had theretofore, and at the time of the fatal rencounter the deceased sought the conflict, then the defendant may act on these threats and the other evidence in the case; and if defendant was reasonably free from fault in bringing on the difficulty, and there was no reasonably safe way of escape open to defendant, and there was, reasonably apparent, actual and impending danger to his life, or great bodily harm, and the defendant fired the fatal shot under this reasonable belief of imminent peril, then they should acquit the defendant." (4) "Dying declarations should be received with the greatest caution by the jury." (6) "From the fact that experience and observation show that sometimes hate and prejudice only expire with life, and that men seek to gratify a spirit of revenge in the face of immediate death, for these reasons, and from the fact that, in the absence of a cross-examination, the whole truth may not be dictated, because attention is not directed to some circumstances, or unconscious delusions produced by surprise or alarm are not dispelled, the evidence of dying declarations should be received with the greatest caution."

Gamble & Powell, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. We are unable to see any valid objection to the remarks of the solicitor to the jury when replying to the plea of former acquittal of the higher degree of the crime charged. It was well for the jury to have such an explanation made to them; and while it would probably have been better for the court to have made it, there was no legal wrong in permitting the solicitor to do so.

The deceased was shot in the back, in the region of the kidneys, with a shotgun, inflicting a wound with an orifice of about three inches, and which, the physician said, shot the left kidney literally to pieces. He was shot at night, and died the afternoon of the next day. While lying on the ground, in a helpless condition, suffering pain, he repeatedly declared that he would die, that he could not get well, though at the same time he asked that a doctor be sent for. Not long after making these declarations, he declared that the defendant shot him. The predicate for the admission of the latter

is objected to as insufficient to show the existence, in the mind of deceased, of a sense of impending death; and the objection is based upon the fact that deceased, while declaring that he would die, yet desired that a physician be sent for. We think there is no force in the objection. We may well conceive how a person in the condition deceased was, who realized his condition, and believed he was going to die, might yet desire the presence of a physician to relieve his sufferings.

There was no error in the instruction that "murder in the second degree is the unlawful killing of a human being with malice aforethought, but without deliberation and premeditation." Code, § 3725; *Ward v. State*, 98 Ala. 100, 11 South. 217, and cases there cited. No deliberation or premeditation is required to characterize murder in the second degree beyond that necessarily involved in the existence of malice. Such is the meaning of the instruction.

The court said to the jury: "I will define to you murder in the first degree, in order that you may better understand the meaning of murder in the second degree; but I instruct you that, under the pleadings in this case, this defendant is not on trial for murder in the first degree; but I simply define murder in the first degree in order that you may clearly and distinctly understand and comprehend the definition I will give you of murder in the 1st [?] degree and manslaughter." The court then defined to the jury murder in the first degree. Evidently, the word "1st," in the above-quoted statement, to which we have annexed the interrogative point, is a clerical misprision, and we will so treat it. It should have read "second." If this definition to the jury of murder in the first degree be regarded as abstract, the proposition of law it affirmed was correct, and we are unable to see, with the explanation the court gave, how it could possibly have misled the jury to the prejudice of the defendant. It was no doubt true, as the court thought, that the jury could better comprehend the qualities of murder in the second degree, when given to them, by having a clear understanding of the qualities of murder in the first degree. The instruction containing no error of law, and having no tendency to mislead the jury to the prejudice of the defendant, it cannot afford ground of reversal.

If the essentials of self-defense were held correctly set forth in charge D, requested by defendant, they are prefaced by the statement that "if the jury are reasonably satisfied from the evidence that Ab Chambers, with another, threatened to take the life of defendant, and these threats were communicated to the defendant, and that, just before and at the time of the fatal rencounter, the deceased was making an attempt to carry out these threats, and had theretofore, and at the time of the fatal rencounter the deceased

sought the conflict, then the defendant may act on these threats and the other evidence in the case." This language was calculated to mislead the jury into the belief that, as a matter of law, the defendant had the right to shoot the deceased if the latter had threatened to take his life, of which he had been informed, and if, just before and at the time of the fatal rencounter, the deceased was making an attempt to carry out the threats, and at and before that time sought the conflict; and we are of opinion that this misleading tendency was not obviated by following up the statement with a correct enunciation of the principles of self-defense. But the charge was also well refused for the reason that, in reference to freedom from fault on the part of defendant in bringing on the difficulty, it required only that he should be reasonably free from fault. The law admits of no qualification of this requirement. The defendant must have been free from all fault or wrongdoing on his part which had the effect to provoke or bring on the difficulty. The charge was properly refused.

Charges 4 and 6, requested by defendant, were argumentative, and invaded the province of the jury, and were properly refused. *Ward v. State*, 78 Ala. 441.

The other exceptions are not specially insisted on in the argument of counsel. We have carefully examined them, and find none well taken. There is no error in the record. Affirmed.

(103 Ala. 440)

BUCKLEY v. CUNNINGHAM et al.

(Supreme Court of Alabama. June 6, 1894.)

LIABILITY OF LANDLORD—LEAKAGE FROM WATER PIPE.

1. In an action by tenants against a landlord for injuries to goods caused by the leakage of a water pipe, it appeared that plaintiffs rented the lower story of the building, and that defendant had control of the upper room in which the leakage occurred. The only stopcock for the water was on the pavement, though the waterworks board had established a rule that a stopcock should be provided in each building. Plaintiffs were not informed of water pipe, though it could be seen by ordinary examination, nor did they request that the water be cut off. Plaintiffs testified that they thought the water was cut off. *Held*, that defendant was not liable on account of his failure to have the water cut off, as it was equally the duty of plaintiffs to attend thereto.

2. Nor was he liable for failure to provide a stopcock inside the building, as a person has a right in the matter of water pipes to construct his own building according to his own preferences.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by N. L. Cunningham and another against M. L. Buckley. There was judgment for plaintiffs, and defendant appeals. Reversed.

Goodhue & Sibert, for appellant. Denson, Bilbro & Burnett, for appellees.

COLEMAN, J. The plaintiffs, Cunningham & Aderbolt, rented from Buckley the lower rooms of a building, in which they carried on a millinery business. There was a water pipe leading from the main of the waterworks of the city of Attalla, under ground, to the rear of the building, and up through the room rented by plaintiffs, to an upper room overhead, by means of which water was conducted to the upper story. On account of a freeze, the pipe burst in the upper room, and the water, escaping therefrom, leaked through upon the goods of the plaintiffs in the room underneath, and injured them. The upper room was unoccupied, and was under the exclusive control of the landlord, Buckley. The precise negligence averred in the first count of the complaint is "that the defendant negligently failed to cut the water off from said upper story," etc. The negligence averred in the second count is "that the defendant negligently failed to provide a shut off for said water pipe, so that the water in said pipe could be shut off," etc. The case was tried by the court, without the intervention of a jury, upon the pleas of the general issue and contributory negligence, and the trial resulted in a judgment for the plaintiffs.

The relation of landlord and tenant, that the water was not cut off, the bursting of the pipe from freezing in the upper room, the running of the water through the floor, and damage to the goods, were fully proven. There was no evidence that the pipe itself was defective, or that it was not put up in a proper manner. There was no cut off to the pipe except the city stopcock in front of the building. Rule 5 established by the board of commissioners of the waterworks provided that, "in addition to the stopcock near the curbstone furnished by the city, each attachment, at the expense of the consumer, must be provided with a stop and waste cock, conveniently placed inside the premises, under the control of the occupant, to be used in case of leakage of the pipe or fixtures, or for making repairs, and to prevent freezing." There was no stop or waste cock attached, as provided in the foregoing rule. It was also in evidence, without conflict, that one Prickett "was employed by the waterworks to turn on and shut off water;" "that it was his duty to cut off the water when parties requested it." It was also in evidence that plaintiffs were not informed when they rented the lower room that a water pipe passed up through it, but this information was not intentionally withheld, and the pipe was open to be seen by ordinary examination, and its existence and position was in fact known to plaintiffs several days before the damage. Plaintiffs never requested either the landlord or Prickett to cut off the water. One of the plaintiffs testified that "she supposed the water had been turned off, and had no idea there was any water in the pipe." From these

facts the court declared, as matter of law, that the landlord was liable. Our opinion is that, under the evidence, the plaintiffs had as much authority over the city stopcock as the defendant, and the defendant owed them no duty to see that the water was cut off, at least until notified and requested to do so. The testimony is full that it was the duty of Prickett "to cut off the water when parties requested it." Plaintiffs were themselves negligent in merely "supposing the water had been turned off." It was their duty to know, and it was within their power and was their privilege to have guarded against, the cause of damage. It follows that the plaintiffs were not entitled to recover under their first count.

The second count charges that "the defendant negligently failed to provide a shut off for said water pipe, so that the water in said pipe could be shut off." If it be conceded that the defendant was negligent in the matter alleged, there is no evidence to show that it proximately contributed to the damage. Plaintiffs made no complaint on this account; made no attempt to cut the water off; made no request to have it done. There was a city shut off convenient to plaintiffs, and, according to the evidence, there was an employé whose "duty it was to cut off the water when requested." Moreover, we are of opinion that every man has a perfect right, in the matter of water pipes or other conveniences, to construct his own buildings according to his own preferences, either with or without them. There being no latent defects or fraud or concealment, a tenant takes a building as it is, regulating the price according to the value, increased or diminished by its condition and conveniences. If the building or room has a water pipe through it, and there is no stop or waste cock, the tenant knows it when he rents the building, fixes its rental value accordingly, and, unless it is provided otherwise by contract, he assumes the risk incident to its condition. *Jaffe v. Hartean*, 56 N. Y. 396; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117; *Doupe v. Genin*, 6 Am. Rep. 47; *Gill v. Middleton*, 105 Mass. 477; *Davidson v. Fischer*, 11 Colo. 583; *McCarthy v. Bank*, 74 Me. 315. We fully realize the maxim "*sic utere tuo ut alienum non laedas*" when this rule applies, and also the liability of an upper tenant, or a landlord who controls an upper story, for all damages sustained by one occupying an under story or room, caused by any culpable negligence of such landlord or upper tenant. The fact that the landlord controlled the upper room in which the pipe burst adds nothing to his responsibility in this case. If the upper room had been occupied by a tenant, with absolute control, to the exclusion of the landlord, such tenant, under the evidence, would not be liable for the damage; neither would the liability of the landlord by reason of such tenancy be lessened. There was no defect in

the pipe, and there was no neglect of duty pertaining to the upper story, where the break occurred. The neglect, if any, was in not shutting off the water; if a duty, one the landlord owed to the occupants of the lower rooms as much as to an occupant of the upper room. The cases of *Jones v. Freidenburg*, 66 Ga. 505, and *Rosenfield v. Arrol*, 44 Minn. 395, 46 N. W. 768, and others of like import do not apply. Here the liability, if it exists, lies behind—further back than—the occupancy or control of the upper story; it is in the negligent failure to cut off the water from the pipes,—a duty owing to plaintiffs, if it be such, without reference to the ownership or occupancy of the upper story. To declare, as matter of law, growing out of the relationship of landlord and tenant, independent of contractual obligation, that the landlord owed a duty to his tenants, in anticipation of a freeze, to see, for the protection of his tenants, that the water was cut off from the pipes, when the facts show that the tenants have equal authority and privilege to shut the water off, or cause it to be shut off at their request, as the landlord would be to lay down a rule of law unwarranted by any just principle or any precedent which we have discovered. Under the evidence, the verdict should have been for the defendant. A judgment will be here rendered to that effect. Reversed and rendered.

(108 Ala. 898)

HAWKINS v. DUNCAN.

(Supreme Court of Alabama. June 6, 1894.)

CORONER'S JURY—FEES—ALLOWANCE BY COUNTY COMMISSIONERS.

Cr. Code, § 4883, provides that the compensation of petit and grand jurors shall be preferred claims, and payable on the certificate of the clerk of the court without being subject to audit and allowance by the county commissioners; section 4885 provides that jurors on a coroner's inquest are entitled to the same compensation allowed grand and petit jurors, "to be paid in the same manner;" section 4876 provides that fees for the holding of an inquest shall be paid out of the county treasury, when, in the opinion of the court of county commissioners, the inquest should have been held. *Held*, that coroners' certificates for jurors' fees are not payable without their first being audited and allowed by the court of county commissioners.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by W. M. Duncan against Kenneth F. Hawkins. There was a judgment for plaintiff, and defendant appeals. Reversed.

William I. Grubb, for appellant. Z. T. Rudolph, for appellee.

BRICKELL, C. J. The action commenced by the appellee, as plaintiff, before a justice of the peace, is founded on the official bond of appellant as county treasurer of the county of Jefferson. The alleged breach of the bond consists in the refusal of the appellant, as county treasurer, having money in his

hands sufficient, to pay, on presentment and demand, a certificate issued to him by the coroner, as his compensation as a juror upon an inquest held by the coroner. The justice of the peace rendered a judgment against the appellant, from which he appealed to the circuit court. A complaint was filed by the appellee, to which the appellant demurred, assigning three causes of demurrer, which are reducible to a single proposition; that the complaint, not alleging that the claim had been presented to, audited and allowed by, the court of county commissioners, did not state a substantial cause of action. The demurrer was overruled, and judgment rendered against the appellant.

The compensation of grand and petit jurors is a preferred claim, payable from the county treasury, on the certificate of the clerk of the court in which the service was rendered, and is not subject to audit and allowance by the court of county commissioners. Code, § 908; Cr. Code, § 4883. The statute providing for the compensation of jurors summoned by a coroner to hold an inquest declares that they "are entitled to the same compensation allowed grand and petit jurors, to be paid in the same manner." Cr. Code, § 4885. As the compensation for grand and petit jurors is not subject to audit and allowance by the court of county commissioners, but is payable on the certificate of the clerk of the court, the argument is,—and it seems to have prevailed in the court below,—that the compensation of jurors summoned by the coroner to hold an inquest must be paid on the certificate of the coroner, and is not subject to the audit and allowance of the commissioners' court. The argument is based wholly on the words "paid in the same manner." These words are not capable of an interpretation which will render applicable to the members of a coroner's jury all the terms of the statutory provisions touching the compensation of grand and petit jurors, the evidence of the compensation which is essential to charge it on the county treasury, and which authorizes its payment. The coroner's jury is not a constituent of a court of record; there is no clerk to certify the compensation, and a certificate by whom becomes the exclusive,—and, in the absence of fraud, the unimpeachable,—evidence of the compensation to which the juror is entitled. Properly interpreted, the words mean no more than that the compensation of the coroner's jury must be paid from the county treasury. If it had been intended they should have a larger signification, withdrawing the claim from the operation of the general statute subjecting all claims to the audit and allowance of the court of county commissioners, there would have been, as there is when a claim is excepted from the operation of these statutes, a mode of verifying or authenticating the claim prescribed.

What is conclusive is that this statute must be construed in connection with section 4876, which declares that "fees for holding an inquest shall be paid out of the county treasury, when, in the opinion of the court of county commissioners or board of revenue, the inquest should have been held." It may be supposed this section refers only to the fees enumerated or specifically mentioned in the section immediately preceding,—the fees of the coroner. The words of the section are general, comprehending all fees, for holding an inquest, payable out of the county treasury. Making them so payable, when, in the opinion of the court of county commissioners, the inquest should have been held, is in harmony with the general policy of the statutes to submit all claims against the county to the audit and allowance of that court. There can be no substantial reason assigned for singling out the fees or compensation of the jurors, making them payable though the court of county commissioners is of the opinion the inquest ought not to have been held, and excluding the coroner and the physician or surgeon. We are of the opinion, before a juror summoned by a coroner to hold an inquest is entitled to compensation payable from the county treasury, the claim must have been audited and allowed by the court of county commissioners. The circuit court erred in overruling the demurrer to the complaint, and the judgment must be reversed, and a judgment here rendered for the appellant, and the appellee will pay the costs in this court and in the court below. Reversed and rendered.

(103 Ala. 411)

SCHALL et al. v. WEIL et al.

(Supreme Court of Alabama. May 24, 1894.)

FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

Where the bill avers, and complainants' proof shows, that their claim against an alleged fraudulent grantor was in existence before, and at the time of, the conveyance to the grantee, and defendant offers no proof, but relies on the denials in his answer, and the recital of consideration in his deed, a decree that the conveyance is fraudulent is proper.

Appeal from chancery court, Lauderdale county; Thos. Cobbs, Chancellor.

Bill by Henry Weil and another against Charles Schall and another to set aside as fraudulent a conveyance of land. Judgment for plaintiffs, and defendants appeal. Affirmed.

The bill alleges, that on the 3d day of October, 1892, complainants recovered a judgment against William Schall, for \$173.70, and \$30 costs, in the district court of Lauderdale county, which judgment was founded upon an indebtedness contracted by said Schall with complainants, prior to March 14, 1892, and that the same is still unsatisfied;

that on the 14th of March, 1892, said William Schall conveyed to defendant, Charles Schall, his brother, for a recited consideration of \$3,000, cash in hand paid, his undivided half interest in certain lands described in the bill; that for several years prior to March 14, 1892, said William Schall had been engaged in running a grocery at Florence, Ala., and prior to that date, was indebted to complainants and other creditors, for goods, wares and merchandise furnished to him, and on information and belief, complainants charge, that he was so indebted, to the extent of \$2,500, and his creditors were pressing said Schall for payment; that about six weeks prior to March 14, 1892, and about a month or six weeks prior to the spring term of the circuit court of Lauderdale county, for 1892, said William Schall left said county, and went to the state of Ohio, leaving his indebtedness to complainants and others unpaid, and from Ohio he sent a deed conveying his lands and lots in said county, described in the bill, to his brother, Charles Schall. And it is averred, that the real estate described in the bill was worth the sum of \$3,000, at the time it was conveyed to said Charles Schall, but it is charged that said conveyance was voluntary and without consideration, and was made for the purpose of preventing said property from being subjected to the satisfaction of said indebtedness due from said William Schall to the complainants and his other creditors, and for the purpose of hindering, delaying and defrauding the creditors of William Schall. The bill contains the alternative statement, that if complainants are mistaken in stating that said conveyance was wholly voluntary and without consideration, then complainants charge, that the consideration expressed in said deed is in large part, if not altogether simulated; that Charles Schall has not paid William Schall the consideration mentioned in said deed, for said lands; that he holds the interest of William Schall in said lands, upon some secret trust for the benefit of said William, and for the purpose of shielding the said property from being subjected to the satisfaction of the debts due from said William, at the time said conveyance was executed, and it is averred that said conveyance was executed for the purpose of hindering, delaying and defrauding the creditors of said William. The prayer is, that said conveyance be declared fraudulent and void, and for a sale of said William Schall's undivided half interest in said lands, or so much thereof as may be necessary for the satisfaction of the amount due complainants, and costs of this suit, and for general relief. The bill was taken as confessed, as to William Schall. The defendant, Charles Schall, answered, that he had no knowledge of the indebtedness of said William to complainants, as averred in the bill, and required proof thereof; that it is true, as

charged, that on the 14th March, 1892, said William conveyed to him, for the consideration mentioned in the deed, one-half interest in the lands described in the bill, but avers that there is a mistake in the deed; that said William intended to convey his one-half interest in 73 acres lying in section 2, township 3, range 11 west, in said county, instead of the two quarter sections particularly described in the bill; that said William never owned or possessed said lands or any interest therein, except the 73 acres above stated, and that respondent does not set up any claim to said two quarter sections of land, except the 73 acres in section 2, township 3, range 11 west, being a part of the west one-half of said quarter section; that respondent will correct said deed from said William to him in order to conform said contract of sale to the true intentions of the parties; that he does not know whether said William owed complainants anything or not, and does not know to whom he was indebted, nor in what sum or sums, if any, nor that his creditors were pressing him. It was admitted, that said William left this state about the first of the year 1892, and was living in the state of Ohio; that the allegations of the bill as to said conveyance being voluntary, and made for the purpose of shielding said property from the payment of the debts of said William, are untrue, as stated; that he paid said William a full and valuable consideration for the property conveyed by him, evidenced by said deed, and that the allegations, to the effect, that the consideration mentioned in said deed is, in large part, if not altogether simulated, and that respondent has not paid to said William the consideration mentioned in said deed for said lands, and that he holds the interest of said William, upon secret trust for the benefit of said William, for the purposes and with the intent expressed in the bill, are unfounded and untrue; that respondent has paid a valuable consideration for said property, and owes said William nothing on the purchase of said lands. On the trial, the complainants introduced the transcript of the judgment in their favor against said William Schall, in the district court of Lauderdale county, rendered as stated in the bill, the decree pro confesso against said William, and the deposition of Henry Well, a member of the complainant firm, who testified that William Schall contracted the debt on which said judgment was founded,—\$81.40 of it on 12th September, 1891, and \$80.75 on November 7, 1891,—and that the judgment has never been paid. The defendant introduced no proofs. The defendant moved to dismiss the bill for want of equity. The court rendered its decree overruling that motion, and decreeing relief to complainants, and holding that said conveyance was made to hinder, delay and defraud the creditors of said William, and was null and void as to complainants, and condemning the interest

of said Schall in said lands, to pay the debt owing by him to complainants.

Pickett & Crow, for appellant. B. M. Jackson, for appellees.

HARALSON, J. This is a contest between the appellees, creditors of the grantor, and the grantee in a conveyance, on a bill filed by the former, assailing the validity of the conveyance, as having been made to hinder, delay and defraud the complainants, who were creditors of the grantor, at the time the conveyance was made. In such a contest, the onus of proving that the conveyance was founded on an adequate and valuable consideration, is upon the grantee. The bill in this case averred, and the proof showed, that complainants' claim against the alleged fraudulent grantor was in existence before, and at the time of conveyance to the grantee. It has long been settled in this state, that in a controversy of this character, the recital of the consideration of a deed thus assailed, is not evidence against the creditor, and is the mere declaration or admission of the grantor, as between him and the grantee. There was no proof on the part of the grantee as to the consideration of this deed. He relied upon the denials in his answer, and supposed, these put the burden of proof of the allegations of the bill on the complainants. Under our uniform rulings, we must regard the conveyance as voluntary and fraudulent. *Hubbard v. Allen*, 59 Ala. 283; *Hamilton v. Blackwell*, 60 Ala. 545; *Zelmnicker v. Brigham*, 74 Ala. 598; *Thorington v. City Council of Montgomery*, 88 Ala. 552, 7 South. 363; *Chipman v. Glennon* (Ala.) 13 So. 823. There was no error in the decree of the chancery court, and it must be affirmed.

(108 Ala. 436)

THOMASON et al. v. LEWIS.

(Supreme Court of Alabama. June 5, 1894.)

CONDITIONAL SALE—WAIVER OF RIGHT TO RETAKE PROPERTY.

1. Where personal property is sold conditionally, the title to remain in the vendor until the price is paid, the vendor, by suing for such price and obtaining judgment, does not waive his right to retake the property.

2. If the vendor, by attachment or execution against the vendee, levies on the property as belonging to the vendee, he will be deemed to have abandoned his claim.

Appeal from city court of Anniston; James W. Lapsley, Judge.

Action of trover, brought by E. M. Lewis, for the use of Matthews & Whiteside, against R. P. Thomason and the Thomason Grocery Company, to recover for the wrongful conversion of an engine and boiler. The plaintiff demurred to defendants' plea. The demurrer was sustained, and defendants appeal. Affirmed.

The said engine and boiler had been sold by E. M. Lewis to Ellis & Strong, who gave notes for the purchase price, the title to the

property being retained by said Lewis until the notes were paid in full. The complaint averred that the notes were duly transferred and assigned to Matthews & Whiteside by E. M. Lewis, the latter agreeing to hold the title to the said engine and boiler for the use of said Matthews & Whiteside until said notes were paid in full. This appeal is taken from the judgment of the city court sustaining the demurrer of the plaintiff to the defendants' pleas, and the only errors assigned are based upon the rulings of the court upon the pleadings.

E. H. Hanna, for appellants. Matthews & Whiteside, for appellee.

COLEMAN, J. The action is in trover, and was brought by E. M. Lewis for the use of Matthews & Whitesides. The defendants interposed a demurrer to the complaint, and, the demurrer having been overruled, pleaded substantially the following facts, by special pleas in defense of the action: E. M. Lewis sold conditionally to Ellis & Strong the personal property the subject of the present litigation. Ellis & Strong mortgaged the same, and upon its foreclosure the appellants became the purchaser. Ellis & Strong executed their several promissory notes to E. M. Lewis for the purchase money, the vendor retaining the legal title in himself until the payment of the purchase money. E. M. Lewis, the vendor, transferred the unpaid notes to Matthews & Whiteside, he agreeing to retain the title to the property for their benefit and protection. Matthews & Whiteside sued the notes to judgment, but the judgment has not been paid. Thomason et al. refused to surrender the property, and the present action was instituted by Lewis for the use of Matthews & Whiteside. Upon demurrer the pleas were held insufficient. The case is brought up under the special act establishing the Anniston city court.

The proposition of law asserted by the appellants is that the transfer of the notes to Matthews & Whiteside, and their suit upon the notes, converted the conditional sale into an absolute sale of the property to Ellis & Strong; that Lewis had the election, upon a failure to pay the notes at maturity, to retake possession of the property, or to pursue the collection of the debt, but could not pursue both remedies, and, having elected one, he thereby waived or lost the right to pursue the other. We do not understand this to be the law in regard to conditional sales of the character of the one under consideration. No doubt, if the plaintiffs recover in the present action, the title to the property will vest in the purchaser, and the debt contracted for the purchase money will be thereby extinguished; and it is equally true that, if the purchase money for the property had been paid, the vendor's title would have passed to the purchasers, and this whether voluntarily paid, or forced by legal process.

It is also the law, as applicable to the present case, and the respective rights of the parties, that if the plaintiffs, by attachment or execution on their judgment, had levied upon the property in question as the property of the defendant debtor, or by any other unequivocal act had recognized the property as belonging to the debtor, such conduct would amount to an election to abandon or waive their claim as the legal owners, and to proceed against it as the property of the vendee. The law will not permit a vendor who retains the legal title to property to have it sold as the property of the debtor, and get the benefit of such sale, and then claim it as his own. Such claims are inconsistent and unjust. These are the principles declared by this court, and they have gone no further. *Lehman, Durr & Co. v. Van Winkle*, 92 Ala. 443, 8 South. 870; *Engine Co. v. Hall*, 89 Ala. 628, 7 South. 187; *Dowdell v. Lumber Co.*, 84 Ala. 316, 4 South. 31; *Iron Works v. Smith* (Ala.) 13 South. 525.

It does not appear from the complaint, neither is any fact averred in the pleas which tends to show a waiver on the part of the vendor or his transferees of the legal title reserved at the time of the sale. The mortgage executed by Ellis & Strong conveyed no greater interest than they owned, and the purchaser under the mortgage bought the property subject to plaintiff's legal title. *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285. There is no error in the record. Affirmed.

(103 Ala. 404)

BELLAMY v. THORNTON et al.

(Supreme Court of Alabama. June 6, 1894.)

GUARDIAN—USE OF PRIVATE FUNDS FOR WARD'S SUPPORT—REIMBURSEMENT—SALE OF WARD'S REAL ESTATE—WHEN ORDERED.

Where a guardian uses his own funds for the support of his wards, under such circumstances as that an order for the sale of their land would have been granted for such purposes if it had been applied for in advance of the expenditures, a sale of sufficient of such real estate to reimburse him will be ordered after his office as guardian has expired, and the land has passed into the hands of a trustee for management.

Appeal from chancery court, Russell county; Jere N. Williams, Chancellor.

Bill by W. A. Bellamy, guardian of the minor children of Ella F. Reese, deceased, against C. J. Thornton, trustee and administrator of the estate of Ella F. Reese, deceased, and others, to remove such administration and guardianship into the chancery court, and there have an accounting, and a sale of so much of the land of such estate and belonging to complainant's wards as may be necessary to pay complainant any balance which may be found due him on final settlement. From a judgment sustaining a demurrer to and dismissing the bill, complainant appeals. Reversed.

L. W. Martin and W. J. Boykin, for appellant.

HEAD, J. In 1884, Mrs. Ella F. Reese died, testate, leaving a real and personal estate, all of which she devised and bequeathed, in equal shares, to her three minor children. By the will she appointed M. L. Patterson as trustee, to manage the estate during the minority of the children, with a provision that, if he should fail to accept, the chancery court having jurisdiction should appoint some suitable person to act as such trustee. Patterson, if he should accept, or, if not, the appointee of the chancery court, was empowered and directed to have full and exclusive control of the estate until the youngest child should arrive at full age, with power to set apart to each child, as he or she should become of age, or to the daughter on her marriage, his or her share of the estate. Meanwhile, out of the rents, issues, and profits of the estate, he was empowered to provide the children with such support, maintenance, and education as their condition and prospects in life would reasonably allow. Patterson was also nominated to act as executor. He, however, renounced both nominations, and declined to serve either as trustee or executor. The chancery court having made no appointment of a trustee, certain creditors of the testatrix applied to the probate court of Russell county to commit the estate to an administrator of its appointment, and the complainant, Bellamy, being then sheriff of the county, was by said probate court appointed to administer the estate by virtue of his office as sheriff, and he entered upon the duties of the trust. He shows by the bill that he found the estate considerably in debt, and the children without the means of maintenance and education; that under proper orders of court he converted the personal property into money, and paid the debts. On the 20th of December, 1884, he reported to the probate court the necessities of the children in respect of their maintenance and education, and that there was no person by or through whom the necessary relief could be afforded them, and prayed for the appointment of a guardian to provide for them; and thereupon the court, reciting in its order the said necessities of the children, appointed complainant, Bellamy, by virtue of his office as sheriff, to act as such guardian, and he entered upon the duties of that office. Thereafter, with the proceeds of the personal property not used in paying debts, and his private funds, he provided for the maintenance and education of his wards, furnishing them only what they imperatively needed, and expended in this way over \$550 more than the entire personal assets which came into his hands as administrator, which sum is now due to him personally. The testatrix left 400 acres of land, which is described and set forth in the bill. Complainant's term of office as sheriff expired in

1888, and with it his offices as administrator and guardian terminated, and it then became his duty to make final settlement of both those trusts. On September 2, 1889, the register in chancery appointed C. J. Thornton trustee to carry out the provisions of said will, who accepted the appointment, and has since had the management of the estate and the control of said minors. In April, 1889, complainant filed his accounts and vouchers in said probate court for final settlement of his administration and guardianship, but thereafter, in an effort to make the settlements, the court declined to take jurisdiction because of the peculiar provisions of the will, and particularly because, as the court thought, it had no jurisdiction to make the then acting trustee a party to the settlement. This bill was filed July 19, 1892, by Bellamy, to remove the administration and guardianship settlements into the chancery court, with special prayer for an accounting and a decree for the sale of such property as may be necessary to be sold to pay him any balance which may be found due him on final settlement, concluding with the prayer for general relief. The devisees and the trustee, Thornton, are the parties defendant. The bill was afterwards amended to meet certain grounds of demurrer interposed by the trustee; and to it, as amended, the trustee again demurred. The chancellor, in vacation, sustained the demurrer, and dismissed the bill, holding that it was not capable of amendment so as to give it equity. This was the equivalent of a dismissal on motion for want of equity, and the correctness of the ruling must be determined upon consideration of the question whether, taking all amendable defects, if any, as cured by intendment, there is equity in the bill.

It is insisted that, under the peculiar circumstances, the dual relation of complainant as administrator and guardian creates an obstacle to the proper exercise of the jurisdiction of the probate court to do complete justice in the settlement of these trusts, for the reason that the offices of administrator and guardian had terminated, and complainant would not be entitled to receive as guardian any distributive interests which might be decreed against him to his wards on the administration settlement, and would not be chargeable as guardian therewith, whereby he might receive credit against the same for expenditures made for the wards. In the view we take of the case, the bill may be supported on another ground, and we need not pass upon this alleged cause of equitable interference. Disposed of as the bill was by the chancellor, it must be taken as sufficiently showing that the father of the wards was unable or refused to support them, and unable to reimburse complainant; that the income of their estate and corpus of the personal property was insufficient; and that it was necessary to their maintenance and education, and for their

best interests, that the real estate, or some portion thereof, be sold for that purpose. In other words, such a state of facts as that an order of sale would have been granted for the purposes mentioned if applied for in advance of the expenditures. It is a general rule that a guardian or other fiduciary having the control of infants' estates will not be permitted to use the corpus or principal of the estate in the support of the wards. He is, as a general rule, confined to the income. On application to the proper court, however, showing urgent need therefor, considering the best interests of the wards, the court will direct the application of such portion of the principal to that use as it deems proper; and, if necessary, will order real estate to be sold for the purpose. Our statutes long ago provided for such an appropriation of both personal and real estate. Section 2780 of the Code of 1876 read as follows: "When upon the representation in writing of the guardian of a minor, it is made to appear to the satisfaction of the probate judge that the rents and profits of the estate of the ward are insufficient for his maintenance and education, the judge of probate may direct a sale of such portion of the estate, real and personal, of the ward as may be necessary for that purpose." In some jurisdictions the rule is adhered to that the guardian, to justify expenditure of the principal and claim reimbursement, must obtain the proper order in advance, denying him indemnity, although the conditions were such as that the necessary order would have been granted if applied for in advance. But this court long since adopted the less rigid rule of ratifying in such cases that which would clearly have been previously authorized, at least to the extent of allowing credit to the guardian, upon the settlement of his accounts, for sums paid out for maintenance and education from the principal of the estate, or beyond the income realized by him. *Stewart v. Lewis*, 18 Ala. 734; *Montgomery v. Givhan*, 24 Ala. 568; *Calhoun v. Calhoun*, 41 Ala. 369; *Waldrom v. Waldrom*, 76 Ala. 285. We are not aware, however, that the question now presented—whether a lien will in any case be decreed in favor of the guardian upon the corpus of the ward's estate for moneys expended out of his own funds, while guardian, in the necessary maintenance and education of the ward—has ever arisen in this state; nor have we found authority elsewhere in support of such relief. In *Foscue v. Lyon*, 55 Ala. 440, a testator, by request, created in Lyon, as trustee, an interest bearing fund of \$50,000, the interest on which should be paid to his daughter, Mrs. Foscue, during her life, and the principal of which, remaining undiminished at her death, should be settled on and vest in her children. The trustee was required to invest the fund in safe or productive stocks, or place at interest on good security, as, in his discretion, would

seem best, collect the dividends or interest annually, and pay the same to Mrs. Foscue. During the long administration of the trust it appears that the trustee paid to her more than the annual income of the fund, and on bill filed by Mrs. Foscue and her children for a settlement, after the resignation of the trustee, the trust estate went into the hands of a receiver appointed by the court. Upon claim made by the trustee for indemnity for the excess paid the life tenant over the annual income, this court, speaking by Chief Justice Brickell, said: "We think, if the trustee, in making payments to Mrs. Foscue, exceeded the interest, she is bound to protect him against loss, independent of an express promise to indemnify him. It is a general rule that the cestui que trust ought to save harmless the trustee who has honestly, without gain to himself, advanced or paid money for his benefit. *Perry, Trusts*, § 458. Her right was to the annual interest realized, or which, by due diligence, the trustee could have realized, from the investment of the trust fund. If she has received more, the duty of refunding, either to the remainder-men or the trustee, if he is charged because the principal has been invaded, is imposed by law. *Tif. & B. Trusts*, 621; *Mills v. Mills*, 7 Sim. 501, 10 Cond. Eng. Ch. 168; *Williamson v. Williamson*, 6 Paige, 298. If the trustee had not resigned, he could have retained from the annual income and interest payable to Mrs. Foscue until indemnified against loss, and the principal restored to the amount it would have been if it had not been diminished by the payments to her. Having resigned, and a suit pending in which she is a party complainant for an account of the administration of the trust, the estate being in the custody of a receiver appointed by the court, it was competent to direct the receiver to apply the income and interest to the indemnity of the trustee. Thereby the principal will be restored for the benefit of the remainder-men." It will be observed that no question did or could arise in that case respecting the application of the corpus of the fund to Mr. Lyon's indemnity, since the corpus did not belong to Mrs. Foscue, but to her children. If she had been the owner of the entire interest, it is not to be perceived why that should not have been subjected to the trustee's reimbursement. In the present case the children own the lands in fee. The office of the guardian, the complainant, has expired; a successor, as trustee under the will, appointed, and the lands passed into his hands for management. We think, if it should be clearly made to appear that the expenditure for which reimbursement is claimed was made, and that it was demanded by the necessities of maintenance and education of the children, and for their best interests, and that the father was unable or refused to provide such necessary maintenance and education, and unable to reim-

burse complainant, he, the complainant, should be reimbursed from the real estate of the children, and that it should be referred to the register, upon proof of these facts, to ascertain the most practicable and advantageous method of accomplishing it, whether by renting out the lands, and applying the rents in that way, or by a sale of all, or a portion, and what portion, of the lands, and on what terms. We think, therefore, there is equity in the bill. The bill may, in some matters of detail, need amendment. If so, what we have said will indicate what is necessary. Reversed and remanded.

(103 Ala. 830)

ENNIS et al. v. HARRIS et al.

(Supreme Court of Alabama. June 5, 1894.)

PLEADING—VERIFIED ACCOUNT—SUFFICIENCY.

An affidavit which states that an itemized account is "just, correct, due in part, and unpaid" is not in conformity with Code, section 2773, which provides that a verified itemized statement is competent evidence of the correctness of the account, as it does not show a prima facie right of recovery, or even that the account was due and payable when suit was brought.

Appeal from circuit court, Fayette county; S. H. Spratt, Judge.

Action by Harris, McWhorter & Co. against T. D. Ennis and others to recover for goods sold and delivered. Judgment was rendered for plaintiffs, and defendants appeal. Reversed.

Nesmith & Sanford and James J. Ray, for appellants. McGuire & Collier, for appellees.

MCLELLAN, J. This action is by Harris, McWhorter & Co. against Ennis et al. on an account for goods, etc., sold by plaintiffs to defendants. It was commenced by summons and complaint. On the complaint is this indorsement, under section 2773¹ of the Code: "This action is founded on account verified by affidavit." At the trial, plaintiffs offered, and, against the defendants' objection, were allowed to introduce, in evidence, an itemized account, the verification of which was to the effect that it was just, correct, due in part, and unpaid. With this account, thus verified, before the jury, plaintiffs rested, and upon this evidence the court gave the affirmative charge at their instance. The court erred, in our opinion, both in the admission of the account and in the charge given. The affidavit did not affirm that the account, or any certain part of it, was due, but only that an account for \$1,801.17, consisting of a great number of items, was, in some uncertain and indeterminable part, due and payable, and not due as to other uncertain and indeterminable part. The ac-

¹ Section 2773 provides that, in suits on accounts, an itemized statement, verified by affidavit of a competent witness, is competent evidence of the correctness of the account.

count and verification must show a prima facie right of recovery. One essential constituent of this right is that the amount of the account is due and payable when the suit is brought. That does not appear here. The account, as offered and received in this evidence, did not make out a case for the plaintiffs, and, so far from their having the right to the affirmative charge, that instruction might well have been given for the defendants. There is no merit in any of the other points presented by this record. Reversed and remanded.

(108 Ala. 424)

KNIGHT et al. v. KNIGHT.

(Supreme Court of Alabama. June 7, 1894.)

ASSIGNMENT OF DECEDENT'S NOTE BY HEIR—RIGHT OF ACTION.

Unless it is shown that the estate of a decedent owes no debts, and has no administrator, a suit on a note which belonged to the estate cannot be maintained by one who claims title thereto by transfer from the heirs and distributees.

Appeal from chancery court, Lowndes county; Jere N. Williams, Chancellor.

Action by A. R. Knight against Comer W. Knight and Nancy McQueen to foreclose a vendor's lien. A demurrer to the bill was overruled, and defendants appeal. Reversed.

The bill in this case was filed on June 15, 1891, by A. R. Knight against Comer W. Knight and Nancy McQueen. As originally filed, the bill averred that on January 27, 1883, John A. Knight, who owned a one-sixth undivided interest in a certain tract of land, sold his said interest to Comer W. Knight for the sum of \$1,250, for which amount the said Comer W. Knight executed, on that day, his promissory note, reciting therein that it was for the purchase money of the lands above referred to; that, subsequently, the said C. W. Knight sold a portion of the lands so purchased from John A. Knight to one Nancy McQueen. The original bill further averred that the said note came into the hands of the complainant by delivery, for a valuable consideration, and that he was the bona fide holder of said note, and that there was still due thereon \$642. The prayer of the bill was for the enforcement of a vendor's lien to compel the payment of said note. To this bill the respondents demurred. The chancellor sustained their demurrer; and the complainant amended his bill by the additional averments "that, in and by the execution and delivery of said note, the said Comer W. Knight made and established a vendor's lien to said J. A. Knight on said lands, to the extent of his interest therein, and that said vendor's lien is still valid and binding for the satisfaction of said note; that, in the year 1889, said J. A. Knight died, holding, at the time of his death, the aforesaid note, still due and unpaid, and that afterwards, in the distribution of the estate of said J. A. Knight, the

same being solvent, and all the heirs and distributees being of full age, the note aforesaid became the property, and went into the possession, of the legal heirs of said estate, and was by them transferred by delivery, and for a valuable consideration," to the complainant. The respondents demurred to the bill, as amended, on the following grounds: (1) That it contained no equity; (2) that it is shown by the bill that the administrator of the estate of said J. A. Knight was a necessary party to said bill; (3) that the bill, as amended, nowhere shows whether the said J. A. Knight died in the state of Alabama, or elsewhere; (4) that said bill fails to show who are the holders of the legal title to the note under which the complainant seeks to establish a vendor's lien, and that the holders of said legal title are necessary parties; (5) that the heirs and distributees of J. A. Knight are not made parties to the bill; (6) it is not shown by the bill whether J. A. Knight left surviving him a widow and children. On the submission of the cause upon these several grounds of demurrer, the chancellor overruled each of them. The respondent brings this appeal, and assigns as error this decree of the chancellor.

Gamble & Powell, for appellants.

HEAD, J. On January 27, 1883, J. A. Knight, owning five-twelfths interest in the lands described in the bill, sold and conveyed the same to the defendant Comer W. Knight, who executed to the vendor his promissory note for \$1,250, for a balance unpaid of the purchase money. Afterwards, Comer W. Knight sold his interest, so acquired, in a portion of the lands, to the defendant Nancy McQueen. J. A. Knight thus held the vendor's lien on the lands for the security of this purchase-money note. Afterwards, he died, still owning the note, of which \$642 remained unpaid; and the bill avers that "afterwards, in the distribution of the estate of said J. A. Knight, the same being solvent, and all the heirs and distributees being of full age, the note aforesaid became the property, and went into the possession, of the legal heirs to the same entitled, and was by them transferred by delivery, and for a valuable consideration, to your orator." It is by virtue of the right to the note, thus acquired by the complainant, that he claims ownership thereof, and the right to maintain this bill to enforce the lien of a vendor on the lands. His ownership and right so to sue are questioned by demurrer to the bill. It will be observed that it is not averred that the estate of J. A. Knight owed no debts, nor that the debts, if any, had been paid; nor that the distribution, by which the note went into the hands of the distributees, was made by the administrator, in the course of administration. It must be taken, therefore, that there were debts which the note in question was needed to pay, and that the ad-

ministrator was entitled to it, for that and other lawful purposes of administration, whenever he might see proper to demand it. This being so, the distributees were without immediate right to it, and could confer none on the complainant. If the bill had averred that there was no administrator, and no debts, or that the distribution to the distributees, by which they acquired the note, was made by the administrator, in course of administration, the case would have been different. In the former case, the distributees could lawfully have divided the estate among themselves. *Carter v. Owens*, 41 Ala. 217. In the latter, they would have acquired the right to the note from the administrator himself. In either case, their transfer of the note, by delivery, to complainant, would have passed to him the beneficial ownership, entitling him to sue in equity to enforce the vendor's lien. Code, § 1764. But a transfer by delivery merely would pass only the beneficial ownership, the legal title still remaining in the transferor; and the general rule is that the transferee in such a case, suing in equity to enforce the note, or rights growing out of it, must make the holder of the legal title a party. We have applied this rule to suits for the enforcement of vendors' liens. *Broughton v. Mitchell*, 64 Ala. 210; *Davis v. Smith*, 88 Ala. 596, 7 South. 159. With his consent, he may be joined, as complainant, with the transferee, or, at the election of the latter, be made a party defendant. *Davis v. Smith*, *supra*. Our decisions have established a virtual exception to this rule, which is, as above indicated, that when the estate of a decedent owes no debts, and has no administrator, the distributees may sue for reduction to possession and distribution among themselves of the personal assets of the estate, without having an administrator appointed and bringing him before the court. *Fretwell v. McLemore*, 52 Ala. 125; *Baines v. Barnes*, 64 Ala. 375, and other cases. Though none but the personal representative can, technically, be the legal owner of the personal assets of a deceased person, prior to distribution or transfer made by him, yet, if there is no personal representative, and no necessity for one,—if his appointment would be a useless formality, having no other office than to make distribution,—the law dispenses with his intervention, treats the beneficiaries as being clothed with his rights and powers, and confers upon them his remedies to reduce the assets to possession. In other words, it, substantially, regards them, in such case, as the legal, as well as beneficial, owners of the assets. We think, therefore, pursuing this well-recognized exception to its logical conclusion, that if there is no administrator, and no debts, and the distributees take possession of the assets, as owners, for distribution among themselves, they will be regarded as the legal owners, and they alone need be brought before the court, as the representatives of the legal title, in a suit in

equity by their transferee of a note by delivery. It would not be necessary to procure the appointment of an administrator, and bring him before the court.

The bill is not well drawn in other respects. It abounds in conclusions where facts ought to be averred. For instance, it falls to show the domicile of J. A. Knight at the time of his death, so that it may be known by the laws of what state the distribution of the estate is governed, nor does it show the relationship of the persons alleged to be distributees to the deceased; but these averments are attempted to be supplied by the conclusions of the pleader that the persons from whom complainant claims were the distributees lawfully entitled to the estate. The demurrers were well taken, and an order will be here rendered reversing the decretal order of the chancellor, and sustaining the demurrers to the bill. The complainant may amend within 30 days, with authority in the chancery court to extend the time on sufficient showing. Reversed, rendered, and remanded.

(108 Ala. 415)

Ex parte TOWER MANUF'G CO. et al.
(Supreme Court of Alabama. June 7, 1894.)
MANDAMUS—PLEADING—JUDGMENT AGAINST MARRIED WOMAN—APPEAL BOND.

1. Where application is made to the supreme court for mandamus to an inferior court of record, and the right to relief is shown by the records of such court, no petition setting forth the facts is required, an authenticated transcript of the record being sufficient.

2. Code, § 3629, which provides that from any judgment or decree subjecting to sale the separate estate of a married woman, she is entitled to an appeal to the supreme court to revise such judgment or decree without security for costs, on making affidavit that she is unable to give such security, applies only to a judgment or decree not binding on a married woman personally, and which, by force of its own terms, subjects to sale her separate estate, but does not apply to a personal judgment against her for the recovery of money.

3. As an appeal will not lie from an order of the city court requiring the clerk to make a transcript and certificate of appeal and staying execution pending appeal, the proper method of reviewing such order is by mandamus.

The Tower Manufacturing Company et al. made application for a rule nisi directed to the judge of the city court requiring him to show cause why a peremptory mandamus should not issue commanding him to vacate an order requiring the clerk to issue a transcript and certify an appeal in suit of Tower Manufacturing Company et al. against C. A. Thompson. Motion granted.

J. J. Willett and D. C. Blackwell, for petitioners. Knox, Bowie & Pelhom, for respondent.

BHICKELL, C. J. On the 10th day of March, 1894, the city court of Anniston rendered a personal decree against C. A. Thompson, a married woman, in favor of the movants, for the sum of \$10,959.36, ordering the

issuance of execution thereon. On the 19th day of March thereafter, Mrs. Thompson having made and filed with the clerk of the court the affidavit prescribed by the statute (Code, § 3629), claimed an appeal from the decree, without giving security for the costs of appeal, or bond, with sureties, to supersede its execution. The clerk refused to make a transcript of the record and certify the appeal. Thereupon she applied to the city court for an order requiring the clerk to make a transcript and certify the appeal, and for a suspension of the execution of the decree until the appeal was heard and determined. The court granted the application and made the order, and the movants, having given notice to the judge of the city court and to Mrs. Thompson, now move for a rule nisi directed to the judge to show cause why a peremptory mandamus should not issue commanding him to vacate the order. The parties have appeared, and submitted arguments and briefs in support and in opposition to the motion.

1. It is suggested by the counsel opposing the motion that it ought to be overruled, because it is not accompanied by a petition or other like pleading, stating the facts on which the right to relief is based, verified by the oath of the movants. If the right to relief was dependent on matter not appearing of record, in whatever form the application was made, a verification of it by the oath of the applicant, or affidavit in support of it, making a prima facie case, would be essential. When the application is made to this court for the grant of the writ directed to an inferior court of record, because of matters necessarily of record, an authenticated transcript of the record renders unnecessary the verification by the oath of the applicant, or other affidavits to support it. The authenticated record is the sole evidence upon which the court acts. A petition stating the facts upon which the right to relief is claimed would be more formal, and in correspondence with the mode prescribed by the statute, when a like application is made to the courts of original jurisdiction. Code, § 3158. The practice of applying by motion, entered here on the motion docket, of which notice is given to the parties in adverse interest, has prevailed too long now to be departed from, however informal it may seem. Ex parte Garland (opinion of Walker, C. J.) 42 Ala. 559.

2. The writ of mandamus, it may be, has been employed by this court more liberally as a remedy for the correction of the errors of inferior tribunals than would seem consistent with the principles of the common law. If this is true, it is in some degree attributable to the existence of peculiar statutory proceedings, in which errors may intervene, incapable of correction by appeal or other revisory remedy. In other cases, to prevent a failure of justice, or irreparable injury, when there was a clear legal right, and an absence

of any other adequate remedy, there has been resort to mandamus. The recent cases of *Ex parte Barnes*, 84 Ala. 540, 4 South. 769, and *Reynolds v. Crook*, 95 Ala. 570, 11 South. 412, are illustrative. In the first case, in the course of a suit commenced by attachment, the goods on which a levy had been made were sold, and the proceeds of the sale were in the hands of the sheriff. A claim of exemption was interposed by the defendant, which was invalid, the attachment having been sued out to enforce the lien for the rent of a storehouse. Yet the circuit court sustained it, and made an order directing the sheriff to pay the proceeds of sale to the defendant. The order was erroneous, and was destructive of the lien for the payment of the rent. It was not a final judgment from which an appeal would lie, and the execution of which the plaintiff could suspend by the giving of a bond with sureties. To prevent a failure of justice and irreparable injury, a mandamus was awarded, compelling a vacation of the order, and the restoration of the parties to the condition in which they were when the error was committed. In the second case, in the course of a suit in equity for the final settlement of an administration, creditors had been notified to come in and make proof of their claims. A creditor appeared, filed and proved her claim, which was allowed. She having died, the proper personal representative appeared, and moved for a revival of the decree in his name, which was refused. The court interfered by mandamus, compelling the revivor, for otherwise there would have been a failure of justice. The claim having been allowed, the right of the creditor established, there was an obvious necessity for his continuous representation in the progress of the suit, in which orders or decrees might be made of injury to him, to which there was not opportunity for objection or exception. These cases are illustrative of the principle upon which this court has proceeded. If an order or judgment or decree is made or rendered, which is not the subject of revision by appeal or other revisory remedy, and yet is erroneous, working injury to the party complaining, and there being no other legal remedy, adequate to the correction of the error and the prevention of the injury, mandamus will be awarded. 2 Brick. Dig. 240, §§ 4, 5; 8 Brick. Dig. 626, §§ 15-39. The statute under which Mrs. Thompson asserted the right to an appeal without giving surety for costs, and a suspension of the issue of execution on the decree, so far as is now material, reads: "From any judgment of the circuit or city court, or from any order or decree of the court of probate, or from any decree of the court of chancery, subjecting to sale the separate estate of a married woman, or any part thereof, be the same her statutory separate estate, or a separate estate otherwise created, she is entitled to an appeal to the supreme court to revise such judgment, order, or decree, without giving se-

curity for costs of appeal, on making affidavit that she is unable to give such security," etc. Code, § 3629. When the statute was originally enacted (March 9, 1871; Pamph. Acts 1870-71, p. 45), there were but few instances in which a personal judgment or decree could be rendered against a married woman. The one was for her debts contracted before marriage, the husband being relieved of his common-law liability for their payment, and the statute expressly declaring that therefor she alone was suable, and her separate estate liable, as if she were unmarried. Code 1876, § 2704. For her torts committed before or subsequent to marriage her liability to suit remained as at common law, and a personal judgment could be rendered against her if the liability was ascertained and fixed. Her statutory separate estate was liable "for articles of comfort and support of the household," and the liability was enforced by an action at law against her and her husband. But as to the wife a personal judgment could not be rendered. So far as she was concerned, the only judgment which could be rendered was a judgment subjecting her statutory estate to levy and sale. The judgment had in it all the properties and elements of a judgment in rem, rather than of a judgment in personam. *Ravies v. Stoddard*, 32 Ala. 599. The only orders or decrees a court of probate could render, unless they were founded on a liability incurred by her in a representative capacity, were for the sale of her statutory or other separate estate, and, like all orders or decrees of sale rendered by that court, were in rem, not in personam. In a court of equity the equitable separate estate of the wife was charged with the payment of her debts, as she would have been charged at law if *sui juris*. But it was the estate only which was charged. A personal liability was not fixed upon her, and a personal decree was not rendered against her. Reading the statute in connection with other statutes, and with the principles of the common law relating to the liability of a married woman to suit, we ascertain its scope and extent. When there is a judgment or decree, not binding a married woman personally, but directly operating upon, and subjecting to sale by the force of its own terms, her statutory or other separate estate, as a matter of right she is entitled to an appeal to this court, without security for costs; and of itself the appeal operates "a suspension and stay of all proceedings" until it is here heard and determined. As was said in *Calahan v. Monroe*, 65 Ala. 254: "It is only when the decree directly orders or directly condemns to sale her estate that the statute confers the privilege of an appeal without surety for costs. No other decree subjects, exposes, or makes liable to sale her estate. The statute must not by construction be strained to meet cases not within the fair meaning of its terms, which are plain and unambiguous, because it may be supposed such cases are

equally meritorious, and entitled to as great consideration from the legislature as those which are embraced by its words." The decree of the city court is an ordinary decree for the recovery of money, affecting and binding Mrs. Thompson personally, so long as unreversed or unvacated, establishing conclusively that the complainants therein are entitled to have and recover of her the sum of money therein expressed. This is the entire force and effect which can be accorded to it. Of itself, it does not operate upon or charge any of her property, real or personal, whatever may be her title to it. It is only an execution issuing upon it, which may become a lien upon her property, the subject of levy and sale. From the decree she was not entitled to an appeal without giving security for costs; nor was she entitled to a stay or suspension of execution without bond with sufficient sureties, payable and with condition as prescribed by the statute.

3. The order of the city court not only requires the making of the transcript and certificate of appeal by the clerk, but it stays the issue of execution until the appeal is heard and determined. From the order an appeal will not lie; and, if it would, it could scarcely be said to be an adequate remedy. During its pendency there could be alienations of the estate of the defendant, the subject of levy and sale, to the irreparable injury of the complainants. As now, so long as the order of suspension remains in force, preventing the complainants from the acquisition of liens by the issue and delivery of execution to the sheriff, alienation of all the property of the defendant may be made, rendering the decree fruitless and unavailing. The case is a clear one for a mandamus. There is no other adequate remedy. It is ordered and adjudged that a rule nisi issue to the judge of the city court of Anniston, requiring him to appear on Monday, June 18, 1894, before this court, and show cause why a peremptory mandamus shall not issue commanding him to vacate the said order.

(103 Ala. 525)

BEHRMAN et al. v. NEWTON.

(Supreme Court of Alabama. June 12, 1894.)

ACTION ON CONTRACT—PLEADING—RESCISSI—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

1. In an action on contract, if defendant does not rely solely on a denial of plaintiff's cause of action, he must plead specially the matter of defense.

2. Where a contract has been made for the sale of a stock of goods at a certain per cent. of the cost, and the seller refuses to sell a portion thereof at such per cent., the buyer can repudiate the whole contract.

3. If, however, while taking an inventory, the buyer discovers that the prices being charged are in excess of those agreed upon, and consents to the change, he will not, in an action for damages for breach of the contract, be allowed to set up such change as a defense.

4. It is not error to charge that the jury must be satisfied, by a preponderance of evidence, of the existence of a fact.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action by Behrman & Winters against W. F. Newton for breach of contract of sale. Judgment was rendered for defendant, and plaintiffs appeal. Reversed.

The goods were in Dothan at the time of sale. Upon the cross-examination of the plaintiffs, they were asked "If they had insurance on the goods." The plaintiffs objected to this question, on the ground that it called for irrelevant and immaterial evidence, and duly excepted to the court overruling their objection. The defendant offered as a witness one Crawford, who, among other things, testified that the plaintiff Behrman had said to him that he could purchase nice, new, clean goods for the price he was selling the goods in question to the defendant, and that the plaintiffs had made \$3,000 out of the said goods. The plaintiffs moved to exclude this testimony from the jury, because it was hearsay, irrelevant, and illegal. The court overruled the objection, and the plaintiffs duly excepted. Upon the introduction of all the evidence, the court, at the request of the defendant, gave to the jury the following written charges: (1) "Fraud vitiates or annuls every contract into which it enters; and if the jury believe that there was any fraud practiced, or attempted to be practiced, by plaintiffs, or either of them, upon defendant, then, so far as the defendant is concerned, this alleged contract of sale and purchase was a void contract, and plaintiffs cannot recover." (4) "The plaintiffs must satisfy the jury, by a preponderance of the evidence, that the contract relied upon by them is the true contract, and, unless this is done, the defendant is entitled to a judgment at their hands." (6) "The fact, if it be a fact, that the plaintiff Behrman did not contradict the testimony of the witness Crawford relative to the conversation between them as to the price and condition of the goods, nor attempt to contradict him, is a circumstance at which the jury may look, in connection with all the other evidence in the case, in determining whether or not Crawford spoke the truth in those matters about which he testified." (7) "If the jury believe, from the evidence in this case, that the plaintiffs intentionally marked some of the goods embraced in the terms of the sale at a price higher than they cost laid down in Dothan, and that, when the inventory was being taken by plaintiffs and the defendant, the plaintiffs intentionally concealed this fact from the defendant, then this was a fraud attempted to be practiced upon the defendant, and your verdict will be for the defendant." (8) "If the jury believe, from the evidence, that the plaintiffs intentionally altered or raised the cost mark of the goods, the subject of this controversy, above the actual cost of the same, then this was a fraud upon the defendant which authorized

him to retire from the contract, and if a part of the goods only were so marked by the plaintiffs, then the defendant had a right to refuse to take said goods, and, in such event, the plaintiffs cannot complain that defendant has damaged them." The plaintiffs reserved a separate exception to the giving of each of these charges.

T. M. Espy and R. H. Walker, for appellants. A. E. Pace, for appellee.

COLEMAN, J. This was an action brought to recover damages for the breach of an agreement, entered into between the plaintiffs and defendant, for the sale of a certain stock of goods, the purchase price being fixed at a certain per cent. on the cost mark of the goods. The breach averred is that defendant refused to accept the goods according to contract. The defendant pleaded, in short, by consent, (1) the general issue; (2) recoupment. There were no other pleas, and issue was joined upon these pleas. No facts are admissible in evidence which are not directed to the support of the facts averred in the complaint and in the pleas, and no instructions should be given which are not applicable to the issues before the jury. In actions *ex contractu*, except it be otherwise provided, the general issue is an averment that the allegations of the complaint are untrue, and puts in issue only the truth of such allegations; and, if the defendant does not rely solely on a denial of the plaintiffs' cause of action, he must plead specially the matter of defense. Code, § 2875. Under the plea of recoupment, damages may be recovered by the defendant, which grow out of, or are connected with, as a part of, the matters set forth in the plaintiffs' complaint, and in breach of the contract upon which suit is founded, or in violation of a duty imposed by the contract. *Ewing v. Shaw*, 83 Ala. 333, 8 South. 692; *Martin v. Brown*, 75 Ala. 422; *Hatchett v. Gibson*, 18 Ala. 593.

The evidence on the part of the plaintiffs tended to show a contract for a sale of a stock of goods to defendant at 65 cents on the dollar, as shown by the cost mark of the goods as then marked, and a readiness to perform his part of the contract, and the refusal of the defendant to accept the goods, and pay for them the stipulated price. The evidence for the defendant tended to show that the terms of the sale were that the defendant was to pay 65 cents on the dollar, according to the original cost marks, and, as a part of the sale contract, the plaintiffs guaranteed to defendant that "the goods were bought from fifteen to twenty-five per cent. cheaper than the same goods could then be bought in the market;" and defendant then offered evidence tending to show that plaintiffs had altered the original cost mark, and had marked the goods up, and that the prices were not as cheap as the goods could have been bought in the market. The plaintiffs offered evi-

dence tending to show that, if the goods were marked up, the defendant waived any objection to the sale and purchase on this account. There was other evidence, but this statement is sufficient for the purposes of considering the questions assigned as error. There should be no difficulty in applying legal principles to the facts of the case. The jury must determine the truth when the facts are controverted. If the plaintiffs agreed to sell the goods at 65 cents on the original cost mark, and refused to deliver them at this price, or any part of the goods, the defendant was relieved from the purchase, and had the right to reject the goods, and repudiate the contract in toto. On the other hand, if, while taking an inventory of the goods, the defendant ascertained that the original cost mark had been erased, and a higher cost mark placed upon the goods, and the matter was adjusted, and the breach on the part of the plaintiffs waived by the defendant, the defendant had the right to make such waiver, and he could not afterwards set up such breach in defense of the action. This was a disputed fact, to be determined by the jury. Again, if the plaintiffs as a part of the contract of sale, guaranteed that the goods were bought at from 15 to 25 per cent. cheaper than such goods could have been purchased in the market, they would be compelled to make this guaranty good, under the facts of this case, to the purchaser, and the defendant could recover any loss sustained from a breach of the guaranty; and the same principles would apply to any guaranty made by the plaintiffs as to the character or quality of the goods. The undisputed facts show that the defendant declined to receive the goods, and there was no evidence offered by the defendant furnishing data, upon which his damages could be computed.

We cannot see the relevancy of the evidence that plaintiffs had collected from the insurance company, prior to the sale to defendant, \$1,000 damages for loss by fire. The defendant had no interest in the goods at that time, and none in the policy of insurance. We do not think the court erred in admitting the statement of plaintiff Behrman, to the witness Crawford, that "he could purchase nice, new, clean goods for the price he was selling the goods to defendant, and that he had made three thousand dollars out of the goods." This evidence might tend to shed light upon the proper cost mark of the goods, and also upon plaintiff's guaranty. The court erred in giving charge No. 1 for the defendant. This charge ignores the evidence which tended to show that the defendant waived the marking up of the goods above the original cost mark, and required a verdict for the defendant, if the plaintiffs "attempted" a fraud, whether the "attempt" was successful or not. There was no error in giving charge No. 4. A jury cannot be reasonably satisfied of the existence of a disputed fact, unless there is a preponderance

of the evidence in its favor. In *Acklen v. Hickman*, 60 Ala. 568, it was held that the preponderance, unless it reasonably satisfied the mind of the jury, is not enough; and in the case of *Vandeventer v. Ford*, 60 Ala. 610, the rule was laid down that a charge should not be given which instructed the jury that they should base their verdict upon a mere preponderance of the evidence. In *Rowe v. Baber*, 93 Ala. 422, 8 South. 865, it is said that the true rule is that, to justify a verdict, the evidence must reasonably satisfy the minds of the jury that the facts exist upon which their verdict is based. These authorities do not conflict with what we have said in reference to charge No. 4. Charge No. 6 is a mere argument. Charges 7 and 8 ignore the evidence tending to show that the defendant waived the marking up of the goods, if in fact they were marked up, higher than the original cost price. We have heretofore criticised the use of the word "attempted" in considering a former charge. These charges require a verdict for the defendant, if the jury should find that the plaintiff intentionally marked the goods up, although the jury might be satisfied, from the evidence, that the defendant had waived his right to rescind the contract for this reason, and this question had been satisfactorily adjusted.

What we have said is deemed sufficient to guide the court on another trial, without further specification. Reversed and remanded.

(108 Ala. 421)

GARY et al. v. WOODHAM et al.

(Supreme Court of Alabama. June 12, 1894.)

ADVERSE POSSESSION—CONTINUITY—DIRECTING VERDICT.

1. Where a person in possession of farm land sells the same in December, and it remains unoccupied for two months, at which time the tenant of the purchaser takes possession, such interruption of actual occupation does not break the continuity of possession, unless there is evidence of an intention to abandon the possession.

2. Where the court has charged as to the right of a party to recover, it is not precluded, from directing a verdict in his favor at his request.

3. A verdict was rendered on a trial, but was not reduced to writing. The court, some days afterwards, the jury still being in attendance, called them together, and directed them to reduce the verdict to writing. *Held*, that the oral verdict was sufficient, and no injury could be caused by its subsequent reduction to writing.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action of ejectment by H. D. Gary and others against William Woodham and others. Judgment was rendered for defendants, and plaintiffs appeal. Affirmed.

The testimony introduced tended to show that, in the year 1854, a patent to the lands sued for was issued by the United States government to the plaintiffs' father, who

had since died, and that the plaintiffs are his rightful heirs. In October, 1881, one Price sold and conveyed by proper deeds the lands in controversy, with other adjoining lands, to one Hutto, who went into possession, and in the early part of the following spring, of 1882, built a house on said land, cleared about 10 acres of it, and continued in possession thereof until December 29, 1885, when he sold and conveyed the said lands to one Halley. Upon the introduction of all the evidence, the court, at the request of the plaintiffs, gave to the jury the following written charge: "If the jury believe from the evidence that the defendants and those under whom they hold, combined, have not had the actual and continuous possession of the land sued for, for the whole period of ten years, they must find for the plaintiffs." Afterwards, at the request of the defendants, the court instructed the jury that, "If they believe the evidence, they must find for the defendants;" and to the giving of this charge the plaintiffs duly excepted. The bill of exceptions contains the following recital: "The plaintiffs' counsel then prepared and tendered to the court a bill of exceptions in the case, and the court suggested some amendments thereto, promised said counsel to rewrite the bill of exceptions, and send it to him (said counsel) that he (said counsel) might make such other or further suggestions as he thought proper, after which said counsel left, and took away with him the file of papers in the case, and afterwards, discovering, on examination of the papers, that there was no verdict of the jury among them, at a subsequent day of the term, after the term allowed by law to the civil docket had expired, and the criminal docket had been taken up, to wit, on the 1st day of September, spread a motion on the docket for a new trial." The grounds of this motion for a new trial were (1) because the case was not given to the jury, and the jury did not make up and render a verdict in said case; (2) because the general affirmative charge, given by the court for the defendants, destroyed the effect of, and was repugnant to, a charge which the court had already given for the plaintiffs. The bill of exceptions then continues: "After this motion was entered, the court reassembled the same jury who had had the case before them, and directed them to return and consider their verdict in accordance with the instructions the court had given them on a previous day, to wit, on the 28th day of August, which was, if they believe the evidence, they must find for the defendants. To this action of the court plaintiffs objected, and, the court overruling their objections, plaintiffs excepted. The court also overruled plaintiffs' motion for a new trial, and plaintiffs duly excepted. The jury that had the case before them were engaged in the trial of other cases between the 28th of August, the time that the evi-

dence was introduced before them, and the time when they were reassembled and instructed to render their verdict for the defendants." There was judgment rendered for the defendants, and the plaintiffs appeal, and assign as error the ruling of the court upon the charges asked, and the overruling by the court of the plaintiffs' motion for a new trial, and the reassembling of the jury, and compelling a verdict by them, as shown above.

J. A. Adams, for appellants. J. G. Comer, for appellees.

MCCLELLAN, J. This is a statutory action for the recovery of land. Plaintiffs' original title is not controverted; but defendants claim title by adverse possession in themselves, and those through whom the possession came to them, for a period of more than 10 years before suit brought. This possession was at all times, under color of title, transmitted from one to another of those whose possession is sought to be tacked onto that of defendants by conveyances formally adequate to pass title. The only question raised in this regard has reference to the continuity of the possession, and that upon the following facts: The first dissessor, one Hutto, cleared a part of the land, built a house upon it, and resided therein and cultivated the cleared land for several years. He then, on the 29th day of December, in the year 1885, sold and conveyed the premises to Hawley. Hawley did not live near the land, and did not, it appears, buy it for the purpose of making his home upon it. Shortly after this sale, Hutto moved off the premises, and they were unoccupied during the months of January and February, 1886. Towards the end of the last-named month, Hawley rented the place for the year 1886 to Carr, who, in person or by his tenant, went into the occupation thereof immediately after this rental from Hawley, and lived and made a crop upon it during 1886. The circuit court, in effect, held that this interruption of actual occupation did not break the continuity of the possession relied on by the defendants, and we are constrained by the authorities to concur in this view. The land was purely agricultural in character. It was at the time of this gap in the occupancy claimed by Hawley, who lived away from it, and did not contemplate occupying it himself, but only through tenants. The only use such tenants could make of the premises was to raise crops thereon. The possession actually taken the latter part of February was as conservative of this use as had it been taken the 1st of January or on the day of sale in the preceding December. The sale and transfer of possession by Hutto to Hawley reasonably, if not necessarily, involved some period of time during which there was no actual occupation. Such periods thus incident to or occasioned by changes of possession, or by the substi-

tution in the possession of one tenant for another from year to year, and which are not of longer duration than is reasonable in view of the character of the land and the uses to which it is adapted and devoted, do not constitute interruptions of possession destroying its continuity, in legal contemplation, when, as here, there is no intention of abandoning the possession. They are but incidents of that continuous possession, which the land inherently and in relation to the manner of its use admits of, and come within the principles declared by this court in *Denson v. Bell*, 56 Ala. 444, and *Hughes v. Anderson*, 79 Ala. 209; and in the following cases in other courts, the first three of which are very like the present case on the facts: *Hudgins v. Crow*, 32 Ga. 367; *Stettinische v. Lamb* (Neb.) 28 N. W. 374; *De La Vega v. Butler*, 47 Tex. 529; *Crispen v. Hannavan*, 50 Mo. 536; *Fugate v. Pierce*, 49 Mo. 441; *Harper v. Tapley*, 35 Miss. 506. These decisions proceed on the idea that, notwithstanding such interruptions of actual occupation, there is in fact no interruption of such actual possession as the land is reasonably susceptible of; and they are therefore not in conflict with that line of adjudications by this and other courts to the effect that the continuity of an adverse holding is broken by the abandonment of possession—such possession as the premises admit of—for any, however short, period of time, even when there is an intention of resuming it. *Railroad Co. v. Philyaw*, 88 Ala. 264, 6 South. 837, and cases there cited. On the principles we have declared, the evidence was without conflict to the establishment of the defense of adverse possession, for 10 years before suit brought, in the defendants, and the court properly gave the affirmative charge, with hypothesis, in their favor.

The fact that the trial court, before the general charge was requested by the defendants, had given an instruction at plaintiffs' instance which submitted to the jury the inquiry whether the defendants, on the evidence, had had 10 years' adverse possession, cannot put the court in error in respect of afterwards giving the affirmative charge for the defendants; and this is true, whether there was inconsistency between the two instructions or not. The court had no right, under the statute, to give this charge for defendants until it was specially requested, and, until the request was made, the trial judge had no option but to submit the whole question to the jury; but his doing so did not cut off the defendants' right to have the jury directed to find in their favor if they believed the evidence, if they were otherwise entitled to this direction. *Railroad Co. v. Markee* (Ala.) 15 South. 511; *Railroad Co. v. Hurt* (Ala.) 13 South. 130.

We gather from the bill of exceptions that the verdict was originally returned *ore tenus* by the jury to the court. This was sufficient (*State v. Underwood*, 2 Ala. 744); and

the action of the court, upon its being found that no written verdict was in the file, in having the jury, which was still in attendance, return a written verdict, was superfluous, and obviously not vitiating; and we are not prepared to say that, had no verdict been originally returned, the matter would avail the appellants, since they show no injury resulting therefrom (*Grace v. McKisack*, 49 Ala. 163).

We find no error in the record, either upon the trial or upon the motion for a new trial; and the judgment of the circuit court is affirmed. Affirmed.

(108 Ala. 58)

CLAYBORNE v. STATE.

(Supreme Court of Alabama. June 7, 1894.)

GAMING—INDICTMENT—VERDICT.

1. Section 4052 of the Code forbids playing cards in any building where liquors are sold. Section 4057 prohibits betting at such playing. Defendant was charged in one count for playing cards at a place where liquors were sold, and that he "did bet or hazard money or bank notes at such game." *Held* to charge but the one offense of betting at a game of cards.

2. Where defendant was found guilty of playing cards, it amounted to an acquittal of the offense of betting; and, as he was not charged with playing cards, he should be discharged.

Appeal from criminal court, Jefferson county; Samuel E. Greene, Judge.

C. C. Clayborne was found guilty of playing cards in a public house, where liquors were at the time sold, and appeals. Reversed.

The appellant was tried under the following indictment: "The grand jury of said county charge that before the finding of this indictment, C. C. Clayborne, whose name is to the grand jury otherwise unknown, played at a game with cards or dice, or some device or substitute for cards or dice, at a tavern, inn, storehouse for retailing spirituous liquors, a house or place where spirituous liquors were at the time sold, retailed or given away, or in a public house, highway, or some other public place, or at an outhouse where people resort, and did bet or hazard money or bank notes at said game, against," etc. The defendant demurred to the said indictment, on the ground that it charged in the one count two separate and distinct offenses. This demurrer was overruled. Upon the cause being tried by the court without the intervention of a jury, as by the law in such cases provided, the court, upon hearing all the evidence, adjudged the defendant "guilty of playing cards in a house where spirituous, vinous, or malt liquors were, at that time, sold, retailed or given away, and assessed the fine of twenty dollars and costs against the said defendant."

Wade & Vaughan, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. The indictment in *Johnson v. State*, 75 Ala. 8, charged that the defendant "played at a game with cards, at a public house, and did bet or hazard money or bank notes at said game." It was held, that the indictment did not charge two offenses,—not the offense of playing with cards, etc., as prohibited by section 4052 of the Code, and betting on such game, prohibited by section 4057, but only the graver offense of betting, denounced by the last-named section. In *Tolbert v. State*, 87 Ala. 29, 6 South. 284, where the indictment charged that the defendant bet at a game of cards, etc., at one of the prohibited places, without also charging that a game was played, the court held that it was fatally defective. *Dreyfus v. State*, 83 Ala. 54, 3 South. 430; *Smith v. State*, 63 Ala. 55. A new form of indictment for betting at cards, etc., under section 4057, was provided in the Code of 1886 (form 16, p. 267), under which we have held it is no longer necessary to allege that a game "was played," as was required in indictments therefor, before this form was provided. *Rosson v. State*, 92 Ala. 76, 9 South. 357. The solicitor, in drawing this indictment, was, no doubt, following our former rulings, in presenting an indictment good for betting. These forms, provided for the guidance of prosecuting officers in drafting indictments, are not exclusive of other forms, in which the offense is well and aptly charged; but, it will be better practice to follow them in cases where they are applicable. And the safer practice always is, to have different counts in the indictments, to meet the different phases the case, under the evidence, may assume. If, for instance, there had been here a count for playing as well as the one for betting at cards, the difficulty encountered would have been obviated. The presentment in the case at bar, is good and sufficient for betting at cards, and if we follow our former adjudications, it is not demurrable for duplicity. Under it, the defendant could be tried only for the offense of betting, as provided by said section 4057 of the Code. The court found him guilty of playing cards, an offense with which he was not charged, and fined him \$20. This was an erroneous finding. It was, however, in legal effect, an acquittal of the offense of betting, with which he was charged. And, inasmuch as he cannot be tried for playing under this indictment, and can be tried again, only for the offense of which the court found him guilty, and not for that of which he was acquitted, it follows he cannot be longer held under this indictment. 3 Greenl. Ev. § 36; *Bell v. State*, 48 Ala. 684; *Mitchell v. State*, 60 Ala. 26; *Nutt v. State*, 63 Ala. 184; *Berry v. State*, 65 Ala. 117; *Smith v. State*, 68 Ala. 429; *Sylvester v. State*, 72 Ala. 206; *De Arman v. State*, 77 Ala. 10. The judgment is reversed, and an order discharging defendant will be here entered. Reversed and discharged.

(103 Ala. 4)

SMITH v. STATE.

(Supreme Court of Alabama, June 7, 1894.)

HOMICIDE—MURDER IN THE FIRST DEGREE—EFFECT OF PASSION.

1. Passion aroused by mere words cannot reduce homicide below the crime of murder in the second degree.

2. As an indictment for murder in the first degree includes all degrees of homicide, the court properly refused to charge that, if the killing was done in the heat of passion, defendant could not be found guilty "as charged in the indictment."

3. On a trial for murder, a request to charge that if the killing was done when defendant was "in great passion, not having sufficient time for his blood to cool, then he is not guilty of murder in the first degree," was properly refused, as it permits no inquiry as to whether defendant or deceased was the aggressor in the altercation which aroused defendant's passion.

4. A request to charge, which assumes that defendant's passion had not time to cool while he went 100 yards, to his house, got his gun, and returned to where he started from, was properly refused.

5. Passion, without reasonable cause, will not be taken into account in determining the degree of murder.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Hilliard Smith was convicted of murder in the first degree, and appeals. Affirmed.

The testimony for the state tended to show that upon the deceased, who was in his field in front of the house of the defendant, calling to the defendant to come and let him show defendant where his (defendant's) hogs had destroyed some of the crop of the deceased, the defendant went down to where the deceased was standing; that they became engaged in a dispute as to whether or not it was the defendant's hogs that had destroyed the crop, and that, upon the deceased saying that his daughter had told him that it was the defendant's hogs, he applied opprobrious epithets to the deceased's daughter, and also cursed the deceased; the deceased replied, "You are another;" that thereupon the defendant told the deceased that if he would wait until he went to his house, which was about 100 yards off, and got his gun, he would come back and kill the deceased; that the deceased remained in his field while the defendant ran to his house, got his gun, and, on coming back, again cursed the deceased, and dared him to "call him another" again; that upon the deceased saying, "You are another," the defendant shot and killed him. The testimony for the defendant tended to show that when he said to him that his daughter had told him a lie the deceased cursed him; that thereupon he (the defendant) said that he "did not want a fuss," but that deceased continued to curse him, and advanced on him with a knife; that he retreated until near his house, where he went, got his gun, and as he came out of his yard with it the deceased continued to advance upon him with the knife, whereupon "he stopped him" by shooting him. Upon the

introduction of all the evidence the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury find from the evidence that at the time Hilliard Smith killed Charles Pickett he acted under the heat of passion, and not having had time for his blood to cool, they cannot find the defendant guilty of murder." (2) "If the jury believe from the evidence that deceased brought on the difficulty, and so much enraged this defendant, and while still under the heat of such passion the defendant killed deceased, then they cannot find the defendant guilty as charged in the indictment." (3) "If the jury find that Hilliard Smith took the life of Charles Pickett while in a great passion, not having sufficient time for his blood to cool, then he is not guilty of murder in the first degree." (4) "If the jury find the killing was done in the heat of blood, although with a deadly weapon, yet if there be no evidence of previous malice, formed design, or such evidence of deliberation as to show that reason held sway, then this is not murder as charged in the indictment." (5) "If the jury find from the evidence the homicide was committed in the undue resentment of an insult offered, if done in the heat of blood caused thereby, before cooling time has supervened, and without any previous formed design, it cannot be murder, and the jury cannot so find." (6) "Though the jury may find the provocation for the killing not such as to excuse the offense, yet if they also find that it was such as to throw and did throw this defendant, Hilliard Smith, into such a heat of passion that he killed the deceased, and that at the time he did the killing he was still ruled and swayed by such passion, then they cannot find the defendant guilty of murder."

Clark & Thomas, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McOLELLAN, J. Hilliard Smith killed Charles Pickett by shooting him with a gun. The evidence for the defendant (his own) tends to show that he shot in the heat of passion. The evidence for the state tends to show that there was no provocation for defendant's passion, except mere words spoken to him by the deceased in response to words of like abusive character first addressed by the defendant to the deceased. On these tendencies of the evidence the jury might have found that the mortal wound was inflicted in the heat of passion engendered by mere words alone. So finding, the necessary effect of charges 1, 2, 4, 5, and 6 requested by the defendant would have been to authorize the jury to return a verdict of guilt of a lower degree of homicide than murder in the second degree; and each of said charges was therefore bad on this, as well as perhaps, on

other, grounds, since no principle in our criminal jurisprudence is more firmly established than that passion aroused by mere words cannot reduce homicide below the offense of murder in the second degree. *Mitchell v. State*, 60 Ala. 26; *Nutt v. State*, 63 Ala. 180; *Ex parte Brown*, 65 Ala. 466; *Roberts v. State*, 68 Ala. 156; *Martin v. State*, 77 Ala. 1; *Watson v. State*, 82 Ala. 10, 2 South. 455; *Holmes v. State*, 88 Ala. 26, 7 South. 193; *Ex parte Sloan*, 95 Ala. 22, 11 South. 14.

The indictment in this case charged, not only murder in the first degree, but also murder in the second degree, and all other grades of homicide. Charges, therefore, which were perhaps intended to declare that on certain postulates the jury could not convict the defendant of murder in the first degree, but which in terms declared that they could not convict him as charged in the indictment (charge 2, for instance), or which assumed that murder in the second degree "is not murder as charged in the indictment,"—the postulates justifying, it may be conceded, the conclusion as to murder in the first degree, but having no bearing upon any lower degree of homicide,—were essentially confusing and misleading. This is an additional reason for the refusal of charges 2 and 4 requested by the defendant. *Horn v. State*, 98 Ala. 23, 13 South. 329; *Bland v. State*, 75 Ala. 574; *Jones v. State*, 96 Ala. 102, 11 South. 399; *Lundy v. State*, 91 Ala. 100, 9 South. 189.

All the charges refused to the defendant, moreover,—that numbered 3, as well as others to which we have before referred,—were bad for the reason that they permit no inquiry as to whether the defendant or the deceased was the aggressor in the altercation in which the words of abuse, which, on one aspect of the evidence, constituted the sole provocation for the defendant's passion, were employed; and this omission of the charges is especially pernicious in view of the fact that the evidence is substantially without conflict to the imputation of fault and aggression to the defendant in that connection. *Allen v. State*, 52 Ala. 391; *Jones v. State*, 96 Ala. 102, 11 South. 399.

Charge 3 is bad also for another reason. The evidence is, without conflict or adverse inference, to the effect that after the alleged passion-engendering words of the deceased had been uttered the defendant went off to his house a hundred or two yards away, got his gun, and came with it, out of his house and the curtilage thereof, back to where the deceased was, and, according to the state's evidence, had all the while remained, and there shot him. This charge assumes, in necessary effect, that all this time was not sufficient for the defendant's passion to cool, and for this it was properly refused.

And this, as also charges 2 and 4,—if we are to consider the latter as intended to assert that words may provoke such passion as will reduce homicide from murder in the first to murder in the second degree,—are bad, in

that they each assume the reasonable sufficiency of the language employed by the deceased to excite mitigating passion in the defendant, when, so far as that passion being justified, the court might well have instructed the jury, as matter of law, that the words shown by the state's evidence at least did not constitute provocation for any mitigating passion on the part of the defendant, and, if they found no other provocation for passion than the words which that aspect of the evidence tended to show, it was wholly immaterial whether the defendant's passions were, in point of fact, excited or not. A passion thus without reasonable cause and immaterially excited is not a passion which the law takes into account in determining whether the homicide is murder in the first or second degree. 9 Am. & Eng. Enc. Law, pp. 579, 580; *Flannagan v. State*, 46 Ala. 703.

Affirmed.

(103 Ala. 532)

NATIONAL FERTILIZER CO. v. HINSON et al.

(Supreme Court of Alabama. June 12, 1894.)

JUDGMENT BY DEFAULT—VACATING—BILL TO SET ASIDE.

1. Where a defendant has not answered, and the court, before reaching the case, announces that the civil docket will not be taken up again, the court may afterwards during the term, and without notice to defendant, render judgment by default, though defendant had a good defense, and was present in court to ask leave to defend when the continuance was announced.

2. That plaintiff falsely informed the court that defendant had agreed to let judgment be taken by default is not ground for vacating the judgment, especially where it does not appear that judgment would not have been given but for such statement.

3. A bill to set aside a judgment by default, that does not show why application to set aside the judgment was not made before adjournment, is fatally defective.

4. In such case, a bill is fatally defective that does not aver ability to prove the defense in a trial at law.

Appeal from chancery court, Geneva county; Jere N. Williams, Chancellor.

Bill by Joseph Hinson and another against the National Fertilizer Company to vacate a judgment, and to enjoin issuing an execution thereon. A motion to dissolve the injunction was overruled, and defendant appeals. Reversed.

Most of the allegations of the bill are sufficiently stated in the opinion. The alleged adequate defenses, which are referred to in the opinion, are thus averred in the bill: "There was a failure of consideration in said note, in that the company did not ship them the quantity of the fertilizers they gave their note for. Second. That said fertilizers were shipped in sacks, and there was no tag or tags attached to each sack, as required by law. Third. The fertilizers were not delivered as per agreement, and complainant had to buy elsewhere. Fourth. That complainant had paid quite a large sum of money, to wit,

net about two hundred and fifty dollars, to the attorney of said National Fertilizer Company, which he has failed to credit on said judgment. Fifth. That an execution is now in the hands of B. F. Pate, sheriff of Geneva county, Alabama, and he has levied said execution upon the property of complainants, and is proceeding to sell the same."

M. E. Milligan, for appellant. J. J. Morris, for appellees.

HEAD, J. On January 16, 1892, at a special term of the circuit court of Geneva county, appellant recovered a judgment by default against appellees for the sum of \$956.39, on a promissory note given for the price of fertilizers purchased. The summons and complaint were sued out in July, 1891. This bill was filed April 7, 1893, to vacate that judgment, and for injunction against the enforcement of execution, in the hands of the sheriff, issued thereon. The alleged equity of the bill is that complainants had meritorious defenses to the action, which they were prevented from making by the fraud of the plaintiff's attorney, unmingled with negligence on their part. The first and third of these defenses, as they are specified in the bill, if true, were good, and stated with sufficient particularity; the first, however, appearing to be only a partial defense to the action. The second, which would seek to invalidate the contract, as a penalty, under the law, for the failure of the plaintiff to tag the sacks of fertilizer, will not be noticed by a court of equity in a bill of this kind. The fourth would be sufficient as the basis of a decree granting a credit on the judgment for the amount paid on the note, the other essentials of the equity of the bill being established. It would not justify setting aside the judgment. The defense which must be relied on, therefore, as justifying the application for, and grant of, an injunction restraining the collection of the entire judgment, is the third, which sets up an entire failure of the consideration of the note; which defense comprehends, also, the partial failure of consideration set up in the first. The facts alleged as showing fraud on the part of plaintiff's attorney, and the want of fault or neglect on the part of complainants, are that on Thursday of the term, when no judgment had been rendered in the case in question, the presiding judge announced publicly "that the civil docket of said court would not again be taken up, and that all parties interested could go home;" and that complainants went home with the understanding that their cases would not be called for trial; and that, as they have been informed, the judgment was taken against them on Saturday morning, upon the statement to the court, by the attorney for the National Fertilizer Company, "that it was by agreement that the judgment be taken," and, upon this statement, the court entered the

judgment by default, although the civil docket had been continued for the term. The bill alleges that no such agreement had been made, but, on the contrary, that complainants had a good defense to the action, and that they remained in court all the week to offer said defense when the case should be called, until they went home upon the said announcement made by the judge. When the announcement of the judge was made, the time for defendants to appear and plead had passed, and, as the court rendered judgment by default, it must be taken, in the absence of averment to the contrary, that they had done neither. They were, therefore, in default, and not entitled to notice of any proceedings which the court might thereafter take in the cause. If, after such default, the court had entered, in that particular cause, a special order of continuance, and complainants had acted upon it and gone home, yet the court could, thereafter during the term, have set aside the continuance, and granted judgment by default, without infringing any legal right whatever of the complainants. If they had been present when judgment was moved for, they could have defended, upon the special plea of failure of consideration, only by the grace of the court. Application by them for leave to defend, upon such a special plea, would have involved a prayer that their negligent violation of the rules of practice of the court, by failing to appear and plead as required by law, be condoned; which prayer would have addressed itself alone to the discretion of the court. If, therefore, plaintiff's attorney, on Saturday, simply moved for and obtained judgment by default, there seems no possible ground upon which they could utter a word of complaint. But the position of the complainants is, as it is stated in the bill, that the judgment "was taken against them upon the statement to the court, by the attorney for the National Fertilizer Company, 'that it was by agreement that the judgment be taken,' and, upon this statement, the court entered the judgment." The only argument, in behalf of complainants, which can proceed upon this averment, is that, inasmuch as the judgment was rendered after (or upon, which means after, as it is used in the bill) the said statement of the attorney to the court, possibly the court was moved thereby to grant the judgment; that, possibly, it would not have granted the judgment had such statement not been made; and, possibly, if complainants had been present, and had seen fit to ask that their default be condoned, and that they be allowed to interpose and defend upon their special plea, the court would have exercised its discretion in their favor, and allowed the defense to be made. This seems to us a frail foundation upon which to rest the equity of a bill in chancery. We cannot know what motive was in the court's mind, in rendering judgment in such a case, for we do know it had the lawful right to

render it, upon the mere motion of the plaintiff, without giving the complainants the least cause of complaint; and if anything was said by the court, at the time, showing a purpose to give complainants further time and opportunity to plead and defend, and not render judgment against them in their absence, from which purpose it was diverted by the statement of counsel that defendants had agreed to the rendition of judgment, it does not appear in the bill. It is very certain that if complainants had done their duty, and filed their plea at the proper time, the court, unless imposed upon, would have taken no action in the case after the public announcement it had made; and if induced, in that case, to render judgment, by a false statement of plaintiff's counsel, their equity to set it aside, upon showing a meritorious defense, would have been clear. How, then, can it be said that the rendition of the judgment, in the present case, was not directly attributable to their negligent failure to appear and plead? Although there may have been fraud on the part of plaintiff, if their negligence concurred with the fraud in producing the result complained of, equity will not grant relief. The rules of equity upon this subject are strict. We need not enlarge upon them. They may be gathered from the following authorities: *Hair v. Lowe*, 19 Ala. 224; *Beadle v. Graham*, 66 Ala. 102; *Collier v. Falk*, Id. 223; *Waldrom v. Waldrom*, 76 Ala. 285; *Roebbing Sons Co. v. Stevens Electric Co.*, 93 Ala. 39, 9 South. 369. The principle is the same as obtains in our statutory proceedings for rehearing. See *Waddell v. Weaver*, 53 Ala. 58; *White v. Ryan*, 31 Ala. 400; *Shields v. Burns*, Id. 535; *Stewart v. Williams*, 33 Ala. 492; *Ex parte North*, 49 Ala. 385; *Ex parte Walker*, 54 Ala. 577; *Ex parte Wallace*, 60 Ala. 267; *Brock v. Railroad Co.*, 65 Ala. 79; *Ex parte O'Neal*, 72 Ala. 560.

Again, the bill is fatally defective in failing to show why application was not made to the court, before adjournment, to set aside the judgment. *Roebbing Sons Co. v. Stevens Electric Co.*, 93 Ala. 39, 9 South. 369, and authorities there cited. Nor do we commit ourselves to the proposition that an unexplained delay of 15 months after rendition of the judgment complained of is not fatal to relief in equity, if the case were otherwise made out. The bill is fatally defective in another particular. We said the complainants' defense to the action at law is sufficiently averred. That is true; but it is not averred that they will be able to prove the defense on a trial at law. The authorities hold this to be a fatal defect. Authorities *supra*. The alleged agreement with the attorney of the plaintiff in judgment, made after the rendition of the judgment, in reference to the allowance of all proper set-offs, manifestly adds nothing to the equity of this bill. We are of opinion there is no equity in the bill, and the injunction ought, for that reason, to

have been dissolved. We do not consider the denials of the answer, for the reason that it does not appear to have been sworn to. Rule 35, Code, p. 817. It may be that the bill can be so amended as to give it equity. We will reverse the decree, and remand the cause, with instructions to the chancery court to dissolve the injunction, unless the bill shall be so amended, under the principles we have declared. Reversed and remanded.

(103 Ala. 563)

SHEPPARD et al. v. DOWLING.

(Supreme Court of Alabama. June 12, 1894.)
ACTION ON CONTRACT—DEFECTIVE PERFORMANCE—DAMAGES.

The fact that work is defectively done is no defense to an action for the contract price thereof, unless defendant proves the damages resulting from such work.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Action by William Sheppard & Co. against John W. Dowling to recover contract price of work done. Judgment was rendered for defendant, and plaintiffs appeal. Reversed.

J. E. Acker and W. D. Roberts, for appellants. H. H. Blackman, for appellee.

HEAD, J. Action on the common counts. Plaintiffs' (appellants') assignor, E. R. Jordan, furnished the material and put on tin roofs on two buildings which were constructed by one M. M. Tye for defendant. One question was whether Tye or the defendant, Dowling, was the debtor to Jordan for this material and work. Upon this issue, Jordan testified for plaintiffs "that he made a contract with M. M. Tye, as the agent of John W. Dowling, the defendant, to furnish the tin and cover two houses for \$474.73; that said Tye told witness, at the time, that John W. Dowling would pay for the work as soon as completed; that after M. M. Tye contracted with him, and while he was doing the work, the defendant, Dowling, told him that he should have his money when the work was completed, if the roof was waterproof." Witness was requested by Dowling, twice, to go upon the roof for the purpose of stopping leaks. J. E. Acker testified for plaintiffs that the account sued on was made out by him, at the request of E. R. Jordan, who transferred it to plaintiffs; that he first made it out to M. M. Tye, knowing Tye paid off the bills. It was first presented to Tye, and he said he was only the agent of J. W. Dowling. The account was then changed by inserting the name of Dowling, and witness then presented it to Dowling, who promised to pay it. He presented it again, and Dowling paid \$100, and said he would pay the balance when the roof proved to be tight. He again presented it, and Dowling told witness to bring suit on it. The foregoing was the material evidence for plaintiffs. The defendant introduced Tye, who testified that he em-

ployed Jordan to furnish the tin and do the work; that the arrangement between witness and defendant was that witness was to buy and select all the materials, and hire all the hands, and Dowling was to pay for all the material and the hire of the hands to do the work on the buildings, and to pay him (Tye) 10 per cent. on the invoice price of all material furnished, and the hire of the hands, as a compensation to him in the construction of the buildings; that he did buy and select all the materials, in his own name, and Dowling paid the bills; that he had no other interest in the building of the houses other than as above stated; that he took Jordan's account to the defendant, Dowling, on the 24th day of December, 1890, and Dowling paid him \$100 on it for Jordan, and he left the account with Dowling; that he was present in Dowling's store when witness Acker was there, and heard him promise Acker to pay the balance of the account if the roof was made waterproof. W. S. Cox testified, on behalf of defendant, that he was clerk for defendant, and that Acker presented the account to Dowling on January 10, 1891, and witness was instructed by Dowling to pay him \$100 on it, which he did, and placed the credit on the account at Dowling's request. Dowling testified for himself that he contracted with Tye to build two houses; that Tye was to select and purchase the material, hire the hands, and that he (Dowling) was to pay said Tye for all of said material, and for the hire of the laborers, and 10 per cent. on the invoice cost of the material and labor; that he had nothing to do with buying or selection of the material, nor the hiring of the hands; that Tye directed him to pay no more on roof until made waterproof; that he made no contract with Jordan to cover the houses, and did not authorize Tye to do so, and that Tye was not his agent; that he paid the bills as presented and approved by Tye, but paid for no labor or material except upon Tye's order or direction; that he had nothing to do with hiring the said Jordan; that the contract with Jordan was made with Tye. Thomas Edwards testified for defendant that he was defendant's bookkeeper since 1889, and that the contract for the construction of the houses was that Tye was to furnish the material and hire the hands, and defendant was to pay the bills, and that the bills were paid by defendant as they were presented and approved by Tye, and that no money was paid upon said building but upon Tye's order or direction, and that sums so paid were charged to Tye. The foregoing was all the defendant's evidence on this issue. Another issue, upon which there was much testimony pro and con, was whether the work had been properly done by Jordan. The defendant's evidence tended to show it was unskillfully and imperfectly done, leaving many leaks in the roof, while the plaintiffs' evidence tended to show to the contrary. It was not disputed, however, that Jordan finished the job, wheth-

er done well or ill, and that defendant has, ever since, been in the possession, use, and enjoyment of the houses, getting the benefit of Jordan's work and material for whatever they are worth. There are no data given in the testimony by which defendant's damages, if any were sustained by reason of defects in the work, can be ascertained. There was a verdict for the defendant, and plaintiffs moved for a new trial, which was denied; and that ruling of the court is the only matter assigned as error.

We must presume the jury were properly instructed in the law upon these issues, and, so presuming, conclude that the finding for defendant was upon the first issue above stated; for the reason that, upon the undisputed evidence, it should have been for the plaintiffs, upon the second issue. The work having been completed and received by the defendant, the fact that it was defectively done is no defense to an action to recover the contract price, except by way of recoupment of damages sustained by the defendant by reason of the defects; and, to get the benefit of this defense, the defendant should have shown what his damages amounted to, according to the legal rules by which such damages are measured. If this were not the law, the defendant would be permitted to defeat the action entirely, and forever bar the plaintiffs from recovering anything, while, at a small cost, he may have repaired the defects, and enjoy forever the use and benefit of a perfect work. As we have said, the defendant gave the jury no data by which to ascertain the amount of his damages, and the finding must have been against him on that issue. So, the only question is whether the evidence of defendant's contractual liability to pay plaintiffs' demand is of that character that the court ought to have set aside the verdict. In *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, we laid down as a guide the rules which should govern the court in the matter of new trials on the ground that the verdict is contrary to the evidence, in the following language: "The decision of the trial court refusing to grant a new trial on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed unless, after allowing all reasonable presumptions of the correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. And decisions granting new trials will not be reversed unless the evidence plainly and palpably supports the verdict. Of course, these rules are not inflexible, but subject to exceptions and qualifications, dependent upon peculiar circumstances." See, also, *White v. Blair*, 95 Ala. 147, 10 South. 257. There are three phases of the testimony upon which the jury might have found for the plaintiffs, viz.: (1) That Tye was defendant's agent in making the contract with Jordan, whereby he (the defendant) became the original and only

debtor. (2) That Tye contracted in his own behalf, thereby becoming debtor; but defendant, in consideration of getting the house built, promised Tye to pay the debt for him; which promise inured to Jordan, at his election. (3) That the second proposition is true, with the qualification that defendant would pay Tye's bills only on his specific order or direction, which direction was impliedly given in respect of Jordan's claim. The case, as presented for defendant, is that Tye contracted on his own account, and that his (defendant's) promise was to pay the amount of the bills to Tye, and not to Tye's creditors. We have carefully considered the testimony with reference to each of these propositions, and, without going into details, reach the conclusion that a new trial ought to have been granted. We deem it advisable not to comment on the evidence, as the case must be tried again.

The special promise made by defendant to Acker, after the work was completed, to pay the account to Jordan, even if it had been unconditional, was not binding on him, if it was Tye's debt, because not in writing, in compliance with the statute of frauds. Reversed and remanded.

(108 Ala. 448)

McCULLOUGH et al. v. FLOYD.

(Supreme Court of Alabama. June 12, 1894.)

DETINUE—JUDGMENT.

The judgment in detinue should be in the alternative, for the recovery of the chattel or its value.

Appeal from circuit court, Coffee county; Jesse M. Carmichael, Judge.

Action by James Floyd against W. S. McCullough and others to recover a chattel. Judgment was rendered for plaintiff, and defendants appeal. Judgment corrected, and, as corrected, affirmed.

The appellee, James Floyd, brought a statutory action of detinue against the appellants to recover a small account book, which was alleged to be the property of the plaintiff. On the trial of the cause in the circuit court, the following judgment was rendered: "Came the parties, by their attorneys, and, issue being joined on the plea of the general issue, there came a jury of good and lawful men, to wit, J. M. Crumpler, foreman, and eleven others, who say on their oaths that they find for the plaintiff for the property sued for. Value of property, one book, twenty-five dollars. It is thereupon considered by the court that the plaintiff have and recover of the defendants the sum of twenty-five dollars for his damages so assessed, and also the costs expended in said case, for which let execution issue." The appeal is prosecuted by the defendants from this judgment, and the same is here assigned as error.

W. D. Roberts, for appellants. P. M. Hickman, for appellee.

PER CURIAM. The judgment in an action for the recovery of chattels in specie, if rendered for the plaintiff, should be entered in the alternative, for the specific chattel or chattels sued for, or, if they are not to be had, for the value thereof, as assessed by the jury. *Brown v. Brown*, 5 Ala. 508. The verdict in this case, though not very formal, is substantially correct,—sufficient to support an appropriate judgment. The judgment rendered only for the value of the book sued for is erroneous. The error is merely clerical, must be here corrected, and a judgment rendered that the plaintiff have and recover of the defendants the memorandum book sued for, or, if that is not to be had, that the plaintiff have and recover of the defendants \$25, the value of said book, as assessed by the jury, and that plaintiff have and recover of the defendants the costs of suit. The judgment, being thus corrected, is affirmed. Affirmed.

(108 Ala. 454)

STATON et al. v. RISING.

(Supreme Court of Alabama. June 13, 1894.)

EQUITY—PLEADING — FRAUDULENT CONVEYANCES — PARTIES.

1. A special prayer in a bill in chancery will be disregarded where there is no averment of fact to support it.

2. In an action to set aside a deed as fraudulent as to creditors, plaintiff cannot compel the foreclosure of a mortgage the lien of which is prior to his judgment.

3. In an action to set aside a deed as fraudulent, neither the heirs nor personal representatives of a deceased grantor are necessary parties, as they cannot be affected by the result.

Appeal from city court of Birmingham, Jefferson county; William W. Wilkerson, Judge.

Action by Philip Rising against N. A. Staton and others to set aside a deed as fraudulent as to creditors. A demurrer to the bill was overruled, and defendants appeal. Affirmed.

McCurley & Hall, for appellants. S. J. Darley, for appellee.

HEAD, J. Appeal from decretal order overruling demurrers to the bill. On August 15, 1888, G. D. Staton, being the owner thereof, conveyed by deed to his wife, N. A. Staton, lots 15 and 16, in block 206, in the city of Birmingham, Ala., for the consideration recited in the deed, of \$8,000; and by another deed, executed on the same day, he conveyed to her lots 18 and 19, in block 38, in said city, for the recited consideration of \$3,500. and the assumption by the grantee of an incumbrance on the lots amounting to \$4,000. On April 3 or 4, 1889, the said grantee, N. A. Staton, and her husband, said G. D. Staton, conveyed the four lots, by deed, to R. W. Beason, for the recited consideration of \$8,000. At the time of the conveyances to the wife, the complainant, Philip Rising, was a

creditor of the grantor, G. D. Staton, and had been since March, 1887; and on April 29, 1889, he reduced his demand to a personal decree in chancery against the debtor, in the sum of \$5,068.24, and had executions thereon, which were returned "No property found." On the 3d day of May, 1889, he perfected a judgment lien upon the property of the debtor by filing and having registered in the probate court of the proper county a statement of his decree, in compliance with the statute. By sufficient averments of facts, these several conveyances are shown by the bill to have been fraudulent and void as against the complainant, and he prays to condemn the lots to the payment of his decree. It appears from the bill that said lots 15 and 16 were held by G. D. Staton subject to a mortgage made by him to J. R. Rodgers and A. S. Andrews, which complainant alleges, upon information and belief, has been paid off and discharged, although the same has not been so marked on the record, where it is recorded, in the office of the judge of probate. It is also averred that said G. D. Staton had died; that he left no property subject to administration; and that no administrator of his estate has been appointed. His heirs are not made parties to the bill. The prayer of the bill contains the following: "Upon the final hearing, orator prays that your honor will ascertain whether or not the amount evidenced by the mortgage to J. R. Rodgers and A. S. Andrews has been paid, and, in event it has, decree that the same be canceled. If it appears that it has not been paid, your honor will ascertain the amount due thereon, and decree the foreclosure of the same, and order a sale of said property therein described, and an application of the proceeds thereof to the payment of said debt, and the balance to the payment of orator's debt, or enough thereof to satisfy the same." The bill also prays that the alleged fraudulent conveyances be set aside, and the lands condemned to sale for the payment of complainant's decree, and for general relief.

It is objected by demurrer that the bill is multifarious, in that it seeks to set aside fraudulent conveyances, and also to compel the foreclosure of a mortgage executed by the fraudulent grantor to third parties. It is enough to say, in answer to the objection, that it cannot properly be said that the bill is filed to compel the foreclosure of the mortgage. It alleges the execution of the mortgage, but, at the same time, avers, unconditionally and without alternative, that it has been fully paid and discharged. The special prayer, therefore, copied above, asking a foreclosure of the mortgage, is without averment of fact to support it, and is manifestly inconsistent with the facts averred. No relief could be granted upon it if, upon other principles, a creditor with a lien could, in equity, compel the foreclosure of a mortgage, held by another, prior in time and

right to his lien. We have held that no such relief is obtainable. *Bingham v. Vandegrift*, 93 Ala. 283, 9 South. 280, and cases cited. The junior incumbrancer may redeem in such cases, upon proper allegations and offer to do equity. This special prayer will then be treated as having no proper place in the cause, and will be disregarded. This done, the bill is a good one for the vacation of the alleged fraudulent conveyances, and condemnation of the land to the payment of complainant's decree. Taking the bill to be true, as the demurrer admits, the mortgage debt has been paid; but the legal title to the two lots the mortgage embraced still remains outstanding in the mortgagees, for which reason they were properly made parties. If, in point of fact, to be developed on answer, the mortgage debt, or any part thereof, remains unpaid, the bill is yet good, as to those lots, for the condemnation and sale of the equity of redemption therein acquired by the alleged fraudulent grantee by virtue of the conveyances.

It is objected, also, that the heirs and personal representatives of the deceased grantor are not made parties. Clearly, the heirs have no interest in the suit. Their ancestor divested himself of all title to the land by his conveyance to his wife. The result of this suit cannot possibly affect them one way or the other. And we think the same is true as to the personal representative. He can have no possible interest in the land, and the decree establishing the debt, which must form the basis of the relief complainant seeks, can in no wise affect him or the personal assets of the estate in his hands. We have been referred to no authority which holds the presence of the personal representative, in a case like this, necessary, and can see no reason why it should be. See *Burffington v. Harvey*, 95 U. S. 99.

Affirmed.

(108 Ala. 629)

GRESHAM v. BRYAN.

(Supreme Court of Alabama. June 13, 1894.)
SALE—WHEN TITLE PASSES—RIGHTS OF PURCHASER—PRESUMPTIONS ON APPEAL.

1. Where part of certain corn in a crib is sold, and has not been separated or measured, the legal title thereto does not pass, and the purchaser has no right to break open the crib and take a quantity equal to the amount sold.

2. Where a bill of exceptions does not purport to set out all the evidence, but contains sufficient to show that plaintiff was entitled to a verdict, it will not, for the purpose of showing error, be presumed that there was other evidence.

Appeal from circuit court, Barbour county; J. M. Carmichael, Judge.

Action of detinue by Theophilus Bryan against W. J. Gresham to recover 130 bushels of corn. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

W. D. Roberts, for appellant. H. D. Clayton and A. H. Merrill, for appellee.

COLEMAN, J. The appellee, Bryan, sued in detinue to recover 130 bushels of corn. It was in evidence that plaintiff had sold to defendant a tract of land, one mule, and 100 bushels of corn, and, to secure the payment of the purchase price, the defendant executed a mortgage to the plaintiff. The mortgage was not produced, and we have no means of ascertaining its provisions or stipulations. It was in evidence that the corn sold to defendant was a part of a lot of corn in a crib mixed with other corn belonging to plaintiff, and the portion sold had never been separated or measured, or delivered to the defendant, and that defendant broke open the crib, and took possession and removed the corn, without the consent, and against the objection, of the plaintiff. This evidence was not disputed, and we are of opinion it is sufficient to show that the legal title to any 100 bushels of the corn in the crib did not pass from the plaintiff to the defendant, under the contract for the sale and purchase of the corn. There was no separation and delivery of the corn. The bill of exceptions does not purport to set out all the evidence, and, as the plaintiff was entitled to the affirmative charge under the evidence, as it appears in the bill of exceptions, we cannot presume there was other evidence, in order to put the court in error. Affirmed.

(108 Ala. 548)

NABERS v. MORRIS MIN. CO.

(Supreme Court of Alabama. June 13, 1894.)

APPEALABLE ORDER.

Under Code 1886, section 3612, authorizing an appeal from a decree in chancery sustaining or overruling a demurrer, or sustaining or overruling a motion to dismiss a bill in equity, where petitioner prayed to be allowed to intervene and claim damages for a breach of contract by a corporation that had been dissolved, and a receiver appointed, an appeal from a decree denying a motion by the receiver to dismiss the petition, and overruling a demurrer thereto, would be dismissed *ex mero motu*.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

The Morris Mining Company filed its petition in the cause of W. T. Underwood and others v. Joseph B. Wolfe, pending in equity, praying to be allowed to intervene in said cause, and propound its claim for \$109,000, as damages for the alleged breach of a contract made and entered into by and between the said Morris Mining Company and the Mary Pratt Furnace Company, a corporation which had been dissolved by a decree rendered in the above-named case, and a large part of whose assets was alleged to be in the custody of Z. L. Nabers, who had been appointed receiver in said cause. The receiver moved to dismiss the petition, and demurred thereto on various grounds. The other appellants moved to dismiss the petition, and demurred thereto, on substantially the same grounds as assigned by the receiver. The court overruled

the motions to dismiss the petition, and the demurrers thereto, and the appellants prosecute this appeal under section 3612 of the Code of 1886, which provides: "From any decree rendered by the chancery court in term time, or by the chancellor in vacation, sustaining or overruling a demurrer to a bill in equity, or sustaining or overruling a plea to such bill, or sustaining or overruling a motion to dismiss such bill for want of equity, an appeal lies to the supreme court." Dismissed. The appellees did not move to dismiss the bill, but, as stated in their brief, this court consenting, waived the question as to whether the proceedings in this case are such as authorize an appeal.

Garrett & Underwood, for appellant. Lane & White, James Weatherly, and Arnold & Evans, for appellees.

HEAD, J. We are compelled to dismiss this appeal, *ex mero motu*, upon the authority of *Clark v. Spencer*, 80 Ala. 345; *Bardley v. Spragins*, Id. 357; and *Jones v. Iron Co.*, 90 Ala. 545, 8 South. 132,—which are directly in point. The statute not authorizing the appeal, we have no jurisdiction of the subject-matter; and consent cannot confer it. Appeal dismissed.

(108 Ala. 461)

SEISEL et al. v. FOLMAR et al.

(Supreme Court of Alabama. June 13, 1894.)

ATTACHMENT—CLAIMS OF THIRD PERSONS—LANDLORD'S LIEN.

1. A claimant in attachment must fail unless the facts which support his title existed when the claim was interposed.

2. Under Code, § 3069, providing that a landlord's lien on chattels brought upon the rented premises "is superior to all other liens, except those for taxes," the lien attaches as soon as the chattels are placed on the premises, and prior to a subsequent mortgage thereon by the tenant.

3. A judgment, in the trial of the right of property levied on by attachment, that the claimant and his sureties pay plaintiff the value of the property, is erroneous, as the appropriate judgment is a condemnation of the property.

4. Such judgment, being a clerical misprision, will be amended without reversal by rendering the proper judgment in the appellate court.

Appeal from circuit court, Pike county; J. R. Tyson, Judge.

In attachment proceedings by Folmar & Sons against A. B. Burnett. Selsel & Co. interposed a lien to the goods attached. Judgment for plaintiffs, and claimants appeal. Modified.

On November 4, 1892, Folmar & Sons made affidavit and gave bond for the issuance of an attachment against one A. B. Burnett. The writ of attachment was regularly issued on November 14, 1892, and levied upon certain personal property which was in the place of business occupied by said Burnett. Upon the levy of this attachment, Selsel & Co. interposed a claim to the goods so levied

upon, as required by statute, and issue was made for the trial of the right to the said property. Upon the trial of this issue the plaintiffs introduced in evidence a contract of lease, in which the said Burnett leased for five years, from the plaintiffs, Folmar & Sons, the said storehouse, commencing on January 1, 1891. The plaintiffs also introduced evidence tending to show that under said lease Burnett went into possession of the store on January 1, 1891, and that the attachment was issued for the purpose of collecting unpaid rent due under said lease, and that at the time of the levy of said attachment the goods so levied upon were in the said storehouse owned by said Folmar & Sons, and rented to the said Burnett, as shown by the said lease. The claimants introduced in evidence a mortgage which was executed by said Burnett, defendant in attachment, to them, on January 8, 1891, conveying to them, for the security of a debt, the same property which was levied upon. This mortgage was renewed by the execution of a subsequent mortgage on December 29, 1891, conveying the same property. The claimants introduced as a witness the said Burnett, who testified that the bar fixtures and furniture described in the mortgage, and levied upon under the attachment, and which were claimed by the claimants in this proceeding, were bought by the witness from Rothschild & Sons, of Philadelphia, Pa.; that the sale under which said fixtures were purchased was a conditional one, the vendors retaining title thereto until they were paid for; that witness had made all of the payments for said fixtures, except the last, amounting to about \$100, and that default in this payment had been made before the levy of the attachment; and that the time within which he was to pay for said fixtures had expired before said levy. The plaintiffs moved to exclude this testimony of the said Burnett because the claimants are attempting to set up an outstanding title to the property claimed in Rothschild & Sons, without connecting themselves with said title. The court sustained this motion, and the claimants excepted. The witness further testified that after he made default in said payment, and after the levy of said attachment, and the interposition of the claim by the claimants, it was agreed between him and Seisel & Co., the claimants, that, if they would pay the balance due Rothschild & Sons, they (the claimants) should have the witness' interest in the bar fixtures, and that after the claim bond was executed he turned over to the claimants the property in question. The plaintiffs moved to exclude this testimony of the witness Burnett, which motion the court sustained, and the claimants duly excepted. At the request of the plaintiffs in writing, the court gave the following charge to the jury: "If the jury believe the evidence in this case, they should find for the plaintiffs, as to the furniture and bar fixtures." The

jury returned a verdict for the plaintiffs, and assessed each piece of property, the value in the aggregate being \$1,424.80. The judgment rendered by the court was "that the plaintiffs have and recover of the claimants and the sureties on the claim bond the aggregate sum of \$1,424.80 for their said damages, as assessed by the jury, and all the costs of this claim suit, for which let execution issue," etc. Claimants bring this appeal, and assign as error the rulings of the court upon the evidence, the giving of the general affirmative charge for the plaintiffs, and the judgment rendered.

Hubbard, Wilkerson & Hubbard, for appellants. R. L. Harmon, for appellees.

BRICKELL, C. J. It is a controlling principle in the statutory trial of the right of property levied upon by attachment or execution that the claimant must recover on the strength of his own title, not because of the weakness or want of title in the defendant in the process. Nor can he be permitted, to support his claim and defeat the levy, to show a title, paramount to that of the defendant in the process, in a third person, a stranger to the proceeding. If the correctness of these principles need vindication, it will be found in the unanswerable reasoning in the early case of McGrew v. Hart, 1 Port. 175-184, and in the subsequent cases of Dent v. Smith, 15 Ala. 286-292, and Foster v. Smith, 16 Ala. 192-194. In Dent v. Smith it was said by Dargan, J.: "If we were to permit a claimant to interpose the title of a third person to defeat an execution, it would be to permit one man to redress the wrongs of another, and thus to take charge of his rights, in which the claimant has no interest. If this could be done, the title of the third person would be bound by the decision, and hence the right and title of the owner in fact would be barred by a proceeding to which he was not a party. This view fully vindicates the propriety of the decision in the case of McGrew v. Hart, and shows that in the trial of the right of property the claimant must rely upon his own title, and cannot be permitted to insist on the title in another, to which he is a stranger." In Foster v. Smith it was said by Chilton, J.: "It is perfectly clear that if the claimant has no right to the property, the title to which he proposes trying by interposing his claim, he cannot recover, because a third person, a stranger to the proceeding, may be supposed to have a title paramount to that of the defendant in execution. By the interposition of his claim he arrests the execution of the process upon the property to which he asserts title, and virtually asserts that the sale of it for the satisfaction of the plaintiff's *fi. fa.* is inconsistent with his rights. If he has no such rights, it is a matter of no concern to him whether the rights of a third person, be-

tween whom and himself there is no privity, may be invaded." From these principles there has been no departure. On the contrary, they have been reaffirmed whenever the question arose. 3 Brick. Dig. p. 776, § 5.

This reference to these well-settled principles is rendered necessary by the insistence of the counsel for the appellants that the title to the property levied on, or a large part thereof, resided in Rothschild & Sons, and not in the defendant in attachment, and that he had no interest therein which was the subject of levy and sale under legal process. Whether this be true or not is not a matter involved in this controversy. If it be true, the title of the appellants, upon the strength of which, only, their claim can be supported, is not aided; and, unless they were privy to or connected with the supposed paramount title, they have no right or interest in its assertion or maintenance.

It is insisted that by the arrangement between the defendant in attachment and the claimants subsequent to the levy and the interposition of the claim, and the arrangement with Rothschild & Sons on the day preceding the trial in the court below, the claimants acquired the title of Rothschild & Sons, and were entitled to assert it as paramount to the right of the appellees. A consideration of the title asserted to exist in Rothschild & Sons, and whether it was superior or inferior to the lien of the appellees for rent, is not necessary, and would not now be profitable. Nor is it necessary to inquire what rights the appellants acquired by the arrangement with the defendant in attachment and Rothschild & Sons. If they acquired the right now claimed, it was acquired subsequent to the commencement of the suit, and it is unavailing to support the claim they had interposed. It is merely elementary to say that a title acquired or facts occurring subsequent to the commencement of a suit, which are essential to a recovery, are unavailing. The claimant in a trial of the right of property, like the plaintiff in an action at law, must fail unless the facts existed when the claim was interposed which entitled him to interpose and maintain it. *Donaldson v. Waters*, 30 Ala. 175. The title of appellants, and the only title, so far as shown, which existed, or with which they had any connection, when the claim was interposed, was derived from the mortgage executed by the defendant in attachment subsequent to the lease or contract of renting of the storehouse. It has not been insisted that the title of a mortgagee is entitled to priority over the lien of the landlord for the rent of a storehouse or other building. The statute declares the lien is "superior to all other liens, except those for taxes." Code, § 3069. The lien attaches as soon as the goods or chattels are brought upon the rented premises, and cannot be defeated by any disposition of them by the

tenant, not in the usual course of the particular business in which he is engaged in and upon the premises. *Abraham v. Nicrosi*, 87 Ala. 173, 6 South. 293; *Weil v. McWhorter*, 94 Ala. 540, 10 South. 131. The result is, we find no error in the rulings of the court, to which exceptions were reserved.

Upon the trial of the right of property levied on by attachment, if the issue be found against the claimant, the appropriate judgment is a condemnation of the property; that it is subject to the levy of the attachment, and is condemned to the satisfaction of the judgment which has been or may be obtained. A judgment that the claimant and his surety or sureties in the claim bond pay the plaintiff in attachment the value of the property, as assessed by the jury, is erroneous. The sureties in the claim bond become liable when the claimant fails to deliver the property to the sheriff. The failure renders it the duty of the sheriff to return the bond forfeited, and then execution thereon may issue against the principal and sureties. Code, § 3013. It was erroneous to render judgment against the appellees and their surety on the claim bond for the value of the goods levied on, as assessed by the jury, and the costs of suit. The error in this respect is a clerical misprision, which was amendable, and would have been amended on motion, in the court below, Code, § 2836. Such errors furnish no cause for the reversal of a judgment, but the record, furnishing sufficient matter to amend by, will be here amended. *Seamans v. White*, 8 Ala. 656; *Gray v. Raiborn*, 53 Ala. 40. The judgment will be amended by the rendition of the appropriate judgment, and of the judgment, as amended, there must be an affirmance.

(103 Ala. 539)

WRIGHT v. JONES.

(Supreme Court of Alabama. June 13, 1894.)
APPEALABLE JUDGMENT—RECORD—PARTIES—EXEMPTIONS.

1. A judgment in a contest to determine whether a homestead is subject to sale on execution is a final judgment, from which an appeal will lie to the supreme court.

2. The record on appeal from a judgment determining that a homestead is subject to sale on execution should show only the proceedings in the contest.

3. Where defendants are sued by their surnames, omitting their Christian names, but there is no allegation of partnership, and the defendants appear and answer without pleading in abatement, they will be deemed to have waived such omission.

4. Exemptions cannot be claimed where the judgment is for tort.

Appeal from circuit court, Crenshaw county; J. R. Tyson, Judge.

Action of trover by Elizabeth Jones against Curtis & Wright. Judgment was rendered for plaintiff, and thereunder a levy was made on dwelling of defendant T. R. Wright. This he claimed to be exempt as a homestead,

and on a contest judgment was rendered for plaintiff, and defendant Wright appeals. Affirmed.

Upon the levy of this execution upon "one house and lot in the town of Luverne, Alabama, as the property of T. R. Wright," the said Wright filed with the sheriff his claim of exemption to the house and lot levied upon, as his homestead. The plaintiff contested this claim to exemption on the ground that it was invalid. Upon the trial of the issue thus formed, it was shown that the lot levied upon was the individual property of Thomas R. Wright, and that Curtis & Wright had no interest whatever in the lot. The defendant introduced in evidence the summons and complaint in the case, of "Jones v. Curtis & Wright, defendants," and the judgment rendered therein, and proved by evidence that at the time of the levy of the execution, and for several years prior thereto, Thomas R. Wright was occupying the house and lot in controversy as his homestead; that it was situated in the town of Luverne, and was worth less than \$2,000. At the request of the plaintiff the court gave the general affirmative charge in her behalf, and to the giving of this charge the said Wright duly excepted. The record and bill of exceptions contained a motion made by the defendant Wright to set aside and vacate the levy of the execution upon the house and lot in controversy. It is not deemed necessary to set out the grounds of this motion, although it was overruled, because said motion, and the ruling thereon, constitute no part of the record upon the proceedings in the contest of exemption.

Gamble & Bricken and D. M. Powell, for appellant. J. D. Gardner, for appellee.

BRICKELL, C. J. The appeal is taken from the judgment rendered against the appellant on the contest of the claim that his homestead was not subject to levy and sale under the execution in favor of the appellee. The contest was in form, and in its essential nature, an adversary suit, and the judgment therein rendered was a final judgment, from which an appeal will lie. The transcript which may properly be certified on the appeal to this court is of the record of the proceedings in the course of the contest. The records of other direct or collateral proceedings had between the same parties, though they may concern the same subject-matter, form no part of the record which ought to be certified, and, if incorporated in it, must be disregarded. The motion to vacate the levy, and the judgment thereon rendered, form no part of the record of the contest, ought not to have been incorporated in it, and must, with the errors thereon assigned, be disregarded.

A suit may be prosecuted against a partnership by its common name. The judgment rendered binds only the joint or partnership

property, and execution issuing thereon cannot be levied on the separate or individual property of either of the partners. The error underlying the argument of the counsel for the appellant is the supposition that the suit in which the appellee recovered judgment against the appellant and his codefendant, was a suit against them as partners, by their common name. Such was not the character of the suit. It was a suit against them as joint tortfeasors, by their surnames only, omitting their Christian names. The omission was pleadable in abatement, and the plea must have disclosed their true and proper Christian names. *Cantley v. Moody*, 7 Port. (Ala.) 443. The omission was cured by the appearance of the defendants pleading in bar. A suit cannot be deemed a suit against a partnership by its common name unless the complaint avers the partnership and the common name, or facts which are equivalent. The averments of the complaint, on which the judgment was rendered, are consistent only with the joint commission by the defendants of the tort complained of,—the conversion of the property of the plaintiff,—not having any relation or connection with each other than that which sprung from the commission of the tort. The action of trover—the form of action in which the judgment was rendered—is an action *ex delicto*, for the recovery of damages; and at common law the general issue was the plea of not guilty; and to it the maxim "*actio personalis moritur cum persona*" applied. The death of either party abated the action, and it was incapable of revivor by or against personal representatives. Statutes have changed this rule of the common law, and the action may now be revived or may be maintained by or against personal representatives. It shall not die with the person. But it remains an action *ex delicto*; an action founded in tort, not founded upon or springing out of contract. It is settled by the former decisions of this court, corresponding to the general course of decisions in other states, that an exemption of homestead or of personal property cannot be claimed when the judgment and execution are for tort. *Vincent v. State*, 74 Ala. 274; *Meridith v. Holmes*, 68 Ala. 190. There is no error in the record, and the judgment of the circuit court must be affirmed. Affirmed.

(103 Ala. 542)

ALABAMA MIDLAND RY. CO. v. RUSHING.

(Supreme Court of Alabama. June 13, 1894.)

WITNESS—RIGHT TO MILEAGE.

Though Code, § 2801, provides that the evidence of a witness may be taken by deposition where he resides more than 100 miles from the place of trial, if such a witness attends the trial when subpoenaed he is entitled to his mileage and per diem fees.

Appeal from circuit court, Pike county; J. R. Tyson, Judge.

Action by J. E. H. Rushing against the Alabama Midland Railway Company to recover damages for the killing of cattle. A motion to retax costs was overruled, and defendant appeals. Affirmed.

This action was brought by the appellee against the appellant railway corporation to recover damages for the killing of cattle. There was judgment for the plaintiff in said suit. Subsequently there was a motion made by the defendant in said cause to retax the costs; and on this motion it was shown that in the cost bill there was one item, amounting to \$23, taxed against the defendant for subpoenaing, and the attendance of, one Askew, as a witness for the plaintiff; that said Askew lived in the state of Alabama, more than 100 miles from the place of trial; and that said Askew attended the trial as a witness, although there was no affidavit filed in said cause "that the personal attendance of the witness was necessary for a proper decision of the cause." On this evidence the court overruled the motion to retax the cost, and the defendant duly excepted. This is the only ruling shown by the transcript.

A. A. Wiley and John D. Gardner, for appellant. Gamble & Parks, for appellee.

COLEMAN, J. The record fails to show that any final judgment has been rendered in the case to authorize an appeal, but, premitting this defect, the circuit court did not err in its ruling on the motion of the appellant to retax the costs. Section 2801 of the Code provides that the evidence of a witness may be taken by deposition "when the witness resides more than one hundred miles from the place of trial," etc., but the statute does not require that the evidence shall be taken by deposition. If the witness reside in the state, and is subpoenaed, and attends in obedience to the subpoena, he is entitled to his mileage and per diem, as other witnesses. There is no error in the record. Affirmed.

(108 Ala. 488)

INDUSTRIAL TRUST, TITLE & SAV. CO.
v. WEAKLEY.

(Supreme Court of Alabama. June 13, 1894.)

LIABILITY OF DRAWER OF CHECK — NECESSITY OF PRESENTATION.

1. Defendant drew his check in favor of N. in payment of a note. At the time, the bank was indebted to him, for services and for checks in his hands, to an amount which, with his balance, was more than the check was for. Before drawing the check, defendant arranged with the cashier of the bank that it would be paid. When defendant gave the check to N., on June 16, 1891, he directed him to go to the bank, which was across the street, and get his money. Instead, defendant indorsed the check to plaintiffs, and sent it to them at Philadelphia, and the bank suspended June 22, 1891, before it was presented for payment. Held, that defendant was discharged from liability on the check.

2. The damage sustained by defendant, by reason of the failure to present the check, was

not the amount of defendant's balance at the time the check was drawn, but the full amount of the check.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Action by the Industrial Trust, Title & Savings Company against John B. Weakley, Jr., to recover the amount of a check. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

The plaintiff requested the court to give to the jury the following written charges: (1) "If the jury believe the evidence, they must find for the plaintiff." (2) "If the jury believe the evidence, they must find for the plaintiff for \$74.36, the difference between the check and the amount on deposit." (3) "If the jury believe the evidence, that at the time the check in suit was drawn, the defendant did not have to his credit unchecked against, on the books of the bank, a sufficient amount to cover the same, they must find for the plaintiff." (4) "I charge the law to be, that a depositor of a bank has no legal right to check against an amount due him for legal or other services, where such amount had never been agreed upon between him and an officer of the bank, and there was no previous agreement as to the amount of the same, and he had never presented his bill to the bank for the same, and such amount had never been placed to his credit." (5) "I charge you that the law is, that a depositor of a national bank has no legal right to overdraw his account, and the bank is under no legal obligation to pay an overdraft." (6) "If the jury believe from the evidence that on the day the check in suit was given, or the day after, the defendant did not have a sufficient amount to his credit in bank, unchecked against, to cover the same, then the bank was not legally bound to pay said check, even if you find that the bank was indebted to the defendant for services, which indebtedness, or the amount of the same, never had been agreed upon between himself and the bank, and for which he had presented no account, and which had never been placed to his credit, in an amount sufficient, which in addition to his deposit account would have covered the amount of the check in suit." (7) "I charge the law to be, that a bank is under no legal obligation to pay a check drawn by a depositor, where such depositor has not a sufficient amount to his credit to pay said check, even if you find from the evidence that the bank owed him, for legal services, enough, which added to his deposit, to cover the check, when his account for services had not been presented to the bank or any of its officers, and there was no agreement as to the amount of the same, and it had not been placed to his credit." (8) "I charge the law to be that nothing but a deposit account is the subject of check by a depositor of a bank." The court refused to give each of these charges as asked by the plaintiff, and the

plaintiff separately excepted to the refusal to give each of them, and also excepted to the court's giving to the jury, at the request of the defendant, the following charge: "If the jury believe the evidence, they must find for the defendant." There was judgment for the defendant, and plaintiff appeals, and assigns as error the refusal to give the charges asked by it, and the giving of the general affirmative charge, as asked by the defendant.

C. E. Jordan, for appellant. Simpson & Jones, for appellee.

HARALSON, J. 1. A bank check is payable immediately on presentation and demand. Its drawing presupposes the deposit of a sum in bank to the credit of the drawer, sufficient to pay it, and amounts to an absolute appropriation by the drawer of that much money, in the hands of his banker, to the holder of the check, to remain on deposit so appropriated, until called for, and it cannot, afterwards, be properly withdrawn. Tied. Com. Paper, § 433; 3 Kent, Comm. 104, note; 2 Daniel, Neg. Inst. § 1597; Morse, Banks, § 373; In re Brown, 2 Story, 511-518, Fed. Cas. No. 1,985; Conroy v. Warren, 3 Johns. Cas. 259; Kinyon v. Stanton, 44 Wis. 479. So strong is this presumption of a check being drawn against an existing deposit, that when one is presented and paid, it has been held, not to be evidence of money lent or advanced by the banker to the customer, but, on the contrary, it is *prima facie* evidence of the repayment to the customer by the banker, to the amount of the check, of money previously deposited by him in the banker's hands. Lancaster v. Woodward, 18 Pa. St. 357; Fletcher v. Manning, 12 Mees. & W. 571.

2. A check being payable instantly on demand, and on funds, which are represented by the bare fact of drawing, to be on deposit in bank, with which to pay it in full,—and which funds, in the eye of the law, are appropriated by the drawer for that purpose,—it follows, as a correct principle of business dealing, that the holder should present it for payment within a reasonable time, otherwise the delay is at his peril. What is reasonable time will depend upon circumstances; but it is a principle of general recognition, that if the bank on which the check is drawn be in the same place where the payee receives it, it should be presented for payment within banking hours on the day it is received, or on the following day. If in the meantime, the bank fails, the loss will fall on the drawer. 3 Am. & Eng. Enc. Law, 213, and cases cited; 2 Daniel, Neg. Inst. § 150; 2 Morse, Banks, § 421; Boone, Banking, § 172; Taylor v. Wilson, 11 Metc. (Mass.) 44; Morrison v. Bailey, 5 Ohio St. 13; Smith v. Janes, 20 Wend. 192.

3. The payee takes a check with legal obligation to present it for payment within

reasonable time, and failing so to do, if the drawer has funds on deposit, sufficient to pay it, he must suffer all the loss which arises from such failure; but if the drawer has no funds in bank, at the time of drawing the check, or having them, subsequently withdraws them, he cannot be said to suffer any loss or damage from the holder's delay or failure to present or give notice of nonpayment. He is liable in such case, without presentment and notice, and may be sued immediately. 2 Daniel, Neg. Inst. § 1590; *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086; Boone, Banking, §§ 172, 181. And the drawer is not discharged by the laches of the holder in not making due presentment of the check, or in not giving due notice of its dishonor, unless he has suffered some loss or injury thereby as by the intermediate failure of the bank, and then, only *pro tanto*. 3 Am. & Eng. Enc. Law, 215, and authorities cited; Morse, Banks, 421d; 2 Daniel, Neg. Inst. § 1587; Boone, Banking, *supra*.

4. But, it sometimes happens, as in the case at bar, that the drawer has a portion only of the amount in bank necessary to pay his check, and the question then presents itself, whether the deficiency of his deposit is an excuse for want of presentment and notice. Mr. Daniel says: "We should unhesitatingly say that the drawer of an overcheck is bound without demand or notice. A check is intended to be the representative of cash. It is the business of the drawer to know the state of his accounts, with the bank, and whether through fraud or carelessness he makes the representation, that he has cash to meet it, as he does by the act of drawing it, it would put a premium upon looseness in commercial transactions to permit him to shield himself behind the plea of want of presentment or notice." 2 Daniel, Neg. Inst. § 1597. "The bank," says Judge Story, "is not bound to pay unless it is in full funds; and it is not obliged to pay, or to accept to pay, if it has partial funds only; for it is entitled to the possession of the check on payment; and, indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with, unless he receives full payment, nor the bank exact, unless under the like circumstances. The holder is not bound to accept part payment, even if the bank is willing to pay in part; for he has a claim to the entirety." In re Brown, 2 Story, 519, Fed. Cas. No. 1,985; Morse, Banks, §§ 294, 446, 450, 455; Dana v. Bank, 13 Allen, 445; Murray v. Judah, 6 Cow. 490.

5. Subject to some exception, it is a correct general proposition, that a bank has no right to allow drawers of checks to overdraw their balances, and pay checks out of funds of other depositors, or the money of the stockholders. Overdrawing, even to persons of good standing with the bank, does not find sanction in sound usage, except under special

conditions. *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086; *Bank v. Woodward*, 18 Pa. St. 357. As to overdrafts, Mr. Morse says, there is power in the bank to allow them; that a customer by negotiating with the authorized and proper officials, may make a legal and binding arrangement by which his overdrafts to a certain amount named, and under the circumstances agreed upon, shall be honored; that such a dealing is in the nature of a loan, and is placing money at his disposal or control. 1 Morse, Banks, § 358.

6. Upon the same subject, Judge Story,—after stating the rule, which seems to be everywhere admitted, that the drawer is liable in all cases for the dishonor of a check, whether it has been duly presented or not, or whether he has had due notice of the dishonor or not, where he has sustained no damage on account of the omission, and after giving his dissent to the proposition, that if the drawer has any funds in the hands of the drawee, he is entitled to due presentment and notice of a failure to pay,—says, that he understands the true doctrine to be, “that if the drawer has a right to draw, in the belief that he has funds, or in the expectation that he shall have funds at the time of the presentment for acceptance by reason of arrangements with the drawee, or putting his funds in transitu, then, and in such cases, he is entitled to due notice.” In *re Brown*, supra. In this case, the principle seems to be recognized, that when the drawer, from any arrangement he may have made with the bank for him to draw, or where, as between him and the bank, there was an open account, with a fluctuating or shifting balance between them, and he did not know that he was drawing without any right to draw, and had the right to believe his check would be paid, and especially, if the payee had assurances that the check would be paid, then, the drawer would be entitled to due presentment and notice. As supporting his view he refers to the cases of *Thackray v. Blackett*, 8 Camp. 164; *Orr v. Maginnis*, 7 East, 358; and *Legge v. Thorpe*, 12 East, 171. These expressions of Judge Story find approval with the Virginia court of appeals, in the case of *Purcell v. Allemon*, 22 Grat. 739; *Smith*, Merc. Law, 237.

7. In the United States, says Mr. Daniel, although it was at one time decided to the contrary in England, an agent, holding a bill or note for collection, would act at his peril in delivering it up on receipt of a check for the amount; and that if the debtor did not pay the amount in money, and the drawer or indorser were not duly notified, he would be discharged, and the loss would fall on the collecting agent. 2 Daniel, Neg. Inst. § 1625; *Whitney v. Esson*, 99 Mass. 308; *Turner v. Bank*, 42 N. Y. 425; *Bank v. Ashworth*, 123 Pa. St. 212, 16 Atl. 596; *Smith v. Miller*, 43 N. Y. 171; *Rathbun v. Steamboat Co.*, 76 N. Y. 376; *Chouteau v. Rowse*, 56 Mo. 65. In the case of *Smith v. Miller*, supra,

the court of appeals in New York hold, that when a check is taken instead of money, by one acting for others, delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment. This, says Mr. Daniel, seems to be the correct doctrine, for the agent exceeds authority in taking the check, and therefore acts at his peril. 2 Daniel, Neg. Inst. § 1625; 2 Morse, Banks, § 421.

8. The evidence in the case before us, is without conflict. One Moore was indebted to the appellant, plaintiff below, in the sum of \$229, due by note, which had been sent by plaintiff to Mr. W. J. Nelson, of Florence, Ala., as agent for plaintiff, for collection. John B. Weakley, the defendant and appellee, of the same town, was the agent and attorney of said Moore. Said Moore had sent this sum of money to defendant, with which to pay said note. All of Mr. Nelson's transactions for the collection of the note were with the defendant. On the 16th June, 1891, the defendant gave his check, on the Florence National Bank, for \$229, payable to the order of W. J. Nelson, “for payment of Moore notes.” On the same day, said Nelson indorsed the check, “Pay to the Industrial Trust, Title & Savings Co., of Phila.,” and sent it to plaintiffs in the mail, and it was forwarded by them, when received, through various banks for collection. The Florence National Bank suspended and closed its doors on the 22d of June, 1891, at about 10 o'clock a. m. On the 23d of June, the check was presented to the defendant, who refused to pay, and it was duly protested. The plaintiff examined the defendant as a witness, who testified, that he drew and delivered the check about 10 o'clock of the day it bears date, and when he handed it to Mr. Nelson, he asked him to take it to the Florence National Bank and get his money; that the bank was located in the town of Florence, and he and Nelson both resided there at the time the check was given; that said bank was located almost opposite to the witness' office, across the street; that at the time of the suspension of said bank, there appeared, by the books of the bank, to his credit, out of moneys deposited by him in the bank, and not drawn out by check, the sum of \$154.64; that in addition thereto, the bank was indebted to him at the time, in the sum of \$75 for legal services rendered by him to the bank, and was also indebted to him in the sum of \$60, due by check drawn in his favor by a depositor of said bank, on the 10th June, 1891; that he proved his claims against the bank, after its suspension, before the receiver, and in the account, he charged the bank with the sum of \$154.64, due him on deposit account, with the amount due him for legal services, and the unpaid check for \$60; and gave it credit for the \$229, being for the check given to said Nel-

son, and \$25, which had been paid to him on account of services rendered, and there remained due to him, the sum of \$60.64, for which he holds a receiver's certificate, and this sum, besides the other amounts specified, the bank owed him, at the time he gave said check to Nelson; that at that time, his account with said bank, as stated, was unsettled, and what it owed him for services and for the unrepresented check, had not appeared on its books, and a balance ascertained. About the time of drawing this check, or a short time before, he went to the bank and stated to the cashier, Mr. Tice, that in the course of a few days he would check upon his account rather heavily, and that it might appear overdrawn on the books, but that the bank was indebted to him for services rendered, and that he had some checks on hand against the bank, and he would, in a few days, come in and have a settlement, but in the meantime, he desired him to pay his checks, as they were (would be) drawn against the sum the bank owed him, and Mr. Tice consented to do so. He further testified, that from the time the check was delivered to Mr. Nelson, till the suspension of the bank, it was indebted to him in an amount greater than the amount of said check, and that the bank still owes him, after crediting it with the amount of said check, the sum of \$60.64. It thus appears that there was an unsettled account between the defendant and the bank, at the date of the giving of said check; that the bank, at that time, did owe him an amount greater than a sum sufficient to pay said check; that he did not draw the same without knowing he had funds in bank with which to pay it, but had the assurance of the teller of the bank that his check would be paid, and, therefore, the most reasonable expectation that it would be paid. He acted with commendable caution in reference to the matter, that he might do neither the drawee nor the bank any injury, and Mr. Nelson had every reason to believe that the check was good and would be paid, for the defendant did what is not usual when one gives another a check on the bank,—requested him to take it to the bank and get his money; and this is just what he ought to have done, and failing, took all the peril of a failure of the bank, before the presentment of the check. Can any one doubt, if Mr. Nelson had gone to the bank, the day he received this check, or the following day, he would have been paid by the bank? He, himself, had every reason to believe it, and had no suspicions, even, to the contrary, for he received a check which acknowledged payment of the notes he had in hand for collection. He must, therefore,—and so must his client, the appellant, so far as appellee is concerned,—suffer the consequences of a disobedience of defendant's request to present the check, and his failure to do so till after the bank failed. As to when giving a check will operate as a payment of the debt for which it

was given, see *Boone, Banking*, § 181, and authorities cited.

9. It remains to be considered, what damage did defendant suffer from a failure of the holder to make due presentment of said check for payment? He can be shielded from the consequences of the holder's neglect, as we have seen, only to the extent he was damaged. It is contended, that defendant owes, at least, the difference between what he had in bank,—\$154.36,—and the amount of the check he gave,—\$229,—which is \$74.36. But we are unable to see that defendant was damaged by the failure of the drawee to present his check, only to the extent of \$154.36,—the amount to his deposit account at the time. He had the right, under the circumstances, to draw for the \$229, and the failure to present the check in time, canceled it as to him, and made it a payment of the Moore note in full. We cannot divide the \$229. Defendant must be regarded as having paid the whole or no part of it. The bank got the benefit of it, and owes it to some one, certainly not to the defendant, against whom it was properly charged by the receiver in his ascertainment of the balance due by the bank to defendant. We fail to see that the \$74.36 has anything to do with the case, or that there was any pro tanto or other damage to defendant, less than the whole amount of the check, growing out of the holder's failure to present it. The charges requested by plaintiff, as applicable to the evidence, were properly refused, and the general charge in favor of the defendant was properly given. Affirmed.

(108 Ala. 33)

HESTER v. STATE.

(Supreme Court of Alabama. June 14, 1894.)

SUMMONING GRAND JURY — RECEIVING STOLEN GOODS—EVIDENCE—IMPEACHMENT OF WITNESS.

1. Where jury commissioners by mistake certify persons as grand jurors for the fall instead of the spring term, and in consequence no grand jurors are summoned for the spring term, the court at such term may order the sheriff to summon persons to serve as grand jurors, under Code, § 4316, giving such authority.

2. On a trial for receiving stolen goods, it is not error to permit a witness to testify that he saw the goods in defendant's possession, and knew them by certain marks.

3. On a criminal trial, a conversation with one of defendant's witnesses, in the absence of defendant, is admissible only to impeach such witness, and the attention of witness must first be called to the time, place, and circumstances of the conversation, and he must be asked whether he made the statements claimed.

4. On a trial for receiving stolen goods, the state need not prove the exact time when, or place where, the goods were stolen, or identify the thief.

5. Where defendant testified that he did not know whose goods they were, nor the person from whom he bought them, and that defendant supposed he was going under a fictitious name, a request to charge that, if the jury believe the defendant's account of the transaction is the correct one, then they must acquit, was properly refused.

Appeal from circuit court, Dekalb county; John B. Tally, Judge.

W. H. Hester was convicted of receiving stolen goods, knowing they were stolen, and appeals. Reversed.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, William H. Hester did buy, receive, conceal, or aid in concealing, one hundred and ninety pairs of shoes, of the value of one dollar per pair; nineteen ladies' hats, of the value of one dollar per hat; five children's caps, of the value of twenty-five cents per cap; one hundred bottles of quinine, of the value of forty cents per bottle; a lot of artificial flowers, of the value of five dollars,—the personal property of the Alabama Great Southern Railroad Company, a corporation under the laws of the state of Alabama, knowing that they were stolen, and not having the intent to restore them to the owner, against the peace," etc. This indictment was preferred at the spring term, 1894, of the circuit court of Dekalb county. The defendant demurred to the indictment, on the ground that it falls to aver that the defendant knew that the goods alleged to have been received had been stolen, and that the defendant had not the intent to restore them to the owner. This demurrer was overruled, and the defendant duly excepted. The defendant moved to quash the indictment, on the grounds (1) that the grand jury finding said indictment was drawn, impaneled, and organized contrary to law; (2) because there was a grand jury drawn by the commissioners' court of Dekalb county according to the law in such cases made and provided. Upon the hearing of this motion, it was shown that at their last meeting, in November, 1893, the jury commissioners of Dekalb county drew the grand and petit jurors for the spring and fall terms of the circuit court for 1894; after the drawing of said jurors, they delivered to the clerk of the circuit court two envelopes, which were indorsed, respectively, "Grand and petit jurors, spring term, 1894," and "Grand and petit jurors, fall term, 1894." That in the envelope which was marked "Grand and petit jurors, spring term, 1894," there was a list of 18 names, which was headed as follows: "State of Alabama, Dekalb county. Fall term, 1894. Grand jurors. At a meeting of jury commissioners of said county, held on 17th day of November, 1893, the time prescribed by law, the following named persons were duly and legally drawn to serve as grand jurors for the fall term of circuit court, 1894, of said county." That in the envelope marked "Grand and petit jurors, fall term, 1894," there was a list, with the same heading, containing the names of different persons. In view of these facts, the clerk of the circuit court did not deliver to the sheriff a list of the grand jurors to be

summoned for the spring term, 1894. When the circuit court convened for the spring term for said county, and it was ascertained that no grand jury had been drawn and summoned, the court ordered the sheriff to summon forthwith, from the qualified citizens of said county, 18 persons qualified to serve as grand jurors; and, upon the sheriff executing said order, the persons so summoned appeared, and, upon the court being satisfied that they were competent to serve as grand jurors at said spring term of the court, a grand jury was duly organized as required by law. It was this grand jury that preferred the indictment against the defendant in this case. Upon these facts, the court overruled the motion to quash the indictment, and the defendant duly excepted. Upon the trial of the cause, as is shown by the bill of exceptions, the state introduced evidence tending to show that the defendant had in his possession goods which had been stolen from a car of the Alabama Great Southern Railroad. The goods then in possession of the defendant were identified by various witnesses. Upon several witnesses testifying that they knew they were the same goods which had been stolen, by certain marks upon them, which they described, the defendant moved to exclude such testimony, on the ground that the goods themselves would be the best evidence of the marks. The court overruled this motion, and the defendant duly excepted. The testimony for the defendant tended to show that he bought the goods, claimed to have been stolen from the railroad, from a peddler, whom he did not know, and that he did not know, nor had any reason to believe, that the goods were stolen. There was testimony introduced by the defendant to show that, at the time of the alleged purchase by him from the peddler, the peddler was seen at a village a short distance from the defendant's store, and was also seen at the defendant's store. One of the witnesses so testifying was William King. In rebuttal to such testimony, the state introduced one S. C. Adams as a witness, who, after testifying that he knew the said William King, was asked by the state about the conversation with him (the witness) and said King, in which one Bill Allen spoke to the witness about the defendant. The defendant objected to this question, and duly excepted to the court's overruling his objection. The witness then answered that, in the conversation with the said King, he said that Bill Allen came to his (King's) house, a short time after the defendant was arrested, and asked him (King) if he could help him (the defendant), as he had gotten into a very bad scrape, the railroad claiming that Hester, the defendant, had in his possession goods which had been stolen from it. The defendant moved to exclude this testimony of the witness as to the conversation with King, and duly excepted to the court's overruling

his testimony. One John Rush was introduced as a witness for the state, and testified as to substantially the same thing in reference to a conversation had between him and the said King. The defendant moved to exclude this testimony also, but the court overruled his motion, and the defendant duly excepted. The defendant requested the court to give, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that, before there can be a conviction in this case, there must be that measure of proof of the stealing of the goods alleged to have been received by the defendant as would warrant a conviction of the real thief, if he were on trial for the stealing of goods in question, and that the thief would have to be some other person than this defendant." (2) "Unless the proof is such, in this case, that there could be a conviction of the real thief, if he were on trial, there can be no conviction. And if it is uncertain from this proof that the goods were stolen, and if you have a reasonable doubt as to who stole the goods, if stolen at all, the defendant is not guilty." (3) "The court charges the jury that the guilt or innocence of Hester can in no manner be affected by statements made by third persons not in Hester's presence, whether they be inculpatory or exculpatory." (4) "Unless the jury is reasonably satisfied from the testimony, beyond a reasonable doubt, who was the person who stole the goods, there can be no conviction."

Howard & Ewing and Davis & Haralson, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was convicted of the offense of buying and receiving stolen property, knowing the same to have been stolen, and not having the intent to restore it to its owner. No grand jury had been summoned for the regular term of the court at which the indictment was presented. Section 4316 of the Criminal Code is as follows: "If in consequence of any neglect on the part of the judge of probate, sheriff or clerk of the circuit or city court, or from any other cause, no grand or petit jury is returned to serve at any term of the court, or no petit jury summoned for any week thereof, the court may, by an order entered in the minutes, direct the sheriff forthwith to summon eighteen persons qualified to serve as grand jurors, and the requisite number to serve as petit jurors." The grand jury was summoned and organized under this provision of the statute. The grand jury thus organized was a legal body, and the court did not err in refusing to quash the indictment upon the ground that it was prepared by an illegal grand jury. Under the circumstances, the court complied strictly with the law. The indictment is sufficient in form,

and the demurrer was properly overruled. There was no error in admitting the evidence which tended to identify the goods, and to prove ownership. The court erred in permitting the witness Adams to testify as to the conversation between himself and the defendant's witness King. These statements of the witness King to Adams were merely hearsay, as testimony against the defendant. Such statements were admissible only for the purpose of impeaching the witness King, and, to render them admissible for this purpose, it was necessary to lay a proper predicate, by first asking the witness King, giving time, place, and circumstances, whether or not he had made such statements. No such or other predicate was laid for the introduction of this conversation. For the same reason, the court erred in allowing the witness John Rush to testify as to the conversation he had with the witness King. These errors require a reversal of the case. The state was not required to satisfy the jury as to the precise time when, or the exact place where, the larceny was committed, or to identify the thief. *State v. Murphy*, 6 Ala. 845. It was sufficient if the jury were satisfied, beyond a reasonable doubt, that the goods were stolen, and that the defendant purchased them, or received them, knowing they were stolen, and not having the intent to return them to the owner, as charged in the indictment. *Collins v. State*, 33 Ala. 434. We presume the charge requested, which had reference to statements of third parties, was based upon the conversations had with the witness King, which we have held erroneously admitted. We find one charge refused which, on first reading, we were of opinion should have been given. It is as follows: "The court charges the jury that a probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and, therefore, for his acquittal; and if, from all the evidence in this case, they believe the defendant's account of this transaction is the correct one, then they must acquit the defendant." The first part of this charge asserts the law correctly, as has been held many times. *Prince v. State (Ala.)* 14 South, 409; *Bain's Case*, 74 Ala. 38; *Williams' Case*, 98 Ala. 22, 12 South. 808. The latter part of the charge is "that if, from all the evidence in the case, they believe the defendant's account of the transaction is the correct one, then they must acquit the defendant." We have examined with care the testimony of the defendant, and find, in the light of all the evidence, that defendant's "account" may be "correct" and yet the jury might find him guilty. The indictment is for buying or receiving stolen property. In his testimony he states that "he did not know whose goods they were, or where they came from." He states that "the peddler [from whom he bought the goods] said that he was from Sand Mountain, and that he bought the goods in Rome, Georgia." "The peddler gave

his name as 'Hell-Roaring Johnson.'" All this might be true, and yet the defendant, under the circumstances, may not have credited the statement of the peddler. It nowhere appears, from his own statements, that the goods were bought in good faith. His version of the transaction might be true, and yet a jury might believe, in the light of all the evidence, that the goods were bought or received under such circumstances that a reasonable man of ordinary observation must have known they were stolen. 33 Ala. 434, *supra*. The defendant stated he did not know the peddler, had never seen him before nor since, and "supposed he was going under a fictitious name." These statements, considered in the light of other evidence in the case, did not require an acquittal, although they may have been true. The court did not err in refusing the charge. For the errors pointed out in the admission of illegal evidence, the case is reversed. Reversed and remanded.

(103 Ala. 429)

O'BRYAN et al. v. DAVIS.

(Supreme Court of Alabama. June 14, 1894.)

EXECUTION SALE—INADEQUACY OF PRICE.

1. An execution sale is not void because the second bidder, who was declared the purchaser, refused to take the goods, and the sheriff thereupon delivered them to the first bidder without a resale.

2. In a proceeding to set aside an execution sale, on the ground of inadequacy of price, because of an irregularity, the defendant introduced several affidavits by persons not shown to be qualified as experts who placed the value of the goods at from \$1,000 to \$2,027. For the purchaser an equal number of affidavits were introduced by persons shown to be experts, which showed the goods were shopworn and very unsalable, and worth only about \$600, the amount they were sold for. *Held* not sufficient to set aside the sale.

Appeal from circuit court, Bibb county; W. D. Denson, Judge.

Appeal by O'Bryan Bros. from a judgment setting aside an execution sale on a judgment in their favor against Joseph M. Davis. Reversed.

O'Bryan Bros. recovered a judgment against J. M. Davis in the circuit court of Bibb county on May 24, 1892. Execution was issued upon said judgment, and levied upon certain property of the defendant, which was afterwards sold by the sheriff of said county; whereupon the defendant, J. M. Davis, moved the court to set aside and vacate the said sale made by the sheriff, upon certain grounds, which are sufficiently stated in the opinion. Upon the submission of this motion, upon the evidence, the court rendered judgment, adjudging that said sale was void and of no effect, and ordering that the same be set aside and held for naught. The plaintiffs in judgment and execution now bring this appeal, and assign as error the rendition of said judgment.

Logan, Horgrove & Vande Graaff and Garrett & Underwood, for appellants. Ward & John, for appellee.

HEAD, J. We will dispose of this case upon the assumption that the circuit court may have properly entertained a motion to set aside a sheriff's sale of personal property, as the parties have not raised that question. This appeal is from the order of the circuit court granting a motion to set aside a sheriff's sale of a stock of goods under execution in favor of O'Bryan Bros., against J. M. Davis, the plaintiffs in the action being the purchasers. The grounds of the motion, as set forth in the writing filed, are that the sale was "illegal and oppressive, and caused the said goods to be sold for about one-third of their real value;" "that said sale was not made at public outcry, as required by law;" "that the sheriff, contrary to law, right, and justice, sold said goods at private sale, to the plaintiffs in execution, and at a price greatly disproportionate to their real value;" "that the plaintiffs directed and controlled the sheriff in making said sale in an illegal and oppressive way, so as to wrong and oppress the defendant." We must confine our considerations to these grounds. We remark that the first, second, and fourth grounds are defectively stated, in that the first fails to show wherein consisted the illegality and oppression in the manner of conducting the sale which caused the goods to be sold for less than their value. So, also, the fourth fails to show what illegality and oppression were practised, or in what way the defendant was wronged and oppressed. The second fails to show that the defendant was in any wise injured by the failure to sell at public outcry. But objection was not made by the purchasers, and we will, as they did, leave the defects to be supplied or cured by proof of any available illegality or oppression and consequent injury to defendant, if such proof has been adduced. It will be observed that the motion itself evidently recognizes the rule, so well settled in law, that mere inadequacy of price will not afford ground for vacating the sale. To have that effect, the inadequacy must be so gross as to create the presumption of fraud. *Ray v. Womble*, 56 Ala. 32; 12 Am. & Eng. Enc. Law, 235; 22 Am. & Eng. Enc. Law, 680, 681. This is the rule in reference to real estate, and for greater reasons should it apply to chattels. Land is fixed and immovable, and it is generally easy, upon setting aside its sale, to place all parties in statu quo. Chattels are movable; consumable in use; often valuable to the possessor only for the purpose of sales, in parcels, to consumers. Possession is at once delivered to the purchaser, and the goods by him used, consumed or disposed of, according to their character, in reliance upon the ownership acquired by the purchase. The facts of the present case will illustrate: A stock of goods valuable

only for the purpose of sale, at retail, to consumers, was sold by the sheriff. The purchasers took immediate possession. Some four months thereafter elapsed before the defendant did or could move to set aside the sale. Meantime the purchasers sold the goods to a dealer in an adjoining county, who, it may be fairly supposed, has disposed of many of them. It is impossible to restore the statu quo. Under these conditions, let the rule we have adverted to be applied in all its force. There must appear, then, some fraud or illegality, coupled with inadequacy of price, to justify the ruling of the court. None of the affidavits, in our judgment, approach a showing of actual fraud on the part of the sheriff or purchaser. They show a single irregularity. The sale was duly advertised showing the time and place. At the desire of the defendant, it was duly and regularly adjourned. A considerable crowd attended. An auctioneer was employed, and, at the proper hour and place, the stock of goods was exposed to public sale to the highest bidder, for cash. There were several bidders. The plaintiff in execution, whose debt amounted to over \$1,000, bid \$800; one Fancher bid \$850; whereupon bidding ceased, and Fancher was declared the purchaser. The sheriff waited three or four hours upon him to complete his purchase by payment, when he appeared, and made known that he would not comply with the terms of sale. The sheriff thereupon informed the attorney of the plaintiffs in execution, who had made for them the next highest bid,—\$600,—that his bid would be accepted, to which the attorney assented; and the sheriff thereupon made return upon the execution that O'Bryan Bros. were the purchasers, at \$800, and delivered the goods, and returned the process to court. The levy was regularly indorsed upon the execution. This action of the sheriff was irregular. Strictly, he should have made a regular resale, at some further day, on proper notice. 22 Am. & Eng. Enc. Law, 600, 617.

But the sale was not void, as the court below declared it to be. Indeed, this remedy, by motion to vacate the sale, presupposes and implies that it is voidable only. Who could contend, in a collateral proceeding involving the title acquired by the purchasers at this sale, that the judgment, execution, and return of the levy and sale thereunder, with proof of possession delivered to the purchasers, would not show title in them which could not be overcome by proof of the irregularity and improper manner in which the sale was effected? Even in sales of real estate under execution, the purchaser's title is made out by showing the judgment, execution, and sheriff's deed; and this title could not be defeated, except in a direct proceeding for that purpose, by showing that the sheriff violated every direction of the statute regulating such sales. *Ware v. Bradford*, 2 Ala. 676; 3 Brick. Dig. p. 452, § 63;

Foster v. Mabe, 4 Ala. 402; *Fournier v. Curry*, Id. 321. The sale, then, to O'Bryan Bros., was not void. It was irregular merely; and if it clearly appears that the irregularity caused the defendant material injury, assuming the propriety of the remedy now invoked, the sale ought to be set aside. The burden is on the party moving to show injury. We said, also, it must be clearly shown. This is a general rule, applicable to this remedy in all cases. It applies with very great force to this case, in view of the consideration to which we adverted when speaking of the inadequacy of price. If it were a question merely whether the evidence preponderates in favor of the allegation that the goods sold for less than their value, we would hesitate long before declaring that it does. Each party introduced a number of affidavits. The defendant, Davis, makes oath that the goods were worth \$1,500. He gives no description of their age, character, or quality. B. L. Tucker bought the goods from O'Bryan Bros. His opinion is that they were worth \$1,000. He does not show what, if any, experience he has had in such matters. H. C. Fancher is the father of E. E. Fancher, who bid off the goods at \$650. He fixes the value at \$1,500, but does not show that he has had any experience with stocks of goods. E. E. Fancher says \$1,250, but, like the others, does not attempt to qualify himself. P. E. Fancher and J. M. Davis, Jr., were, and had been for several years, clerks in the store of the defendant. They assisted in making an inventory of the goods, and swear that each article was put down at its fair value, and that the inventory amounted to about \$1,700. This inventory did not include certain specified goods, and P. E. Fancher swears that he afterwards assisted the sheriff in making a complete inventory, putting everything down at its fair value, and it showed \$2,027. This is all the testimony for the defendant as to value. For the purchasers, Bates, the sheriff, made an affidavit giving a full history of his acts and doings in connection with the sale. His testimony, as well as that of M. J. Latham, another witness for the purchasers, goes far to show that the goods, in greater part, consisted of remnants of old stock which had come down for six or seven years, through three successive firms doing business in the same house; that they were odds and ends, old, shopworn, and very unsalable. Bates brings to view the testimony of defendant given in a chancery case about two years before, which strongly supports this conclusion. The sheriff shows that about the 1st of June, before the sale, on July 22d, Davis closed the store, and it remained closed until the sale, during which time the goods had become very much damaged. He swears that the inventory of \$2,027 was made strictly at cost prices, without regard to their actual value, and that he knew at the time that they were so dam-

aged by age, dust, dampness, and vermin that they were not worth half that sum. He shows that prior to the sale he made diligent effort to find a purchaser, saw many persons in various places, and urged them to be present at the sale, but in no case could he get an offer of over \$600, and he swears that \$600 was a fair valuation. William T. Atkins, who shows himself to be an expert in matters of this kind, of 27 years' experience, examined this stock of goods with the view of buying them for O'Bryan Bros., and he swears that \$600 was all they were worth. He describes the goods, and shows they were very old, and many of them shopworn and unsalable. Very few of them had been purchased within a year prior to the sale. After the sale, he undertook to dispose of the goods for O'Bryan Bros., and tried over his whole territory to find a purchaser. He received the following bids from parties who knew the stock well: L. & E. Lamar, Selma, \$500; A. P. Howison, Randolph, \$500; B. L. Tucher, Randolph, \$550; W. B. Reynolds, Montevallo, \$550 cash, or \$587.50 part cash and part on time. He says he told defendant, if he could arrange with any of his friends to take the stock at \$600, he could do so, and he had over a month in which to make such arrangements. M. F. Gardner swears that he is, and has been for 12 years, engaged in buying and selling goods, and has had a great deal of experience in the merchandise business generally. He was the auctioneer who made the sale for the sheriff. He says there were about 25 persons present at the sale. He states that, in his opinion, the stock was composed largely of odds and ends, which he regarded in a great measure worthless, and considerably shelfworn, and that he would not have paid more than \$600 for the stock. He made a personal inspection of the bulk of the stock. There were at the sale several experienced merchants, among them Allen P. Howison and J. W. Bland, Jr., who were bidders. M. J. Latham, the present sheriff of Bibb county, says \$600 was a fair valuation for the goods. He was well acquainted with them. A. P. Howison, an experienced merchant, was present at the sale, and tried to buy the stock. He swears, in his judgment, it was not worth over \$650. This is substantially the evidence for the purchasers. Comment is unnecessary. It cannot be insisted that it is clearly shown that the defendant was injured. It is argued that the goods ought not to have been sold en masse, but should have been sold off at retail. The only evidence on that subject is the affidavit of Atkins, who swears that, in his opinion, they would not have realized any more by that method of sale. Besides, defendant was present at the sale, and made no objection, and did not request that they be sold in that way. Evidently, the court below did not regard the alleged inadequacy of price as established, but acted on the mistaken con-

ception that the sale was void. The judgment of the circuit court is reversed, and a judgment will be here rendered overruling the motion to set aside the sale.

We inquire whether a court may properly entertain a motion to set aside a sheriff's sale of personal property under execution, unless under such peculiar circumstances that the property can be restored, and the parties placed in statu quo. Should not the defendant in execution, if injured by the fraud or oppression of the sheriff, be left to his remedy against the officer?

Reversed and rendered.

(103 Ala. 477)

Ex parte DAMON et al.

(Supreme Court of Alabama. June 14, 1894.)

ATTACHMENT BOND—INSOLVENCY OF SURETIES.

Code, § 2998, provides that plaintiff in attachment, before or during the trial, may amend any defect of form or of substance in the bond, "and no attachment must be dismissed for any defect in the bond," if a sufficient bond is given. *Held*, that where the sureties on an attachment bond became insolvent, to the knowledge of the court, it may require an additional bond, with good sureties.

Petition for mandamus by M. F. Damon & Co. to compel the court to vacate its order requiring petitioners to execute a good and sufficient bond in an attachment suit. Writ denied.

In response to the rule nisi granted on the filing of said petition, the respondent answered, setting up the following facts: "That on the 12th day of August, 1892, there was a suit instituted by an attachment in favor of the said M. F. Damon against W. T. Maund for the sum of three thousand and thirty-five dollars, returnable to the circuit court of Henry county, at Columbia, Alabama, at the fall term of 1893. Respondent further says, that it was shown to the satisfaction of the court by sufficient and legal proof, that the securities, John C. Skipper and J. O. McEachen, on the attachment bond of the said applicant, were wholly insolvent, and that there could not be made anything out of them by legal process, and that said bond was worthless as to the securities thereon. Respondent further says that there was an order rendered by said court at the spring term, 1893, of the circuit court for Henry county, at Columbia, Alabama, requiring the said applicant, M. F. Damon, to execute a good and sufficient attachment bond in said cause on the ground of the insolvency and insufficiency of the securities on his said attachment bond."

T. W. Espy, for petitioners.

HARALSON, J. The sureties in the attachment bond in this case became insolvent. The petition for the mandamus recites, that when the bond was approved by the clerk they were reputed to be solvent. The approval of the bond was *prima facie*

evidence of their solvency. 1 Am. & Eng. Enc. Law, 907; *Blaney v. Findley*, 2 Blackf. 338. The petition further recites, that it was made to appear to the judge, against whom this proceeding is directed, that since the approval and filing of said bond by the clerk of the court, the two sureties on it had become insolvent; and the return of the judge to the alternative writ states, "that it was shown to the satisfaction of the court, by sufficient and legal proof, that the sureties, John C. Skipper and J. O. McElachen, on the attachment bond of said applicant, were wholly insolvent, and that there could not be made anything out of them by legal process, and that said bond was worthless as to the securities thereon." The court, accordingly, made and entered an order requiring the plaintiff in attachment—the petitioners here—"to execute a good and sufficient bond in said cause by the first day of the next term of the said court." The competency of the court to make this order, is questioned by this proceeding, and we are asked by the petition, by our madamus, to require the court to vacate and annul said order.

An attachment is an extraordinary proceeding, and, in some of its operations and effects, may prove to be a harsh and injurious one. It is the general rule, therefore, to require, as a condition to its issuance, that the plaintiff shall make an affidavit of the existence of some ground, such as the law authorizes for its issuance, and to enter into bond, such as the statute prescribes. The affidavit is intended as a restraint upon the conscience of the plaintiff, against the wrongful suing out of the attachment; and the bond, to impose an additional restraint, by fixing a definite liability upon him and his sureties, as indemnity to the defendant against loss, from the wrongful and vexatious use of the process. 1 Wade, *Attachm.* §§ 102, 107; *Wap. Attachm.* § 112; *Drake, Attachm.* § 114; 1 Am. & Eng. Enc. Law, 905. Accordingly, we find the principle maintained in these authorities, that a bond is to be regarded as insufficient when it fails to furnish the full statutory indemnity, although it may partially secure the defendant against loss; and that, it is defective when it is lacking, not only in the indemnity intended, but in some matter which renders it doubtful whether it may be relied on as a security against the mischief contemplated by the statute. A bond, therefore, must be regarded as defective, when it is insufficient in security, as well as when it is lacking in some particular, which, while it does not render it absolutely void, does render it an imperfect obligation for the purposes intended. 1 Wade, *Attachm.* §§ 114, 115, 288; *Bumberger v. Gerson*, 24 Fed. 257. It is the right, then, of the defendant, to have the attachment dissolved whenever, at any stage of the cause, the bond shall become defective or insufficient, as an indemnity, on account of the in-

solvency of its securities; but the plaintiff should be accorded the right of maintaining his cause by repairing a defect brought about by no fault of his. *Wap. Attachm.* §§ 124, 125; *Bumberger v. Gerson*, *supra*.

So far, we have treated the case without reference to our own statute on the subject. The Code (section 2998) provides, that "the attachment law must be liberally construed to advance the manifest intent of the law; and the plaintiff, before or during the trial, must be permitted to amend any defect of form or of substance in the affidavit, bond or attachment, and no attachment must be dismissed for any defect * * * in the bond, or for want of a bond, if the plaintiff, his agent or attorney is willing to give or substitute a sufficient bond." It follows from the principles announced above, and from the injunction of our own statute, that "the attachment law must be liberally construed to advance the manifest intent of the law," and that when the sureties on an attachment bond become insolvent, and it falls thereby, in the indemnity it was given to provide, it becomes defective in substance, and that fact being established to the satisfaction of the court, it may and ought to require an additional bond with good and sufficient securities. 1 *Brick Dig.* p. 159, § 56. Mr. Drake, in his work on Attachments, announces, that if a bond, legal in terms, parties and amount, be given at the institution of the suit, and accepted by the proper officer, the court will not, without some statutory authority, look into any alleged want of sufficiency in the parties. *Drake, Attachm.* § 145. It is on this authority the petitioners' counsel relies in filing this application. This principle is announced by the author, on the authority of the case of *Prosky v. West*, 8 *Smedes & M.* 711. In that case, however, the decision proceeds, as stated, on the ground, that where additional or other security is allowed to be claimed, special provision has been made by statute, pointing out the mode of the application, and the grounds which must be established whereby to entitle a party to it, and without which it is not allowable. These authorities do not, when rightly interpreted, contravene our conclusions in this case. *Mandamus denied*.

(108 Ala. 545)

BELSER v. YOUNGBLOOD et al.

(Supreme Court of Alabama. June 14, 1894.)

LANDLORD'S LIEN—WHEN TITLE TO CROP PASSES.

1. Where a landlord has a lien for rent on a crop of cotton, and the tenant gives bales sufficient thereof to cover the rent, and so notifies the landlord, who instructs the tenant to sell it for his account, this is such a constructive delivery as will transfer the legal title to the landlord.

2. Where the tenant sells the cotton without instructions from the landlord, and before it has been set apart, the purchaser will be liable in trover to one holding a mortgage on

the crop, though the proceeds of sale are paid by the tenant to the landlord.

Appeal from circuit court, Pike county; John R. Tyson, Judge.

Action by Youngblood & Son against Jeff Belser for the conversion of three bales of cotton. Judgment was rendered for plaintiffs, and defendant appeals. Reversed.

The plaintiffs' evidence tended to show, and it was undisputed, that they held a mortgage on crops to be raised by one Henry Mills, for the year 1892; that said Mills owned no lands, but rented from others; that the defendant bought three bales of cotton from said Mills which were raised by him in the year 1892. With this proof, after proving the value of the cotton, the plaintiffs closed. The evidence of the defendant, which was also uncontradicted, was to the effect that the said Mills rented land, in the year 1892, from Mrs. Lovejoy, Mrs. Strickland and Mr. Young; that the cotton which he purchased from said Mills was raised on the lands of these persons; that one of the bales was not raised by Mills but belonged to Mrs. Strickland in her own right, and said Mills, as her agent, sold it to the defendant, and that when he purchased the other two bales from Mills, he told defendant, that it was rent cotton. Defendant further proved, that of the other two bales he bought from said Mills, the first was rent cotton, raised on land that Mills had rented from Mrs. Lovejoy in the year 1892, for which rent he owed her 400 pounds of lint cotton, which was included in said bale; that defendant rented land also, in that year, from Mrs. Strickland, for which he owed her 100 pounds of lint cotton, and this 100 pounds belonging to Mrs. Strickland was also included in that bale, which was ginned and packed, of rent cotton belonging to said parties, Mrs. Lovejoy and Mrs. Strickland; that he notified each of said landlords, that her rent cotton was ginned and packed and at the gin house for her, and Mrs. Lovejoy sent him word to take it and sell it and bring her part of the money to her; and Mrs. Strickland authorized him also to sell it and bring her, her part of the proceeds; that he accordingly sold the cotton to defendant and paid the proceeds to Mrs. Lovejoy and Mrs. Strickland; that the other bale sold to defendant by said Mills, was raised on land which he had rented from said Young in the year 1892, the rent payable in money; that said Young authorized said Mills to gather, pick and sell cotton and pay him the money; that he sold it and paid Mr. Young \$26.50, and the balance was paid for picking, ginning and preparing the cotton for market. On this evidence, the court charged the jury that if they "believed the evidence they must find for the plaintiffs for the value of the two bales of cotton admitted by defendant to have been raised by Henry Mills, the mortgagor, in 1892, and bought by defendant, with interest from the

time of the conversion." There was judgment for plaintiffs; and defendant brings this appeal, and assigns as error the giving of the charge above copied.

Parks & Gamble and R. L. Harmon, for appellant. John D. Gardner, for appellees.

HARALSON, J. Touching the cotton sold to defendant by the mortgagor, grown on Mrs. Lovejoy's and Mrs. Strickland's places, the evidence is conclusive that they had a lien on the bale of cotton set apart to them, to the extent of their respective claims for rent,—400 pounds to the one, and 100 to the other; that the mortgagor, Mills, notified Mrs. Lovejoy, that her rent cotton was ginned, packed and at the gin house for her, and in reply, she sent him word, that he could take it and sell it and bring her, her part of the money, for 400 pounds of the cotton; that Mrs. Strickland also authorized said Mills, her tenant, to sell her part of said bale and bring her the money, and that said Mills, accordingly, sold said bale of cotton to defendant and paid Mrs. Lovejoy and Mrs. Strickland the proceeds. In this transaction, then, it is manifest, that while the bale of cotton was not actually delivered to the landlords who had liens on it, it was in the eye of the law constructively delivered, and when they authorized the tenant, after the bale was set apart for them, to take it and sell it and bring them the proceeds, they and he stood related, as if he had actually delivered the cotton to them, and they had returned it to him for sale. He became their agent after that for its sale. The cotton became theirs, and if Mills had sold it and failed or refused to account to them for the proceeds, they could not have sued the purchaser for it. While it may be admitted, that if the landlords had not authorized the mortgagor tenant, to sell the particular bale of cotton, and bring them the proceeds, and he had, without their authority, sold it and paid the proceeds to them, the defendant would be liable to the plaintiffs, as mortgagees, for its value,—which seems to be the effect of our decision in *Keith v. Ham*, 89 Ala. 590, 7 South. 234,—still, when these persons were notified that their rent cotton was ready, packed in a bale for them, and they instructed the tenant to take and sell it and bring them the proceeds, the sale vested a good title to the property in the purchaser, the defendant, and the case is taken from the influence of that decision.

The facts are different in respect to the bale raised on Mr. Young's place. There was no delivery of the bale to him, actual or constructive. The evidence does not show that any particular bale was set apart to which, by his consent, his lien as landlord attached. So far as appears, Mr. Young had given his tenant no more authority to sell this particular bale, than any other part of the rent cotton. The evidence goes no fur-

ther than to state, that Mr. Young authorized the tenant, Mills, generally, to pick cotton, sell it and pay him the money. The plaintiffs had a lien on this bale, and all the balance of the crop, the tenant may have raised on the Young place, subject to the landlord's lien, and it would sanction a dangerous precedent, to allow the tenant to sell, at his discretion, a part of the crop on which the rent lien attached, before its delivery to the landlord, and hold that the purchaser acquired a good title by such sale, as against the mortgagee who did not consent thereto. This would be contrary to the former rulings of this court. *Keith v. Ham*, supra; *Bird v. Womack*, 69 Ala. 392; *Higgins v. Whitney*, 24 Wend. 380.

On the record as presented, the court erred in giving the general charge for plaintiffs. They were entitled to recover no more than for the one bale of the Young cotton. Reversed and remanded.

(108 Ala. 602)

MORRIS v. BRANNEN et al.

(Supreme Court of Alabama. June 14, 1894.)

BILL OF EXCEPTIONS—TIME OF SIGNING.

A bill of exceptions which bears no date will not be considered on appeal, where the record fails to show either that it was signed in term time, or that by agreement of parties it was signed in vacation.

Appeal from circuit court, Pike county; J. R. Tyson, Judge.

Action of ejectment by Claude Morris against Brannen & Sons and others. Judgment was rendered for defendants, and plaintiff appeals. A motion to strike out the bill of exceptions was granted, and the judgment affirmed.

D. A. Baker and A. O. Worthy, for appellant. Parks & Gamble, for appellees.

HARALSON, J. A motion is made to strike from the record, what purports to be a bill of exceptions in this case, because it does not appear to have been signed by the presiding judge within the time, and as prescribed by law. The bill concludes with this language, "and the plaintiff presents this his bill of exceptions, and most respectfully asks that the court sign the same, within the time allowed," etc., and then follows the name, "J. R. Tyson, Judge." It bears no date, and there is nothing in the record to show when it was signed, whether in term time or afterwards. There is not shown to have been any consent or agreement of counsel in writing, for it is to be signed after the adjournment of court, but the judgment entry recites, that 30 days be allowed plaintiff to present a bill of exceptions. Section 2761 of the Code provides that "no bill of exceptions can be signed after the adjournment of the court, during which the exception was taken, unless by consent or agreement of counsel in writing,

except in such cases as is otherwise provided." This has been the law of this state, since 1844, except under the latter act, the time within which counsel might agree for a bill to be signed in vacation, was limited to 10 days after the adjournment of the term of the court, at which the trial was had; and since the act of February 14, 1870 (Acts 1869-70, p. 99), that limitation of 10 days was taken out. The statute of 1844, has been many times before this court, and always with a uniform construction,—that it was not directory, but mandatory on the judges, to sign the bills, if at all, strictly within the terms of the statute, as to time, and that, unless the record showed affirmatively, that a bill of exceptions found in it, was signed by the presiding judge, before the adjournment of the court, or within 10 days thereafter, by the written consent of the counsel engaged in the cause, it must be rejected, as forming no part of the record. *Wood v. Brown*, 8 Ala. 563; *Kitchen v. Moye*, 17 Ala. 143; *Haden v. Brown*, 22 Ala. 572; *Markland v. Ables*, 81 Ala. 435, 2 South. 123. And in *Maddox v. Broyles*, 42 Ala. 436, it was held, that "where a bill is without date, and the record contains no evidence that it was signed in term time, or within ten days thereafter, pursuant to the written consent of the parties, for that purpose, it cannot be looked to by the appellate court as a part of the record, for any purpose." *Bryant v. State*, 30 Ala. 270; *Rubber Co. v. Mitchell*, 37 Ala. 314. On the 22d February, 1887, an act was approved (Acts 1886-87, p. 126), providing, that in all cases where bills of exceptions are authorized, the court in term time, may, on the application of either party, fix the time in which bills of exception shall be signed, and the judge, in vacation, may, for good cause, extend the time fixed in term time; provided, in no case shall the time allowed exceed six months, and provided further, that nothing herein contained shall prevent parties from agreeing as to time, as now provided by law. This act has received the construction of this court, to the effect that a bill of exceptions may be signed in vacation, within the time fixed by an order of court entered in term time, and this may be enlarged by a subsequent order made before the expiration of the time fixed by the first, but not after its expiration, and not extending in all, beyond six months. *Furnace Co. v. Glasscock*, 86 Ala. 244, 6 South. 480; *Ladd v. State*, 92 Ala. 58, 9 South. 401; *Rosson v. State*, 92 Ala. 76, 9 South. 357. As we have seen, by the repeated and uniform rulings of the court, in the construction of a similar statute,—to which this later statute is supplementary,—the bill of exceptions bearing no date, and the record containing no evidence that it was signed in term time, or in vacation pursuant to the written agreement of the parties, cannot be looked to by us for any purpose. The con-

struction given the act of 1844, must apply to the present statute, when the bill not being signed in term time, there is an order of the court allowing a fixed time in vacation, within which the bill may be signed. In such case, it must appear on the face of the bill that it was signed by the judge within the time allowed, or it cannot be upheld. The motion to strike the bill from the record must prevail, and the appeal having nothing thereafter, on which to rest for a reversal, the judgment of the court below must be affirmed. *Markland v. Ables* and *Maddox v. Broyles*, supra.

Affirmed.

(103 Ala. 548)

MOON v. JACOBS.

(Supreme Court of Alabama. June 19, 1894.)

MORTGAGES—BILL TO REDEEM—PARTIES.

A bill in an action by the owner of the equity of redemption to restrain the sale of mortgaged lands under foreclosure, and to redeem, which alleges that certain persons negotiated for the purchase of the mortgage, and had it transferred to defendant, and that they control the same, is not demurrable because such persons are not defendants, as they have no interest which can be affected by the suit.

Appeal from chancery court, Perry county; William H. Tayloe, Judge.

Action by G. C. Moon against G. M. Jacobs to enjoin the sale of lands under foreclosure. A demurrer to the bill was sustained, and plaintiff appeals. Reversed.

J. H. Stewart, for appellant. John T. Vany, for appellee.

BRICKELL, C. J. The original bill was filed by the appellant to redeem certain lands from a mortgage executed by his vendor, who had conveyed to him in fee simple; he promising, as part of the consideration, to pay the mortgage debt. The mortgage debt had matured, and the mortgage and debt had been, by the mortgagee, assigned to the appellee. In reference to the assignment, the allegations of the bill are that the two sons of the appellee negotiated for the purchase of the debt and mortgage from the mortgagee, and had them transferred to the appellee, who owns and holds the same. It is further alleged that the two sons manage and control the debt and mortgage in the name of the appellee. The appellee, as assignee, through attorneys, was proceeding to execute a power of sale contained in the mortgage. The appellant tendered the full amount necessary to a redemption, which was refused, and thereupon filed this bill to enjoin the sale and to be let in to redeem. The appellee demurred, assigning several causes, one only of which the chancellor sustained, and that is the nonjoinder of the two sons of the appellee. From the decree sustaining that cause of demurrer this appeal is taken.

The necessary parties defendant to a bill for redemption are all the persons legally or

beneficially interested in the legal estate created by the mortgage, and parties entitled to receive or share in the payment of the mortgage debt. The two sons of the appellee did not stand in either of these relations. By assignment absolute and unconditioned, the appellee has acquired the legal estate and the mortgage debt. The negotiation by the sons of the purchase of the mortgage and debt terminated in the assignment to the appellee,—to hold for herself, not for the sons, directly or indirectly. Taking the allegations of the bill to be true, as they must be taken on demurrer, the sons have no interest in the suit, or in its subject-matter, and there is no possible contingency or aspect of the cause in which a decree could be rendered, affecting them. If they had been active in the proceedings to foreclose, impeding the appellant in redemption, it was as the agents of the appellee, in her name and right; and, as a general rule, a mere agent, having no right or interest involved, ought not to be joined as a party with his principal. Story, Eq. Pl. § 231. The decree of the chancellor must be reversed, a decree here rendered overruling the demurrer, and the cause remanded. Reversed, rendered, and remanded.

(103 Ala. 57)

SMITH v. STATE.

(Supreme Court of Alabama. June 20, 1894.)

JURISDICTION OF CITY COURT—PERJURY—EVIDENCE.

1. Acts 1888-89, pp. 564, 565, give the city court of Anniston jurisdiction in the county of Calhoun, and provide that it shall have jurisdiction of causes of action "arising within said designated limits whether the parties reside therein or not." *Held*, that the court had jurisdiction of all persons in said county, whether the cause of action arose therein or not.

2. In a trial for perjury the original pleadings, rulings, and judgment of the court in the case in which the perjury is alleged to have been committed may be put in evidence, where the final judgment is not made up.

3. The subpoena docket, with a check thereon which the clerk testifies he put there when the defendant was called as a witness, is admissible.

4. A witness who testifies to the good character of defendant may be asked on cross-examination, for the purpose of affecting his credibility, and not for the purpose of affecting the character of defendant, whether or not he heard of certain offenses charged against defendant before the trial.

5. Where several particulars in which defendant swore falsely are embraced in one count, proof of one or more of these particulars will sustain a conviction, though all are not proved.

Appeal from city court of Anniston; James W. Topsley, Judge.

Sam Smith was convicted of perjury, and appeals. Affirmed.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, that Sam Smith, on the trial of a civil action in the city court of Anniston for damages for

personal injury to John Smith while said John Smith was an alleged passenger on one of the trains of the Richmond & Danville Railroad Company, leaving Anniston for Birmingham, on June 17th, 1891, in which John Smith was plaintiff, and the Richmond & Danville Railroad Company, a corporation under the laws of the state of Virginia, defendant, being duly sworn by the clerk of said court, who had authority to administer such oath, falsely swore that he (Sam Smith) saw John Smith buy a ticket at Anniston for Birmingham on said train; that he (said Sam Smith) got on said train at Anniston, and sat in the same car with John Smith, and a little in front of him; that after leaving Irondale the conductor went to said John Smith, and demanded his fare to Birmingham; that said John Smith told him (the conductor) that he had paid his fare to Birmingham; that the conductor commenced abusing him (said John Smith), grabbed him by the left arm, pushed him to the rear door of the car, cursed the said John Smith, and pushed him off the car while it was in motion,—the matters so sworn to being material, and the oath of said Sam Smith in relation to such matters being willfully and corruptly false, against the peace and dignity of the state of Alabama." The defendant demurred to this indictment on the grounds (1) that the substance of the proceedings or pleadings in the suit in which defendant is charged with having taken a false oath is not set out in the indictment; (2) that the indictment fails to show that the cause of action in which the defendant is charged with taking a false oath arose within the jurisdiction of the city court of Anniston; (3) the said indictment fails to aver sufficiently what part or parts of the defendant's testimony are false; (4) it fails to show sufficiently for what crime the defendant was indicted. This demurrer was overruled, and the defendant duly excepted. The defendant pleaded not guilty, and, by special plea, that the cause of action in which the defendant is averred to have sworn falsely was not within the jurisdiction of the city court of Anniston. On motion of the state this special plea was stricken from the file, as frivolous and as being no answer to the indictment, and to this ruling the defendant duly excepted.

Upon the trial of the cause the state introduced evidence tending to show that on the trial of the cause of action in the city court of Anniston, in which one John Smith was the plaintiff, and the Richmond & Danville Railroad Company was defendant, brought for the recovery of damages for personal injuries sustained by the said John Smith, by being ejected from the train of the railroad company, the defendant in the present case swore, among other things, that he saw the said John Smith buy a ticket at Anniston for Birmingham over said road; that said John Smith was a passenger on said train,

and, after having given his ticket to the conductor, was ejected by the conductor from the train before reaching Birmingham; and that this testimony was false. Upon the examination of the clerk of the city court of Anniston, he testified that he was present at the trial of the cause of John Smith against the Richmond & Danville Railroad Company, and that the defendant in the present case was subpoenaed as a witness in the case of John Smith v. Richmond & Danville Railroad Company, and answered to his name, and was sworn and examined as a witness therein. At the request of the solicitor the said clerk of the city court produced the subpoena docket in the case of John Smith v. Richmond & Danville Railroad Company, and in connection therewith offered to introduce the checks thereon, which showed that the name of the defendant in this case was checked off, the clerk testifying that the said names had been checked off as the witnesses answered to their names. The defendant objected to the introduction of this docket and the entries thereon because they were immaterial and irrelevant and incompetent evidence. The court overruled the objection, and the defendant duly excepted. Wait, a witness for the state, testified that he saw and heard this defendant testify on the trial of the case against the railroad company. The testimony for the defendant tended to show that the facts testified to by him on the trial of the case of John Smith v. Richmond & Danville Railroad Company were true. One Donovan was introduced as a witness for the defendant, and, after testifying that he knew the general reputation of the defendant in the community in which he lived, stated that his reputation was good; that "he had never heard anything against him until this matter came up." On cross-examination the counsel for the state asked the witness this question: "Have you not heard it said, before this indictment was found, and after the case of John Smith v. Richmond & Danville Railroad Company was tried in this court, in which John Smith claimed damages for injuries, that the defendant and others had conspired together to recover damages by false swearing as to how he was ejected from the train?" The defendant objected to this question on the ground that it was irrelevant, incompetent, and illegal, "and because the question calls for evidence of a rumor arising from and growing out of the same matters and transactions about which the defendant is charged with false swearing." But the court overruled the objection, and allowed the question, "on the ground that the witness had said in his direct examination that he had heard nothing against the defendant before the indictment was found." To this ruling the defendant duly excepted. To the question asked, the witness answered that he had heard that the defendant and others,

in the suit referred to, had "sworn to things which they did not see." The defendant moved to exclude the answer of the witness on the same ground he objected to the question, and duly excepted to the court's overruling his motion.

Upon the introduction of all the evidence, the court, *ex mero motu*, instructed the jury in writing as follows:

"Gentlemen of the Jury: A grand jury of your county charges Sam Smith with the crime of perjury, as is set forth and stated in the indictment which has been read before you. In order to convict him the state must, by the evidence, establish all the material allegations of the indictment, and if you have any reasonable doubt as to any of those material allegations you must acquit the defendant. First. The evidence must satisfy you that the defendant, Sam Smith, was duly sworn to testify in a cause in this court entitled John Smith against the Richmond & Danville Railroad Company. Unless he was put under the sanction of an oath, and unless it was administered by the officer named in the indictment, and was in the cause named, you must acquit. But, if he was duly sworn to testify in the cause named, then inquire further whether or not he testified substantially as alleged in the indictment. Consider fully and carefully what the evidence now before us shows as to his testimony in the former case, and see whether or not the material allegations of the indictment as to his testimony are proven to have been sworn to by him on the trial. (Did he, in the other case, testify substantially as the grand jury say that he did? It is not essential that every part of his testimony, as narrated in the indictment, should be proven. For instance, the indictment says that defendant swore that John Smith went out of the back door of the car. If this is a mistake in the indictment, the mistake should not prevent conviction, if the material and substantial allegations are proven, as I will advise you hereafter.) But the state must show you by satisfactory proof that the defendant did give the evidence substantially as alleged in the indictment; otherwise, you cannot convict. (Then carefully consider and compare all the evidence, and say whether the defendant's evidence, complained of in the indictment, was false or true. If you find different witnesses contradicting each other, then, as reasonable, intelligent men, weigh the testimony of the state going to show the falsity of the defendant's statement against the evidence showing its truth, and try and determine which you must believe.) I cannot instruct you which witness, or which set of witnesses, to believe. The responsibility rests on you. I may assist you, however, by some general rules which our experience shows us to be valuable in such cases. For instance, take the state's witnesses, and their testimony. How was it given before you? What interest or preju-

dice are they shown to have in the case? What amount of intelligence, capacity, or memory do they show to have? Is their testimony reasonable or unreasonable? Was it given in with the apparent desire to tell the truth, or was their evidence given in with an apparent desire to convict the defendant? Was their sworn testimony, as they gave it, inconsistent, or was it contradictory? Compare the whole testimony of state's witnesses, and see if they corroborate each other or contradict each other. If you find that they corroborate each other literally and minutely, consider whether or not this minute corroboration may not show preconcert and arrangement with a purpose to convict. If, on the contrary, there is a substantial agreement and corroboration between the state's witnesses, together with some variety and seeming conflict as to nonessential or immaterial matters, you should note that agreement and corroboration as important to enable you to determine the naturalness and truthfulness of their statements, for experience shows us that witnesses seeing the same occurrence, and detailing the same, are apt to honestly differ in some of the details, and differences as to details are frequently found to be consistent with substantial agreement as to the essential and material facts. Now, use these same rules in weighing the testimony offered you by the defendant, and in considering the value of the testimony of the defendant's witnesses. How did they testify,—positively, intelligently, fairly, and impartially, or otherwise? Do they corroborate each other in substantial and material points, or do they contradict each other? If they agree in the substantial parts of their testimony, it should go to establish the correctness of their evidence. But, if they contradict each other in matters as to which you believe they cannot be mistaken, you should consider that fact, in estimating the reliability and correctness of what they depose to. Taking all the evidence that has been offered to you on both sides, try and arrive at the truth of the issues here. Was the evidence of Sam Smith, as charged in the indictment, substantially true, or was it substantially false? If satisfied that it was true, you must acquit. Or if, on considering all the evidence, you are not satisfied beyond a reasonable doubt that defendant swore falsely, you must acquit. If you are satisfied he swore falsely, go a step further. Was that false testimony material in the case of John Smith v. Richmond & Danville Railroad Company? From an inspection of this record, I tell you that it was material to show that John Smith did or did not buy a ticket to Birmingham, and was or was not ejected from the car, as alleged in his complaint; and if defendant testified as to these matters that John Smith did or did not buy a ticket, or was or was not ejected, the testimony was material in that cause. And, if the defendant swore falsely as to either of those

matters, it is not essential to prove that he testified falsely as to other parts of his alleged testimony.

"Go, also, a step further. The testimony complained of must not only have been false and material to the issue, but it must have been willfully and corruptly false. It was willfully false if the defendant was not present on the cars, and knew nothing of what he was testifying about, yet testified that he was present, and testified to occurrences on the car, or if, being on the car, and knowing what actually occurred, he knowingly and intentionally testified to what was untrue. You should ask yourselves, was the testimony false, and did Sam Smith know it was false? Again, the law says it must have been corruptly false. If a man, in order to help a friend or harm an enemy, testifies falsely for the purpose of misleading a court or jury, you may well believe and find that his purpose was a corrupt one. If, however, the false testimony is given in by mistake or by inadvertence, and with no purpose of wrongly influencing a court or jury, you cannot convict. (If, however, the state has convinced you that, in the matters set forth in the indictment, this defendant, being duly sworn in the cause as stated in the indictment, testified willfully and corruptly false as to things material in the cause, as alleged in the indictment, then your verdict should be, 'We, the jury, find the defendant guilty as charged in the indictment.') If the state has not so convinced you, you should say, 'We, the jury, find the defendant not guilty.' This cause is important in view of the fact that the charge is of the gravest character, affecting the liberty of this defendant, whom the state does not want to have punished unless he is guilty. It is of the gravest importance, also, because, if guilty, this defendant has shown contempt for the solemn sanction of his oath before the Almighty to tell the truth, the whole truth, and nothing but the truth. He has, if guilty, come into a court, and shown defiance and contempt for the great state, and for this tribunal, which has been established to do equal justice between us all. If he is guilty, and you, by mistake, turn him loose, you encourage him, and others who may be like him, to defy and condemn the law of the land. If, by mistake, you turn loose a guilty perjurer in this case, what security have we against other bad men who may seek to use the machinery of this or other courts to advance their base and wicked designs? If, on the other hand, you, by prejudice or mistake, convict an innocent man, you do him a wrong and injury which is irreparable and most grievous, and make this court an engine for wickedness and oppression. (Hence, I solemnly charge you to carefully weigh the evidence, one against the other, and see which side is telling the truth.) First, see if you can reconcile it all. If you cannot reconcile it all, and are forced

to conclude that some are lying, try and find out who they are. The prosecution says that defendant and his friends who have testified for him conspired together to rob the railroad company by means of the suit of John Smith against the company, and made up their stories carefully, so as to have them agree as to a few main points, whereas, on other matters, concerning which they could have had no chance to foresee and agree about, they differ. It is for you to say if this is so or not. The defendant, by his counsel, tells us that this is a case of persecution,—the strong cruelly and wickedly oppressing the poor and weak,—and that the state witnesses are uncertain, unreasonable, and contradictory, and hence unworthy of belief. We sit here, gentlemen, to guard as well as we can against any such iniquity as is charged against the prosecution. If the evidence shows you that such is being attempted, and, in fact, unless you are thoroughly convinced that it is not so, you must acquit the defendant. But do not jump to that conclusion simply because the defendant is poor and ignorant, and a great corporation is assisting in the prosecution. The poor widow has a right to cry out to the judge and jury, 'Avenge me of mine adversary.' But she has not a monopoly of that right. All in the land, high and low alike, have a right to appeal to the court of the country, and get redress for their injuries. And if a man has injured you, and while doing so violates the criminal law, you have a right to go before the grand jury and make your complaint, and you have a right to assist, and you are to be commended for assisting, the officer of the law in bringing a guilty man to justice; for in convicting a guilty man you strike terror to wrongdoers, and so help to protect the weak and the innocent. And this right to assist the state in prosecuting a criminal who has wronged you is a right which every one, rich and poor alike, enjoys. The question here is, is this a guilty man? not, who is prosecuting or assisting in the prosecution of this case? True, it may be said, this prosecuting company has power to send to Atlanta, Rome, and along the line of its road, and gather up witnesses to falsely swear away this man's liberty. And you must consider the likelihood and probability of its doing so, and must fairly consider any and everything tending to show that it has done so. Critically examine the question in the light of experience and reason. Is it probable and reasonable that this company, or its managers or agents, actuated by a wicked and revengeful feeling against the defendant, or against John Smith and his friends, who swore for him, or by any other motive, are now seeking, by perjury and subornation of perjury, to cruelly punish them for standing up for his rights? If you believe the testimony of those of the defendant's witnesses who have testified to you that there

were no white men in that car, then you must believe that those state's witnesses have perjured themselves, and therefore, on their evidence, you should not convict this defendant. But, if you believe the state's witnesses were there in the car, then the untrue denial of their presence in the car by defendant's witnesses is a circumstance to be considered against the defendant. (But if, on considering the evidence of the state's witnesses, you think, either from their manner of testifying, or from their appearance, or from the substance of their evidence, or for any other reason, that they have been hired or suborned or persuaded or otherwise induced to come here and perjure themselves, or if you think that they have come here from their homes, voluntarily, to blacken their souls with perjury, in order to send this man to the penitentiary, then you must acquit), and must say, by your verdict, 'We, the jury, find the defendant not guilty.' (But if you see no just grounds to disbelieve the case, as made by the state and its witnesses, and are convinced that, in the matters material to the issue in the John Smith Case, the defendant, being duly sworn in manner as alleged in the indictment, testified willfully and corruptly to what was false, you should say, 'We, the jury, find the defendant guilty as charged in the indictment.')

The defendant separately excepted to those portions of the general charge of the court, copied above, which are in parentheses, the exceptions being separately reserved at the time such portions of the charge were read to the jury.

The defendant also requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that if they believe the evidence they should find the defendant not guilty." (2) "The court charges the jury that unless they believe from the evidence that the personal injuries for which John Smith claimed damages in the civil suit mentioned in the indictment were received by him within one of the beats of Calhoun county, Alabama, as now laid off, to wit, Anniston precinct, No. 15, Oxford precinct, No. 13, De Armanville precinct, No. 17, or Maddox precinct, No. 4, then you should find the defendant not guilty." (3) "The court charges the jury that if they believe from the evidence that acts or conduct of the agent or employé of the Richmond & Danville Railroad Company which are alleged in the pleadings in the civil action for damages, mentioned in the indictment to have caused the personal injuries to John Smith, plaintiff in said action, were done or committed by such agent or employé in the county of Jefferson and state of Alabama, then they should find the defendant not guilty." (5) "The court charges the jury that if they believe from the evidence that John Smith received the personal injuries in

Jefferson county, Alabama, for which he claimed damages in the civil action mentioned in the indictment, then you should find the defendant not guilty." (11) "The court charges the jury that unless they believe from the evidence, beyond a reasonable doubt, that the whole of the testimony set out in the indictment was willfully and corruptly false, then your verdict should be, 'We, the jury, find the defendant not guilty.'" (12) "The court charges the jury that if they believe from the evidence that any one of the facts charged in the indictment as having been falsely sworn to by the defendant was true, and had a real existence, then they should find the defendant not guilty, even though they should believe from the evidence that the defendant had no knowledge at the time he was testifying that the same was true." (13) "The court charges the jury that if they believe from the evidence that the defendant testified in the civil action for damages, mentioned in the indictment, that the conductor took John Smith out of the rear door of the car at the time John Smith was ejected from the train, near Irondale, then you should find the defendant not guilty." (14) "The court charges the jury that if they have any reasonable doubt from the evidence as to whether the defendant bought a ticket at Anniston, for Birmingham, for the train leaving Anniston for Birmingham on June 17, 1891, then they should find the defendant not guilty." (15) "The court charges the jury that if they have a reasonable doubt from the evidence whether the defendant got on the train with John Smith at Anniston, and sat in the same car with him until after leaving Irondale, on June 17, 1891, they should find him not guilty." (16) "The court charges the jury that if they believe from the evidence that it is true that the conductor, after leaving Irondale, June 17, 1891, went to John Smith, and demanded his fare to Birmingham, and that John Smith told the conductor that he had paid his fare to Birmingham, then you should find the defendant not guilty, even though you should believe from the evidence that the defendant did not know the same was true at the time he was testifying in the civil action for damages mentioned in the indictment." (17) "The court charges the jury that they must find from the evidence, beyond all reasonable doubt, that the defendant testified to each and every fact in substance as the same is charged in the indictment, before they would be warranted in returning a verdict of guilty against the defendant." (18) "The court charges the jury that there is no evidence before them in this case upon which they should find that the defendant was sworn as charged in the indictment." (19) "The court charges the jury that they must find from the evidence, beyond all reasonable doubt, that each and every fact charged in the indict-

ment as having been testified to by the defendant was false, and had no real existence, before they would be warranted in returning a verdict of guilty." (22) "The court charges the jury that you cannot find that the defendant was sworn by the clerk of this court, unless the evidence convinces you of that fact beyond all reasonable doubt, and the testimony of the witnesses Shepperd and Wait is not sufficient to warrant you in finding that fact." (23) "The court charges the jury that the mark on the subpoena docket opposite defendant's name is not sufficient to warrant you in finding that fact, unless the proof further satisfies you, beyond all reasonable doubt, that A. H. Shepperd made the mark at the time he called his name to be sworn."

Joseph Carthel and T. C. Sensabaugh, for appellant. Wm. S. Martin, Atty. Gen., for the State.

COLEMAN, J. At a term of the Anniston city court the defendant was tried and convicted of perjury. It is insisted that the city court of Anniston had no jurisdiction of the civil case on the trial of which it was averred the offense of perjury was committed. That was a suit brought to recover damages for personal injuries, brought by John Smith against the Richmond & Danville Railroad Company. The cause of action for which the civil suit was brought arose in Jefferson county, Ala., and, territorially, was beyond the limits of the area over which the city court of Anniston had jurisdiction. It is therefore contended that the city court had no jurisdiction of the civil cause. The act establishing the city court of Anniston confers jurisdiction upon causes of action "arising within said designated limits whether the parties reside therein or not;" but this provision does not limit, and was not intended to limit, the jurisdiction of the court to causes of action only arising within the designated limits. It has jurisdiction over all persons residing within the designated limits, without regard to where the cause of action arose, and, in addition thereto, to causes of action arising within the limits, whether the person resides therein or not, provided, of course, that he resides in the county of Calhoun. This is evident from reading the statute. Acts 1888-89, pp. 564, 565. The evidence shows without conflict that the Richmond & Danville Railroad Company was running its trains within the "designated limits," and "was doing" business therein. Code, 2642; Sullivan v. Sullivan Timber Co., 15 South. 941. The exceptions were not well taken.

The state introduced in evidence, against the objection of the defendant, the original pleadings and the rulings of the court and the judgment of the court in the case of John Smith v. Richmond & Danville Railroad Company. It was proven that the

final record in the case had not been made up. There was no error in admitting this evidence. Williams v. State, 68 Ala. 551. The court did not err in admitting the subpoena docket of the case of John Smith v. Richmond & Danville Railroad Company. The purpose of this evidence was to show that the defendant was summoned as a witness; that he attended, and was duly sworn. The testimony of the clerk that he checked the names of the witnesses who were sworn and examined, and the check opposite the name of the defendant, in connection with this testimony, were competent, as tending to show that the defendant was sworn as a witness in the case. There was evidence tending to show that defendant was duly sworn as charged in the indictment, and there was no error in refusing the general charge for the defendant.

A witness who has testified in chief to the good character of the defendant may be asked on cross-examination whether or not he has heard of certain offenses (specifying them) charged against the defendant, before the beginning of the then pending prosecution. This is allowable only on cross-examination,—not as evidence affecting the character of the defendant, but as evidence affecting the credibility of the witness testifying to good character. Moulton v. State, 88 Ala. 116, 6 South. 758; Ingram v. State, 67 Ala. 72; Moore v. State, 68 Ala. 362; Walker v. State, 96 Ala. 53, 11 South. 401; Thompson v. State (Ala.) 14 South. 879; Lowrey v. State (Ala.) 13 South. 498.

The indictment, in form, strictly conforms to that given in the Code, to the statute, and to the requirements of the law, as held in many cases. Cr. Code, p. 275, § 3908; Jones v. State (Ala.) 14 South. 98; Walker v. State, 96 Ala. 53, 11 South. 401; Barnett v. State, 89 Ala. 165, 7 South. 414; Hicks v. State, 86 Ala. 30, 5 South. 425; Williams v. State, 68 Ala. 551.

The indictment charges, as matters falsely sworn to, "that he (Sam Smith) saw John Smith buy a ticket at Anniston for Birmingham, on said train; that he (Sam Smith) got on said train at Anniston, and sat in the same car with John Smith, and a little in front of him; that after leaving Irondale the conductor went to said John Smith, and demanded his fare to Birmingham", and other substantive averments are made in the indictment. But this enumeration is sufficient for the purpose of considering the exceptions to portions of the general charge given by the court, and the refusal of the court to instruct the jury as requested by the defendant. The proposition involved in the exceptions is this: Whether, before the state could demand a conviction, it was necessary to satisfy the jury beyond a reasonable doubt that defendant committed perjury as to each and every averment of the matter alleged to be material and falsely sworn to, or whether, upon proof that the

defendant was guilty as to one or more of such averments, the jury should convict, although, as to the other averments, the state may have failed in its proof. The court held that the latter was the correct rule, and in effect instructed the jury, if they found that the defendant was guilty of perjury in swearing that he saw John Smith buy a ticket at Anniston for Birmingham, as laid in the indictment, it was their duty to convict him, although there might be material matters charged in the indictment as to which the jury might be satisfied that defendant had sworn truly. We are of opinion that the court ruled correctly on this proposition. In 2 Whart. Cr. Law, § 1301, the law is stated thus: "All the several particulars in which the prisoner swore falsely may be embraced in one count, and proof of the falsity of any one will sustain the count." In Bish. Crim. Proc., the rule is thus stated: "When there are several assignments of perjury, proof of any sufficient one will sustain the count." The text is supported by the following authorities, which are precisely in point: *State v. Bishop*, 1 D. Chip. 120; *Com. v. Johns*, 6 Gray, 274; *State v. Hascall*, 6 N. H. 352. In the case of *Harris v. People*, 64 N. Y. 148, it was charged that the defendant falsely swore that at the time of the fire there was upon the premises "a stock consisting of 60,000 cigars, 185,000 cigarettes, 400 lbs. weight of Havana tobacco, and 640 lbs. of Virginia tobacco." It was claimed on the trial that there was a variance in the number of cigars proven and as averred. The court used this language: "The variance was as to one of a number of distinct items as to which Harris was charged with swearing falsely, and if the jury had found that he swore falsely as to the other items, or as to any one of them, a verdict of guilty would have been proper. When an indictment charges that the prisoner has stolen a number of articles, * * * or has obtained goods by a number of false pretenses, or has sworn falsely in an affidavit as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offense charged." The principle is recognized in the opinion in the case of *Williams v. State*, supra. Our conclusion is that, where the indictment charges several distinct assignments of perjury, proof of either material assignment will authorize a conviction.

Construing the charge given by the court, ex mero motu, as a whole, we think it defines the law correctly as to what constitutes perjury. We find no error in the instructions given to the jury to guide them in weighing the evidence of the witnesses, and in framing their own conclusions.

Charges 22 and 23, requested by the defendant, are objectionable, in that they invade the province of the jury, and are argumentative and misleading. The other charges requested assert propositions of law

inconsistent with those declared in this opinion. There is no error in the record. Affirmed.

(108 Ala. 574)

VERNER v. ALABAMA G. S. R. CO.

(Supreme Court of Alabama. June 19, 1894.)

NEGLIGENCE—PLEADING—INJURY TO PERSON ON TRACK.

1. A complaint which joins in one count the allegations of willful injury and negligence is demurrable.

2. One who is wrongfully ejected from a train has no right to travel on the railroad tracks if there is any other safe and convenient route.

3. A railroad company is not liable for injury to a person walking on its tracks unless its agents are guilty of willful wrong or wanton negligence.

Appeal from circuit court, Tuscaloosa county; S. H. Spratt, Judge.

Action by C. B. Verner, as administrator of the estate of Samuel D. Winter, against the Alabama Great Southern Railroad Company, to recover damages for injuries causing the death of plaintiff's intestate. A demurrer to the bill was sustained, and plaintiff appeals. Affirmed.

The complaint filed in the cause was as follows: "The plaintiff claims of the defendant the sum of twenty thousand (\$20,000) dollars as damages for the wrongs and injuries done by it hereinafter complained of: For that whereas, heretofore, to wit, on or about the 24th day of September, 1892, the defendant was owning and operating a railroad from Meridian, Mississippi, to Chattanooga, Tennessee, which railroad passed through the county of Tuscaloosa and the state of Alabama, and the plaintiff avers that at the time the aforesaid plaintiff's intestate was walking and traveling on defendant's said railroad, at a point about four miles north of the Tuscaloosa depot on said defendant's road, at a point on said railroad near what is known as 'Box Spring,' in said county, as he had a right to do, and that, while being on said railroad track at the time and place aforesaid, the said defendant so negligently, carelessly, willfully, recklessly, and maliciously ran one of its said trains and locomotives on, over, and against plaintiff's said intestate, and, by reason of the bruises, hurts, and wounds thereby caused, plaintiff's said intestate was so injured, by the said wrongful act of the defendant, that he died from the effect of the said wounds and injuries received by him aforesaid, on, to wit, the day and year aforesaid. The plaintiff avers that the agents of defendants who were operating the said locomotive and train of defendants saw plaintiff's intestate on the said track, at the said time and place aforesaid, in due time to have prevented the injuries to plaintiff's intestate complained of, if the said agents of defendant running and operating the said locomotive and train had used and exercised even reasonable diligence and prudence in oper-

ating the said locomotive and train, but that, instead of using and exercising diligence to prevent said injuries to plaintiff's intestate, they, knowing that plaintiff's intestate was on said track, failed to blow the whistle or ring the bell, or to give any other warning to the plaintiff's intestate of the said approaching train, but knowingly and willfully allowed him to remain on said track without being warned of the approaching train, as aforesaid, and knowingly and willfully and maliciously and recklessly ran said train on and against plaintiff's intestate, as aforesaid, and without ever giving, or attempting to give, any warning to him as aforesaid, and without attempting to stop or check the speed of the train so as to prevent striking and killing plaintiff's intestate; that if the said agents of defendant operating said train had used even due diligence, after they discovered plaintiff's intestate on the track aforesaid, or after they ought to have discovered him, they could have warned him of the approaching train, and allowed him to escape unhurt, or could have checked or stopped said locomotive and train before striking said intestate; that the train was moving up grade at the time and place of the injuries aforesaid, and could have been easily stopped had the defendant used reasonable diligence and care which he owed plaintiff's intestate. Plaintiff avers that, at the time and place of said injuries, said defendant was running its train at a reckless speed, and without proper and sufficient headlights on said engine, and said plaintiff further avers that the said defendant utterly disregarded its duty to the said plaintiff's intestate at the time and place aforesaid, in that it then and there so negligently, carelessly, willfully, and maliciously operated and worked its said locomotive and train of cars with defective headlights as aforesaid, and so negligently, carelessly, and recklessly conducted itself in and about the premises that, by reason thereof, it ran its said locomotive and train on and against the plaintiff's intestate with great force and violence, and, by reason of said bruises, hurts, and wounds thereby caused to him by the said defendant, he died on, to wit, the day and year aforesaid. Plaintiff further avers that on or about the 24th day of September, 1892, his intestate, Samuel D. Winter, boarded one of the defendant's trains at Coaling Station, one of the defendant's depots in the county of Tuscaloosa, to come to Tuscaloosa, another depot of defendant in said county, for the purpose of coming to Tuscaloosa and returning to Coaling on the same day, as a passenger on defendant's said train, he having purchased a round-trip ticket, which entitled him to be carried said journey as aforesaid by the defendant, which was then engaged in the business of common carrier, for the purpose of transporting freight and passengers over its said line of road, and for said purpose it was operating a system of railroads between Chattanooga,

Tennessee, and Meridian, Mississippi; and that its said road passed through the county of Tuscaloosa and the state of Alabama, and between the said points, Tuscaloosa and Coaling, a distance of fifteen (15) miles, over which portion of said road it had contracted to carry plaintiff's intestate and return as aforesaid. That plaintiff's intestate came to Tuscaloosa on defendant's train on the day aforesaid, and as a passenger on said train. Late in the afternoon on said day, plaintiff's intestate, having finished his business in the city of Tuscaloosa, boarded one of the defendant's trains at the depot at Tuscaloosa as a passenger on said train, and having a ticket or contract from the defendant to carry him back to Coaling. That plaintiff's intestate was carried on said train a distance of two miles to a point on defendant's road known as the 'Gravel Pit.' That there the defendant stopped said train, and failed and refused to carry plaintiff's intestate on to Coaling, as it had agreed to do, but left him there, without any means of transportation, and at a strange and unknown place to plaintiff's intestate, there being no inhabitants or persons at said place, except the defendant's agents in charge of said train, there being not even a road or highway leading to or from said Gravel Pit, except the defendant's railroad; and that, defendant refusing to carry him further on his journey, plaintiff's intestate was compelled by the said wrongful acts of defendant to attempt to complete his journey on foot, he being put off of said train, as aforesaid, at a strange, unfrequented, and deserted place, as aforesaid. He set out to walk to the next station, to wit, Cottondale. He was overtaken by one of the defendant's said trains, which came up behind him without giving him any warning or notice of its approach; and, without his knowledge, the said engine and train of defendant suddenly ran against him, and struck the person of the said intestate, and was then and there killed, by the careless, negligent, willful, and reckless act and conduct of the defendant and its agents and employes operating said railroad. That at the point where intestate was killed by the said defendant's train, as aforesaid, said road was perfectly straight for the distance of one mile or more, and was on a steep up or ascending grade, in the direction in which the said train and intestate were traveling; and that the plaintiff's intestate was or could have been seen for a distance of a mile or more by the defendant's employes in charge of said train. And the plaintiff avers that the defendant, after discovering the perilous condition of plaintiff's intestate, or after they ought to have discovered it, by exercising reasonable diligence, they could have notified or warned him of his danger and allowed him to escape unhurt, or could have stopped said train before striking the said intestate, but that the defendant negligently, knowingly, and willfully omitted and refused to warn the plain-

tiff's intestate of the said approaching train, or to stop or attempt to stop or check said train before striking plaintiff's intestate, but that they carelessly, willfully, and recklessly ran said train on and against said intestate, then and there killing intestate, as aforesaid, for which wrongful act of the defendant, as aforesaid, the plaintiff claims of it the sum of twenty thousand (\$20,000) dollars, as damages for killing his intestate as aforesaid. That, by reason of the premises, a cause of action has accrued to the plaintiff against the defendant, wherefore he brings this suit."

The defendant demurred to this complaint, upon the following grounds: (1) Said complaint combines in one count two separate and distinct causes of action, in this: that it claims damages on account of the defendant negligently, carelessly, willfully, recklessly, and maliciously killing the deceased, and also claims damages for that the defendant had some contract of carriage with the deceased, which the defendant failed to carry out, having put the deceased off its cars at the Gravel Pit. (2) Said complaint shows that the deceased was a trespasser on the track of the defendant, yet claims damages, on the ground that the servants of the defendant were guilty of negligence in not exercising reasonable diligence in discovering the deceased on the track. (3) Said complaint seeks in the same count to recover against this defendant for a reckless and malicious act and for damages arising from the negligence of its servants. (4) Said complaint shows that the deceased was a trespasser on the track of the defendant, yet seeks to recover against this defendant for acts of simple negligence on the part of its servants. (5) Said complaint is repugnant, in this: it alleges that the engineer of the train, or the servants of the defendant, saw the deceased on the track of the defendant in time to have warned him, and ran over him without warning, and at the same time alleges that the injury to the deceased was caused by negligently, carelessly, willfully, and maliciously operating an engine with a defective headlight. The court sustained this demurrer of the defendant, and, the plaintiff declining to plead further, judgment was rendered for the defendant. The plaintiff now brings this appeal, and assigns as error the ruling of the trial court upon the demurrer.

Jones & Mayfield, for appellant. A. G. Smith, for appellee.

COLEMAN, J. The action was brought to recover damages for personal injuries inflicted upon plaintiff's intestate, which caused his death. The court sustained a demurrer to the complaint, and, upon plaintiff's refusing to amend or plead further, rendered judgment for the defendant. The appeal is prosecuted from the ruling of the court sustaining the demurrer. The appellant contends there are two counts in the complaint. The

pleadings indicate that, at the hearing, it was considered as containing but one count, and we are of opinion that this was the correct view. After placing the amount of damages claimed at \$20,000, the remainder of the complaint consists in statement of facts and circumstances under which the injury arose and the several averments of different causes of action against the defendant. Whether regarded as containing one count or two counts, the complaint is defective and subject to demurrer. To divide the complaint into two counts, as claimed by appellant, then each count contains averments of willful injury and of simple negligence. In the first it is averred that the agents of the defendant operating the train "saw" deceased on the track in time to have stopped the train, and "knowingly and willfully and maliciously ran said train on plaintiff's said intestate." In the same count it is averred that defendant's agents failed to use "due diligence after they discovered plaintiff's intestate on the track, or after they ought to have discovered him." In the same count it is averred that the defendants were negligent in "running the train at a reckless rate of speed, without proper and sufficient headlights on said engine," and such negligence was the cause of the injury. We have stated sufficient from the first count to show that the plaintiff has joined in the same count a charge of willful injury and simple negligence.

We will now consider the remainder of the complaint, which, according to the appellant's contention, constitutes a second count. It shows that plaintiff's intestate was a trespasser on defendant's track. Although wrongfully ejected from the car, this wrong did not give plaintiff's intestate the right to use the road for travel. One trespass can never justify another. If the complainant had showed that, after being ejected from the car, there was no safe and convenient route from the point of his ejection except to walk on the track, the deceased would have been excusable for using it until he reached a point where he could leave the track. The proposition asserted in the complaint and insisted on in the brief is, because deceased was ejected from the car, this gave him the right to pursue his journey to the next station on the track. The proposition is wholly untenable. By his own showing, plaintiff's intestate was a trespasser at the time of his injury. This complaint then avers that the train came up behind him, without warning, and ran over him, "after discovering the perilous position of plaintiff's intestate, or after they ought to have discovered it by the exercise of reasonable diligence." The defendant owed no duty to be on the lookout for plaintiff's intestate at the time and place he was injured. Unless defendant's agents were guilty of willful wrong or such wanton negligence as to be its equivalent, plaintiff could not recover under the

averments of the second count. Considering the complaint as containing but one count, the criticisms placed upon it are more apparent.

The questions presented by the demurrer are fully discussed in the case of *Railroad Co. v. Markee* (Ala.) 15 South. 511.

Affirmed.

(34 Fla. 181)

REYES v. STATE.

(Supreme Court of Florida. July 27, 1894.)

PUBLICATION OF OBSCENE PAPERS — SUFFICIENCY OF INDICTMENT.

1. An indictment under section 2620, Rev. St., which charges the accused with publishing and distributing an obscene paper containing an obscene figure or picture, should set out such paper in *haec verba*, or give such description of the same as decency permits.

2. An indictment which fails to give such description of the obscene paper, figure, or picture as is prescribed in the preceding headnote, and fails to give any description of the same sufficient to advise the defendant of the nature of the charge and accusation against him, is fatally defective, and such defect is not cured by a verdict of guilty.

3. Our statute (section 2892, Rev. St.) which provides that an indictment shall be adjudged good which charges a crime substantially in the language of the statute was not intended to obviate the necessity of stating the circumstances which constitute the definition of the offense charged; when necessary to advise the prisoner of the nature of the charge against him.

4. The indictment in this case seeks to charge the defendant with publishing and distributing an obscene paper containing an obscene figure or picture. It does not set out the paper, figure, or picture in *haec verba*, or by any certain description, or give any excuse for failure to do so. *Held*, that said indictment was vague, indefinite, and uncertain; that it charged no offense; that it exposed the defendant to a second prosecution for the same offense; and that no judgment should be entered upon a conviction obtained upon the same.

(Syllabus by the Court.)

Error to circuit court, St. Johns county; R. M. Call, Judge.

James Reyes was convicted of improperly printing books and pamphlets, in violation of Rev. St. § 2620, and brings error. Reversed.

M. C. Jordan and W. A. MacWilliams, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

LIDDON, C. J. The plaintiff in error was indicted under section 2620 of the Revised Statutes of Florida, against improperly printing, etc., obscene books, pamphlets, papers, etc. The indictment, after omitting the preliminary part thereof, was in the following words: "That one James Reyes, late of the county of St. Johns and state of Florida, on the 23d day of January, in the year of our Lord 1894, in the county and state aforesaid, did then and there print, publish, and distribute certain printed and written paper containing obscene language and an obscene figure or picture, manifestly tending to the corruption of the morals of youth, contrary to the

form of the statute in such case made and provided, and against the peace and dignity of the state of Florida."

A trial was had at the spring term, 1894, of the circuit court of St. Johns county, at which the defendant was convicted. A number of assignments of error are made, predicated upon various rulings of the circuit court. Upon the view we take of the case, it is only necessary to pass upon one of them, which is the ninth, and relates to the refusal of the court below to grant defendant's motion in arrest of judgment. Among the grounds of this motion we need to pass only upon the third, fourth, and fifth. In substance, all of these grounds alleged that the indictment is insufficient; that it does not charge any offense under the laws of the state of Florida, and does not apprise the defendant of the true character of the charge intended therein so as to enable him to prepare his defense; and that it was not so framed as to protect the defendant from a second prosecution for the same offense. All of these objections were well taken. The motion should have been granted, and the judgment arrested. The indictment wholly fails to set out in *haec verba*, or to give any description whatever of, the alleged "printed and written paper containing obscene language and an obscene figure or picture," which it charges the defendant with printing, publishing, and distributing. The authorities are practically unanimous that such an indictment is insufficient. The case assimilates itself very much to a charge of forgery, in which the alleged paper or instrument must be set out in *haec verba*, or according to its tenor. Some of the authorities hold that the paper, in a case of this kind, must be set out in *haec verba*, or some reason given for the failure to do so, or there must be an averment that the matter of the paper is so obscene that it would be improper to place it upon the records of the court. The weight of authority is, however, that matter of the obscene paper or picture need not be set out in *haec verba*, which might be very difficult, especially in the case of a figure or picture, but that a specific description of the same must be given, or an excuse for not setting out the same, as mentioned in the last sentence above. The indictment should give such description of the paper, figure, or picture as decency permits. Failing to comply with the requirements mentioned, the indictment is fatally defective, and the defect is not cured by the verdict in the case. 17 Am. & Eng. Enc. Law, p. 10, note 3, and authorities cited; *Thomas v. State*, 103 Ind. 419, text 426, 2 N. E. 808; *State v. Hanson*, 23 Tex. 232; *McNair v. People*, 89 Ill. 441; *Com. v. Holmes*, 17 Mass. 336; *State v. Brown*, 27 Vt. 619; *Com. v. Tarbox*, 1 Cush. 66; 1 Bish. Cr. Proc. 496.

The words used in the indictment are in the very language of the statute. In this case, however, this is not sufficient. The indictment should state the circumstances which

constitute the definition of the offense. Failing to do so, no judgment can be entered upon the verdict. *Stevens v. State*, 18 Fla. 903; *Hamilton v. State*, 30 Fla. 229, 11 South. 523.

In arriving at our conclusions herein, we have not overlooked the provisions of our statute (section 2892, Rev. St.) which provides "that every indictment shall be deemed and adjudged good which charges the crime substantially in the language of the statute." It could not have been the intention of the statute that an indictment would be sufficient which gave a defendant no information of the charge against him sufficient to enable him to prepare his defense. Such a construction put upon it would be in conflict with the eleventh section of the bill of rights of our constitution, which provides that every person accused of crime "shall be heard * * * to demand the nature and cause of the accusation against him." This point was involved in the case of *McNair v. People*, 89 Ill. 441. The state of Illinois has a statutory provision almost identical with our statute just cited, but it was held in that case that the statute did not dispense with the necessity of giving some specific description of the alleged obscene paper. The statute and the indictment in that case were very similar to the statute and indictment now under consideration. We think the indictment so indefinite in its terms that the defendant might be exposed to danger of a second prosecution for the same offense.

The judgment of the court below is reversed, with directions that the indictment against the defendant be quashed, and that he be discharged from further prosecution under the same.

(24 Fla. 85)

DUVAL v. HUNT et al.

(Supreme Court of Florida. July 19, 1894.)

DEATH BY WRONGFUL ACT—PLEADING—PARTIES—DEPENDENTS FOR SUPPORT—DAMAGES—NEGLECT OF FELLOW SERVANT—CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE.

1. In actions for damages caused by negligence, while it is not necessary that the declaration should set out the facts that tend to establish the negligence complained of, yet it is requisite in all such cases to allege facts sufficient to point out the wrongful act of commission or omission that constitutes the negligence relied upon for recovery.

2. Our statute granting the right of action for death by wrongful act or negligence confers the right exclusively (1) upon the widow or husband, as the case may be; and, if there be neither of these, then (2) upon the minor child or children; and, if there is neither widow nor husband nor minor child, then (3) upon such person or persons who are dependent for a support upon the person killed; and, if there is no one belonging to either of the above three classes, then (lastly) upon the executor or administrator of the person killed. The existence of the right of action in any of these classes of persons, in the numerical order named, commencing with the second class, is wholly dependent upon the fact whether there is any person in case belonging to any of the classes

who are given by the statute the precedent right over him to maintain the action. The existence or nonexistence of any one having the precedent right of action under the statute enters into the very substance of the right of action itself when instituted by any of the named classes of persons after the first; and when the suit is brought by any of these different classes, except the widow or husband, the declaration, in order to show a cause of action, should affirmatively show the nonexistence of any other person having a precedent right of action over the plaintiff under the statute.

3. When the suit is brought in such cases by a person who bases his right to recover upon the fact that he is a dependent upon the deceased for support, then he must show, regardless of any ties of relationship, or strict legal right to such support, that he or she was, either from the disability of age or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon deceased for a support. When adults claim such dependence there must be, because of some of the disabilities above mentioned, an actual inability to support themselves, and an actual dependence upon some one for support, coupled with a reasonable expectation of support, or with some reasonable claim to support, from the deceased.

4. Suits on behalf of minors, in such cases, must be instituted by and in the name of a next friend.

5. Where the deceased for years prior to his death had voluntarily cared for and supported his aged mother, a minor sister, and a minor niece, all of whom were without property means of support, such support in the past gave them a reasonable expectancy of its continuance in the future; and, when coupled with the disabling advanced age of the mother and the disabling minority of the others, and their want of property means, conferred upon them the right to recover under the statute as "dependents for support;" the value of such support for the mother to be estimated to the end of her expectancy of life, and for the minor sister and niece up to their arrival at their majority. The fact that the father of such minor niece was alive, and physically and mentally able to maintain her, would not deprive her of the right to recover as a dependent in such case, where the deceased had in fact maintained and supported her from her earliest infancy, and her father, during that time, had not supported her, and had no property.

6. No recovery can be had for the death of any one caused by the wrongful act, negligence, carelessness, or default of another, unless the wrongful act, negligence, carelessness, or default from which the death ensues was such as would have entitled the deceased person to a recovery of damages had death not ensued. If, for any reason, the deceased person would have been defeated or barred from recovery had he been alive and suing for personal injury only, then the same reason or cause for his bar or defeat will bar and defeat a recovery for his death by any one suing on that behalf.

7. Chapter 3744 (act approved June 7, 1837) was adopted here from the Code of the state of Georgia. Besides our adoption of the terms of the statute itself, according to the well-settled rule, we also adopt, as forming an integral part of the same, any known and settled construction placed thereon by the courts of the state from which it has been adopted, in so far as that construction is not inharmonious with the spirit and policy of our own general legislation on the same subject.

8. Under section 2 of said chapter 3744, that is as follows: "If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery, and no contract

which restricts such liability, shall be legal or binding,"—one employé of a railroad company can recover of the employing company for injury sustained through the negligence or carelessness of another employé of the same company, provided he be without fault. To entitle the injured employé to a recovery in such a case, he must himself be entirely free from fault or negligence.

9. Under this provision of the statute an employé of a railroad company cannot recover damages from such company for injuries sustained by him on account of the negligence or carelessness of another employé, unless wholly without fault himself, even though in performing the act that results in the injury he was acting under the orders of a superior.

10. Where an employé of a railroad company uses defective and dangerous tools and appliances, with knowledge of their defectiveness and dangerousness, and is injured thereby, he cannot be said to be without fault, and cannot recover of the company, under this statute, even though his use of them was by the direct command of a superior officer, who was also an employé of the same company.

11. Where the aged mother and the minor sister and minor niece of the deceased are suing, as dependents for support, for recovery of the damage sustained by them through the wrongful death, it is error to instruct the jury "that there is no fixed rule or standard to measure the damages that should be awarded, but that the amount thereof rests in the judgment and discretion of the jury; and that, in estimating the damages, they shall take into consideration the full time that the deceased would probably have lived." The meaning of our statute is that the damages to be awarded are such only as will compensate the beneficiaries of the action for the loss resulting to them from the death. In estimating the damage sustained by the mother in such a case the jury should take into consideration the probable duration of the joint lives of herself and the deceased son, and should give her such an amount as she, from the proofs, had the reasonable expectation of receiving from the deceased during the time that she would probably have lived jointly with him; and in estimating the damage in such case accruing to the minor sister and minor niece, who, by reason of their minority, are entitled to sue as dependents, the jury, in absence of proof of any other disability, mental or physical, except that of their minority, should limit their finding to such an amount as would compensate them for the loss of the means of support that, from the proofs, they could reasonably have expected to have received from the deceased up to and until they arrived, respectively, at the age of 21 years. Mortuary tables in approved use are relied upon as evidence of the probable expectancy of life of the various persons involved in such suits.

12. In estimating the damages, where an aged mother, a minor sister, and a minor niece of the deceased are suing, as dependents for support, for his homicide, the jury should be instructed to inquire from the proofs what would be a reasonable support for the mother during the probable remainder of her natural life, and for the minors until they arrive at their majority, according to the circumstances in life of the deceased as they existed at his death, and as they may be reasonably supposed to exist in the future, in view of his character, habits, occupation, and prospects in life, the earnings he received, his health, age, talents, and success in life in the past, as well as the amount of aid in money, property, or services that he was accustomed to furnish them while in life; and when the money value of that support during the period named has been found, to give, as damages, its present worth. The estimate thus to be made must be based on facts in evidence, and must be confined to those dam-

ages that are pecuniary in their nature, and that result from the death of the deceased.

(Syllabus by the Court.)

Error to circuit court, Duval county; James M. Baker, Judge.

Action by Ann B. Hunt and others against H. R. Duval, receiver of the Florida Railway & Navigation Company. Judgment for plaintiffs, and defendant brings error. Reversed.

The defendants in error, Ann B. Hunt, Annie V. Hunt, Catherine H. Hunt, Sarah E. Hunt, and Sealey M. Hunt, by her next friend, N. S. Upchurch, in May, 1889, in the capacity of dependents for support upon William J. Hunt, sued the plaintiff in error, H. R. Duval, as receiver of the properties of the Florida Railway & Navigation Company, in the circuit court of Duval county, for damages resulting to them, as such dependents, from the death of said William J. Hunt, alleged to have been brought about through the negligence of such receiver in the operation of said railway. The declaration, after reciting that H. R. Duval had been appointed receiver of the properties of the Florida Railway & Navigation Company by an order of the circuit court of the United States for the northern district of Florida in certain suits in equity therein pending, and that leave had been granted by said United States court for the institution of this suit against such receiver in the state court, alleges in two counts as follows: (1) "That on the 21st day of September, A. D. 1888, the plaintiffs, and each of them, were dependent upon William Jackson Hunt for support and maintenance. That on the day and year aforesaid the said William J. Hunt was an employé of the said H. R. Duval, as such receiver, the defendant, who was then and there in possession and operating the railroad of said company, to wit, the line of railroad between Baldwin and Fernandina, Florida; and the said William J. Hunt, being then and there such employé of the said receiver on the line of railroad aforesaid, and upon a train of cars, without any fault, negligence, or carelessness on his part, was killed by being struck with an iron rail through and by the carelessness, negligence, and default of the said defendant and his agents and employés; and that the said carelessness, negligence, and default of the said defendant was such as would have entitled him, the said William J. Hunt, to maintain an action for damages in respect thereof had his death not ensued,—to plaintiffs' damages of \$20,000, which, though often requested, defendant has refused to pay." (2) "That on the 21st day of September, A. D. 1888, the plaintiffs, and each of them, were dependent upon William J. Hunt for support and maintenance; and on the day and year aforesaid the said William J. Hunt was an employé of the said H. R. Duval, as receiver aforesaid, who was then and there in possession of and operating the railroad of said com-

pany, to wit, the railroad between Baldwin and Fernandina, Florida; and the said William J. Hunt being then and there employed by said receiver to perform work and services on a train of cars consisting of an engine, tender, and flat cars loaded with railroad irons and iron rails; and the said William J. Hunt being then and there upon the said train of cars as aforesaid, between Baldwin and Fernandina aforesaid, on the day and year aforesaid, without any carelessness, negligence, or fault on his part, and while the said train of cars was in motion, was killed by being struck with an iron rail by and through the negligence, carelessness, and default of the said receiver and his agents and employes; and that such carelessness and negligence and default of the said receiver and his said agents and employes was such that, if the death of the said William J. Hunt had not ensued, he would have been entitled to maintain his action for damages in respect thereof,—to plaintiffs' damages of \$20,000, which, though often requested, defendant has refused, and still refuses, to pay."

After the refusal by the court to grant his motion to quash the writ of summons and to dismiss the cause on the ground that the suit was by a next friend, and that no bond and security had been given by such next friend for the faithful application of the recovery in such suit, the defendant pleaded: (1) The general issue of not guilty; (2) that the alleged grievances, if any, were occasioned solely by the fault and negligence of the said William J. Hunt.

The case was tried upon the issues thus made, and resulted in a verdict and judgment for the plaintiffs, from which the defendant takes writ of error.

John A. Henderson, for plaintiff in error.
H. Bisbee, for defendants in error.

TAYLOR J. (after stating the facts). This is an action for death by wrongful act under the provisions of the statute of February 28, 1883 (chapter 3439), and is the first case of the kind presented in our court. Had the declaration been demurred to, we have no hesitancy in saying that we would have been compelled to hold that it was entirely insufficient in its allegations as to the negligence charged against the defendant. While it is not necessary in a declaration to set out in minute detail all the facts that tend to establish the negligence complained of, yet it is requisite, in all cases of this kind, to allege facts sufficient to point out the wrongful act of commission or omission that constitutes the negligence relied upon for recovery, in order that the defendant may know what he is called upon to answer, and that the court may be able to say, upon the pleading, whether that which is set up and relied upon as negligence constitutes negligence in law. The declaration here does not come up to

this rule, but alleges negligence in such general terms as to amount to the assertion of a bare conclusion of law, without pointing out any wrongful act of commission or omission on the defendant's part that constitutes such negligence. *Walsh v. Railway Co.*, 15 South. 686 (decided at the present term). So far as the negligence of the defendant is concerned, the parties, plaintiffs and defendant, seem to have postponed the allegata of the case to be evolved with the probata thereof, out of the evidence submitted at the trial. The case, as made by the proofs, is briefly as follows: Ann B. Hunt, the mother, with her three unmarried daughters, Annie V., Catherine H., and Sarah A., and her grandchild, Celia M. Hunt, and her son, William J. Hunt, the deceased, all lived together at Calahan, Fla. William J. Hunt, the son, was 35 years of age at the time of his death, was unmarried, and had been for years contributing his wages to the support of his mother, sisters, and niece above named. At the time of his death he was in the employ of the defendant receiver in the capacity of section master or foreman of a squad of section hands on the Florida Railway & Navigation Company's line of road. He had occupied the position of section master for three or four years, and, prior to his promotion to that position, had for many years been in the employ of the said road as a common laborer or shoveler. At the time of his death he received wages at the rate of \$42.50 per month. On the 21st day of September, 1888, the defendant receiver, through his employe, C. W. Burroughs, as assistant road master, was engaged with an engine and some 20 or more flat cars distributing steel rails along the road to renew the old ones. At a station called Crawford, in the afternoon of that day, the deceased, William J. Hunt, came up with his squad of section hands, in obedience to the orders of Burroughs, to go with the train to his section, distant about a mile, there to distribute rails from said train. This construction train waited at Crawford on a side track for some time, until after the passage of a passenger train. Burroughs, the assistant road master, had charge of the construction train and its movements until he left it at Crawford to take the passing passenger train, when he left it in charge of one Hogan, as conductor; but before leaving, because of delays in unloading experienced in removing the stanchions that held the rails on the flat cars, he ordered William J. Hunt to remove the middle stanchions from the cars while they were standing there at Crawford waiting for the passenger train to go by. Hunt, in obedience to this order, while the train was standing at Crawford, in the daytime, took part with his own hands in driving out the middle stanchions from the car upon which he afterwards rode, and upon which he was killed, leaving only four stanchions in all to secure the rails with which the car was loaded, one of them locat-

ed near each of the four corners of the car on the sides. There is no proof that the stanchions were removed from any other car in the train but this one, from which Hunt himself removed them. After the passenger train went by, the construction train pulled out. Hunt, with several others, voluntarily rode upon the car from which he had removed the stanchions. After going about half a mile, while the train was running at the rate of from six to eight miles per hour, and after it had become dark, the front end of a rail on the car worked out from behind the stanchion on the right-hand front end of the car, and fell to the ground, while the other end of the rail remained upon the car. The motion of the car poised it in an upright position on the ground, and it fell back upon the car from which it first fell, and struck Hunt, killing him instantly. The uncontradicted evidence of one of the witnesses for the plaintiffs is that, while Hunt was engaged in removing the stanchions, he (the witness) called his attention to the danger there was in so doing. To which Hunt replied that "it was orders." The proof fails to show the age of Ann B. Hunt, the plaintiff mother, but does show that two of the plaintiff sisters are over 21 years of age, and that the other plaintiff sister is 20 years old, and that the plaintiff niece, who sues by next friend, is 18 years of age; that all of them except the mother are strong and healthy, and able to do various kinds of remunerative work, and that one of the adult sisters, since Hunt's death, is earning \$8 per month, and another one of them \$12 per month. The proof shows further that the father of the plaintiff niece is still living, and is strong and healthy, and engaged in business, and that he is sober and industrious. Ann B. Hunt, the grandmother of this child, took her to live with her when she was quite young, on the death of her mother.

Before taking up the main points of the case, we will dispose of a preliminary question upon which error is assigned. Before pleading, the defendant moved to quash the writ of summons, and to dismiss the cause, upon the ground that the suit was by a next friend, and no bond or security had been given by the next friend to secure the faithful appropriation of the amount that might be recovered. This motion the court overruled, and, we think, with propriety. The record shows that the judge required such bond to be given, and we find that the next friend did execute and file the requisite bond. But, even if such was not the case, the omission by the next friend to give the statutory bond for the faithful application of the proceeds of the suit, if it could avail a defendant as a legitimate ground for quashing the writ, or for dismissal of a suit, under any circumstances, could not, in this case, have justified the dismissal of the suit as to all of the plaintiffs, but only as to the one of them represented by next friend.

Our statute (chapter 3439, approved February 28, 1883) granting the right of action for damages resulting from death by wrongful act, though similar, in its main features, to the original English statute (9 & 10 Vict. c. 93), passed in 1846, popularly known as "Lord Campbell's Act," and to the statutes on the same subject adopted by the various American states, differs essentially from all of them in respect to the persons to whom the right of action is given, and much more pointedly confines the recovery to the damages that the party or parties entitled to sue have sustained by reason of the death. The provisions of our statute necessary to be noticed are as follows:

"Section 1. Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any agent of any corporation when acting in his capacity of agent of such corporation, and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then and in every such case the person or persons who, or corporation which, would have been liable in damages if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as make it in law amount to a felony.

"Sec. 2. Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither a widow or husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither a widow or husband, or minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and where there is neither of the above class of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed; provided that any action instituted under this act, by or in behalf of a person or persons under twenty-one years of age, shall be brought by and in the name of a next friend."

The original English, or Lord Campbell's, act, and the majority of the state statutes, give the right of action in the first instance to the executor or administrator of the deceased for the use of the persons beneficially interested; but our Florida statute gives the right of action in such cases (1) to the widow or husband, as the case may be; and, if there be neither of these, then (2) to the minor

child or children; and, where there is neither a husband, nor widow, nor minor child, then (3) to any person or persons who are dependent for a support upon the person killed; and, if there is no one belonging to either of the above three classes, then (lastly) to the executor or administrator of the person killed. From the terms of our statute itself, and by the judicial construction placed upon similar statutes, the existence of the right of action in any of these named classes of persons, commencing with the second class above, is wholly dependent upon the fact whether there is any person in esse belonging to any of the classes who are given by the statute the precedent right over him to maintain the action. For example, if there is in existence a legal widow of the deceased, then she alone has the right of action, and no right of action vests in either minor children, dependents, or personal representatives; and, if there is neither husband nor widow, but a minor child, such minor child would alone have the right to recover, and dependents, as such, and personal representatives, would not have any right to recover. The existence or nonexistence of any one having the precedent right of action under the statute enters into the very substance of the right of action itself when instituted by any of the named classes of persons after the first; and when the suit is brought by any of these classes, except the widow or husband, the declaration, in order to show a cause of action, should affirmatively show the nonexistence of any other person having a precedent right of action over the plaintiff under the statute. *Barker v. Railroad Co.*, 91 Mo. 86, 14 S. W. 290; *Gibbs v. City of Hannibal*, 82 Mo. 143; *Tiff. Death Wrongf. Act*, § 116, and citations.

As the ages of the plaintiffs in actions of this kind, and other circumstances connected with their individuality, enter so closely into and become such a material factor in regulating the amount of the recovery in each particular case, and are so closely interwoven with the question of damages, it becomes a matter of great importance in every case of this kind, both for the prosecution and defense, to see to it that the proper plaintiffs are before the court. It is objected in this case that some of the plaintiffs are not shown by the proofs to belong to that class of persons denominated by the statutes as "dependents;" that they are not shown to belong to that class of persons, within the contemplation of the statute, who are or were dependent for a support upon the deceased. In the consideration of this question as to who are to be deemed dependents for a support within the contemplation of the statute, we find ourselves in an entirely new field of inquiry, without the help of any judicial determination in point. Our statute, as before shown, stands alone in its provision giving the right of action to this undefined class of persons. A Mis-

souri statute, prescribing certain safeguards to be used in mines for the protection of miners, gives the right of action, in case a death ensues from failure to comply with the statutory requisites, to persons dependent upon the deceased for a support (*Rev. St. Mo. 1889, § 7074*); but, after diligent search, we find no judicial definition there of the class of persons contemplated by their statute under the generic "dependents for a support." In determining the question we are left to analogy, and to the intent of the statute, to be gathered from its entire context. In granting the right of action in such cases to the preferred class generically termed "children," we find that the statute confines the right to minor children; pointedly omitting adults from the right of action itself. If there be no child or children of the deceased who are below the age of 21 years, then, says the statute, in effect, we pass over such children as may be over the age of 21 years, and confer the right next upon such persons as may be dependent for a support upon the deceased. We are forced to conclude from this pointed omission of adults from the preferred class termed "children" that the lawmaking power, in conferring the new right of action, kept in mind the rule of law that imposes upon parents the duty of supporting their children until they arrive at the age of 21 years, when, in contemplation of law, they become able to care for and support themselves, and when, too, they are freed from the parental control, becoming masters of their own movements, time, earnings, and property. In this case we have two adult sisters of the deceased as plaintiffs suing in the capacity of "dependents for a support." The proofs submitted show, in reference to them, that, though their deceased brother, during his lifetime, voluntarily contributed his earnings towards their support while they remained in thriftless idleness, yet, so soon as the mainstay of their idle livelihood is cut off, we find them both, not only able to do so, but actually earning larger amounts as monthly wages than their proportionate shares would have been of their deceased brother's wages had every dollar of it been equally divided between the different members of his household. Had the deceased been their father, instead of their brother, standing, as to them, only in loco parentis, it is quite clear that they could not have maintained the action. But again, in reviewing the adjudications of other courts upon statutes similar in the main, we find an unbroken array of them to the following effect: That, where the death of a parent is sued for by minor children, the recovery for the support lost to such children by the death is to be estimated only to the time when such children arrive at their majority; and when a parent sues for the death of a minor child the parent's recovery is limited to the date when such child would have reached

his majority,—thus recognizing the rule of the law that, as between parent and child, their mutual obligations to each other cease at the arrival of the child at its majority. *Tiff. Death Wrongt. Act*, §§ 160, 164, and citations; *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884; *Baltimore & O. R. Co. v. State*, 33 Md. 542. The proof shows these two plaintiffs, the adult sisters, to be healthy and strong, mentally and physically, and fully able to support and maintain themselves. They were not, therefore, in fact dependent for a support upon their deceased brother; and we do not think that the proofs sustain their claim to have been such dependents upon him as would properly include them within the class to whom the right of action is given by the statute. It would be overlooking patent legislative intent for us, under the proofs, judicially to range physically and mentally strong and able adults in the category of dependents entitled to sue, when the statute itself pointedly leaves them out when conferring the right upon the children of the deceased, a more highly favored class. We think that when the suit is brought by a person who bases his right to recover upon the fact that he is a dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support, from the deceased. We do not think that the proofs here bring the two adult plaintiff sisters of the deceased, Anna V. Hunt and Catherine H. Hunt, within the class of dependents contemplated by the statute, and the recovery in their favor, under the proofs submitted, was unauthorized. Had there been a strong, healthy, adult brother of the deceased, fully as capable, mentally and physically, as was the deceased to earn a livelihood, but who contented himself, with his brother's acquiescence, to live in idleness upon the fruits of his brother's labor, the right of action, as a dependent, could have been claimed for him with as much propriety, within the contemplation of the law, as for these two adult sisters. The proof shows further that one of the plaintiff sisters, Sarah E. Hunt, was only 20 years of age at the time of the trial, yet the action was instituted in her own individual name and right, and so was the recovery had. Aside from the elementary rule disabling a minor to maintain any suit in its own name, the impropriety of this requires no other demonstration than a bare reading of the proviso to section 2 of the statute quoted,

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that mandatorily requires every suit of this kind on behalf of a minor to be instituted by and in the name of a next friend. In so far as the question of the right to sue in the capacity of dependents for support is concerned, we think that the proofs, though not so full and clear as they might and ought to have been, are sufficient to show that Ann B. Hunt, the mother, Sarah E. Hunt, the minor sister, and Celia (or Sealy) M. Hunt, the niece of the deceased, did occupy such a position towards him as would properly put them, within the purview of the law, in the class of dependents for support who have the right to sue. While the proof is fatally defective, as we shall see when discussing the question of damages, in its failure to show the age of Ann B. Hunt, the mother, still it is sufficient to show that she was without property, and that she is probably a person of such advanced years as made her in fact dependent upon her son for support during the remainder of her life. The moral obligation resting upon a son to maintain his mother in her old age, coupled with the fact that he had been so supporting her for years, gave to her such a reasonable expectancy of his support for the remainder of her natural life as brings her entirely within the rule. The disability of minority of the sister Sarah E. Hunt and of the niece, Celia M. Hunt, coupled with the fact that they had been cared for, supported, and protected by the deceased for many years prior to his death, and the want of property means of support, gave to them also such a status as dependents, and such reasonable expectancy of a continuance of such support, until their arrival at their majority, as gave to them also a right of action, in the category of dependents for support. The proof shows that the deceased had for years stood as to them in loco parentis. This being true, so far as the niece is concerned, it makes no difference that her own father is alive, strong, and healthy. He has not in fact supported her for years. The deceased uncle did, and her reasonable expectancy was that he would have continued to do so. The loss sustained in this expectancy, coupled with the dependence of her minority and lack of means, gives her the right to sue.

Having disposed of the question of parties entitled, under the statute, to maintain the suit, the next question presented for discussion is, in what cases of this kind is any one entitled to a recovery, regardless of the statutory class to which the plaintiffs may belong? We have the answer to this question in the plain provisions of the statute itself. In order to warrant a recovery by any one for the death of any one caused by the wrongful act, negligence, carelessness, or default of another, the wrongful act, negligence, carelessness, or default from which the death ensues must be such as would have entitled the deceased person to maintain an action for damages had death

not ensued. If, then, a case is presented wherein the deceased party would have been defeated or barred from recovery for any reason, had he been alive and suing for personal injury only, then the same reason or cause for his bar or defeat will bar and defeat a recovery for his death by any one suing on that behalf. *Pym v. Railway Co.*, 2 Best & S. 759; *Nellson v. Brown*, 13 R. I. 651; *Tiff. Death Wrongf. Act*, §§ 63-65, and citations.

It is asserted in the briefs of the plaintiff in error that the doctrine of comparative negligence, under chapter 3744, Act June 7, 1887, was and is not applicable to this case; that it was not invoked or considered. We find it to be entirely true that the provisions of this act were not invoked or considered at the trial, as is apparent from the instructions given, but we cannot overlook the fact that the proofs in the case bring it within the terms of that act, and make its provisions the law of the case; and because its provisions were so entirely ignored constitutes one of the most serious errors in the trial of the cause. The provisions of this statute are as follows:

"Section 1. That no person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him.

"Sec. 2. If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery, and no contract which restricts such liability shall be legal or binding."

The proof shows that the death comprising the foundation of this suit was brought about in the operations of a railroad company; that the deceased was at the time of his death an employé of that company, or of the receiver operating the road in the company's stead; that the negligent act that was the proximate cause of the death consisted in the use at the time by the operatives of the company of a flat car loaded with iron rails that was insufficiently equipped with stanchions to secure upon the car its load of rails; that the imperfectly stanchioned car, upon which the death occurred, had been properly secured and equipped with stanchions, but that the deceased himself, with his own hands, after joining the force employed with the construction train in distributing rails, put the car in its imperfectly stanchioned condition by removing all of the stanchions therefrom except four; that he did this by the order of another employé of the same company, but who was a superior

officer in charge of the construction train and its movements and operatives; that the deceased, while removing the stanchions from said car, was cautioned as to the danger that would attend their removal; that he removed them while the train was standing still on a side track during the daytime; that he afterwards, when the train pulled out, voluntarily rode upon the car from which he had removed the stanchions to the point where he was killed; that the car upon which he rode, and upon which he was killed, was the only one in the train that was imperfectly supplied with stanchions; that the only defective feature of the car consisted in the absence from it, while loaded, of a sufficient number of movable wooden stanchions, the iron pockets designed to hold the stanchions in place being properly constructed, and sufficient in number. Under these circumstances it became very questionable, under the provisions of section 2 of the act above quoted, and the construction placed thereon by the supreme court of Georgia, from whose statute book we have adopted that provision of law, whether the deceased could have maintained an action had he been injured instead of losing his life. If he could not have recovered for personal injury under the circumstances, then, as before shown, no one can recover, under the same circumstances, for his death. As said before, our legislature has adopted the above-quoted statute *totidem verbis* from the statutes of the state of Georgia (Code Ga. 1873, §§ 3034, 3036), section 3034 being section 1 of our act, and section 3036 being section 2 of our act. Besides our adoption of the terms of the statute itself, according to the well-settled rule, we also adopt, as forming an integral part of the same, any known and settled construction that had been placed thereon by the courts of the state from which it has been adopted, in so far as that construction is not inharmonious with the spirit and policy of our own general legislation on the same subject. *End. Interp. St.* § 371; *Brennan v. People*, 10 Mich. 169; *Pangborn v. Westlake*, 36 Iowa, 546; *Draper v. Emerson*, 22 Wis. 147; *Com. v. Hartnett*, 8 Gray, 450; *Marqueze v. Caldwell*, 48 Miss. 23. Section 2 of this act, before its adoption here, had received a well-settled construction by the supreme court of Georgia to the effect that it gives to the employés of a railroad company a right to recover of the master for injury sustained through the negligence or carelessness of coemployés, or other employés of the same master, in cases where the injured employé is without fault; but to warrant a recovery in such cases the injured employé must be entirely free from fault or negligence. Any fault or negligence on his part will prevent a recovery. *Rowland v. Cannon* (decided in 1866) 35 Ga. 105; *Railroad Co. v. Bishop* (1873) 50 Ga. 465; *Campbell v. Railroad Co.* (1874) 53 Ga. 498; *Sears v. Railroad Co.* (1875) *Id.* 680; *Johnson v.*

Railroad Co. (1875) 55 Ga. 133. In Railroad Co. v. Adams, 55 Ga. 279 (decided in 1875), where the plaintiff sought to recover for personal injury, the facts were that the plaintiff, an employé of the defendant company, while riding on a dump car with other employés and one Bennett, the section master over them, was ordered by the section master, while the car was in motion, to get back on the car, and get his coat and bucket, so as to be ready to get off at plaintiff's shanty close by. In stepping around in obedience to this order, his foot slipped, causing him to fall in front of the car, which ran upon him, inflicting serious injuries. On these facts the trial court gave to the jury the following charge: "If you find that Bennett, from the evidence, had authority to employ and discharge the hands under him, and had authority over plaintiff with power to discharge him for disobedience of orders, and you further find from the evidence that the injury was caused by the order or direction of Bennett, then plaintiff is not precluded from recovering, even though he was guilty of some wrong or fault himself which contributed to the injury." The supreme court, in passing upon this charge, says: "This charge of the court was error. Whilst the statute authorizes an employé of a railroad company to sue it to recover damage for an injury caused by the negligence of another employé of the company, still, to entitle the plaintiff, as such employé, to recover at all against the company, he must be without fault or negligence on his part. The statute makes no distinction between the grades or classes of employés of a railroad company, and therefore the courts are not authorized to recognize any such distinction so as to enable the plaintiff to recover on the principle of contributory negligence, as assumed in the charge of the court." This decision was followed and approved in 1882 by the same court in Baker v. Railroad Co., 68 Ga. 699. The facts in that case were that the plaintiff, an employé of the defendant company, was engaged with other employés, under the direction and control of a section master, in cutting an iron rail in two with imperfect, worn, and defective tools that he knew to be so defective; but he used them on this occasion by the immediate order of his superior, the section master. A small piece of iron flying off from the defective tools he was using struck him in the eye, seriously injuring him. He sued the company for the injury sustained. The court, in its opinion, says: "The evidence in this case of the plaintiff establishes the fact that he was aware the implements he was engaged in using were unfit and unsuitable and dangerous, and with this knowledge he took the risk. Can it be said he was faultless? But did the fact that he undertook this dangerous duty by the immediate order of his superior (the boss trackman) excuse him, and relieve him from the rule that he must be without fault or negligence? This

proposition was given in the case of Railroad Co. v. Adams, *supra*, by the circuit judge, but he was reversed, and this court held that an employé cannot recover damages from a railroad company for injuries sustained by him on account of the negligence of a coemployé, unless without fault himself, even though in performing the act which resulted in the injury he was acting under the orders of a superior." To the same effect is the case (decided in February, 1883) of Bell v. Railroad Co., 70 Ga. 566, and Railroad Co. v. Haslett, 74 Ga. 59. In the case of Railroad Co. v. Maloy (decided in 1886) 77 Ga. 237, 2 S. E. 941, where a parent was suing for the death of her minor son, who was an employé of the defendant company, the court holds that the provisions of section 1 of our act do not apply to employés of railroads so as to permit them to recover where they are at fault, and to diminish the amount of the recovery in proportion to the fault attributable to them; that, in order to recover, they must be free from fault; and, if the injury is sustained in consequence of any fault or negligence on their part, they cannot recover; and that, where a suit is brought by the parent of a minor employé to recover for the killing of her son, the parent could not recover unless he could have done so if he were in life. There is nothing in these interpretations of the Georgia statute by the supreme court of that state that is discordant with the spirit and policy of our own general legislation; and, according to the settled rule of construction already announced, those interpretations are to be deemed as having been adopted by our lawmakers along with the terms of the statute itself, as integral parts thereof; and it becomes our duty to so hold. Under these decisions, with the proofs in hand, we do not see how the plaintiffs here can legally recover. The deceased was an employé of the defendant. He used a defectively stanchioned car, with knowledge of its defective and dangerous condition, himself aiding in rendering it defective. The defendant had done its duty in supplying perfectly constructed and securely stanchioned cars, and had no direct instrumentality in putting the car in its temporarily defective condition. It was rendered temporarily defective by an ill-advised order from another employé of the same defendant, who was a superior officer, it is true, but, under these repeated decisions, it makes no difference under this statute. Where an employé uses dangerous and defective appliances with knowledge of their dangerousness and defectiveness, he cannot recover, even though he uses them by the direct command of a superior, who is also an employé of the same company. In the language of the Georgia decisions, the statute makes no distinction between the grades or classes of employés whose negligence may be the proximate cause of the injury, and therefore the courts are not authorized to rec-

ognize any such distinction when testing the question of fault or negligence on the part of the employé receiving the injury.

On the question of damages the court gave the following charge: "The amount of damages, if you find for the plaintiff, rests in your judgment and discretion. There is, in such a case as this, no fixed rule or standard to measure the damages that should be awarded the plaintiffs, if you find in their favor. You should take into consideration the age, health, habits, industry, capacity for business, and probable time deceased would have lived in the ordinary course of events, and award the plaintiffs, if you find in their favor, such an amount as will compensate them for the damages they have sustained by reason of the death of William J. Hunt." This charge is assigned as error, and it is clearly erroneous, according to the terms of our statute itself, and to the adjudged cases upon statutes with the same provisions in reference to the damages to be recovered in such cases. While all the authorities agree that it is almost impossible to formulate any definite rule for the assessment of the damages to be recovered, still there are certain well-defined legal principles that serve as guides to the ascertainment of the amount to be awarded that should not be ignored; and we find no case that sanctions the broad assertion of this charge "that there is no fixed rule or standard to measure the damages that should be awarded, but that the amount thereof rests in the judgment and discretion of the jury." The charge is fatally defective, too, in practically telling the jury that in estimating the damages they shall take into consideration the full time that the deceased would probably have lived. The language of our statute on the subject of the damages to be awarded in such cases is: "And in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed." The plain meaning of this is that the damages to be awarded are such only as will compensate the beneficiaries of the action for the loss resulting to them from the death. Take the case in hand of the aged mother plaintiff. She is suing here for the loss of her support that she has sustained in her son's death. What is the necessary limit, as to time, of that loss? It ends, of course with her death. Upon the idea that she is laboring under the infirmities of old age, she is permitted to sue as a dependent. The legally recognized probability is that her life would have come to an end, in the usual course of events, many years in advance of that of her son. The error of the charge, in permitting her to recover the means of support for herself during all the years of her son's probable life,—for many years, in all legal probability, after she had ceased to exist,—becomes glaringly apparent. The charge should have instructed the jury to take into consideration the probable duration of the

joint lives of herself and her son, and to give her such amount as she, from the proofs, had the reasonable expectation of receiving from her son during the time that she would probably have lived jointly with him. *For- dyce v. McCants*, 51 Ark. 509, 11 S. W. 694. This feature of the charge was erroneous also in its application to the two minor plaintiffs that were, by reason of their minority, held to be entitled, under the proofs, to sue as dependents. The jury should have been instructed, as to them, in the absence of proof of any other disability, mental or physical, that would have rendered them dependent in fact beyond the period of their minority, that they should find such an amount as would compensate them for the loss of the means of support that, from the proofs, they could have reasonably expected to have received from the deceased up to and until they arrived, respectively, at the age of 21 years. *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884; *Baltimore & O. R. Co. v. State*, 33 Md. 542, and 41 Md. 268. From this view of the law it becomes apparent, as before stated, that the proof was fatally deficient in not giving the age of the plaintiff mother. We find, too, that the mortuary tables in approved use are relied upon in such cases as evidence of the probable expectancy of life of the various persons involved in such suits. *Tiff. Death Wrongf. Act*, § 174, and citations. In *Railroad Co. v. Johnson*, 38 Ga. 409,—a case where a widow sued for the death of her husband,—the court, upon the question of damages, says: "In estimating the damages in a case where the wife is suing for the homicide of her husband, who was without fault, the jury are to inquire what would be a reasonable support for the wife, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably supposed to exist in the future, in view of his character, habits, occupation, and prospects in life; and, when the annual money value of that support has been found, to give, as damages, its present worth." Upon the general subject of damages, in cases like the one in which the above enunciation was made, it is one of the most accurate and concise formulations that we have met with for the guidance of juries in estimating the damages. Amplifying and formulating the quoted enunciation to correspond with the circumstances of the case in hand, we should put it thus: In estimating the damages, where an aged mother, a minor sister, and a minor niece are suing as dependents for support upon the deceased, for his homicide, if he was without fault, the jury are to inquire what would be a reasonable support for the mother during the probable remainder of her natural life, and for the minors until they arrive at their majority, according to the circumstances in life of the deceased as they existed at his death, and as they may be reasonably supposed to exist in the future, in view of his

character, habits, occupation, and prospects in life, the earnings he received, his health, age, talents, and success in life in the past, as well as the amount of aid in money, property, or services that he was accustomed to furnish them while in life; and, when the money value of that support during the period named has been found, to give, as damages, its present worth. In the well-considered case of *Hutchins v. Railway Co.*, 44 Minn. 5, 46 N. W. 79, the court, upon the general subject of damages, says: "There is nothing better settled than that the principle on which damages are to be assessed under these statutes is that of pecuniary loss, and not as a solatium. No compensation can be given for wounded feelings, or loss of the comfort and companionship of a relative, nor for the pain and suffering of the deceased. The true and only test is, what sum will compensate the next of kin for the pecuniary loss sustained by them by the death of the deceased? Or, in other words, what, in view of all the facts and circumstances in evidence, was the probable pecuniary interest of the beneficiaries in the continuance of the life of the deceased? A case under this statute is clearly distinguishable from one for a willful or malicious tort, where punitive damages, or damages for injuries to the feelings, are allowable; or one for personal injuries to the plaintiff himself, where compensation is allowed for mental and physical pain and suffering, as well as for probable future injury to health. In all such cases, the damages not being confined to strictly pecuniary loss, the estimate of them is necessarily so largely in the discretion of the jury that a court will not ordinarily interfere with their verdict, unless it is so excessive as to warrant a belief that they must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." But, as already remarked, the damages under the statute are wholly compensatory for pecuniary loss, and exclude all punitive or exemplary elements, as well as all solace for loss of society, or compensation for the injured feelings of the survivors, or the suffering of the deceased. Hence it is not, in general, so difficult to estimate the damages; and for that reason courts will have less hesitancy in interfering with verdicts. The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry, his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin. His constant attention and care in their behalf, in the relation of husband and father, is also to be considered in estimating the pecuniary loss to his family. The determination of the amount of damages is by no means left to the uncontrolled discretion of the jury. Their estimate must be based on facts in evidence, and

confined to those damages which are pecuniary in their nature, and result from the death of the deceased. The following authorities sustain the general principles announced: *Richmond v. Railway Co.*, 87 Mich. 374, 49 N. W. 621; *Railway Co. v. Asbury*, 84 Ill. 429; *Hall v. Railway Co.*, 39 Fed. 18; *Railroad Co. v. Baches*, 55 Ill. 379; *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Staal v. Railroad Co.*, 57 Mich. 239, 23 N. W. 795; *Blake v. Railway Co.*, 18 Adol. & E. (N. S.) 93.

What we have said completely disposes of the case without special notice of other errors assigned. From what has been said, the erroneous theory upon which the case was tried and submitted to the jury becomes evident, as well as the inapplicability and erroneousness of the instructions of law given. The judgment of the court below is reversed, and a new trial awarded.

MABRY, J., concurring in the reversal of the judgment, filed the following opinion:

On the case presented here on the record I think the judgment of the circuit court must be reversed. The suit was instituted against H. R. Duval, receiver of the Florida Railway & Navigation Company, in the state court, by permission of the federal court appointing said receiver, to recover damages for the alleged wrongful killing of William J. Hunt, an employé of the receiver, on the line of said railroad in September, 1888. The suit was instituted by the mother, three sisters, and a niece of the deceased to recover damages alleged to have been sustained by them by reason of the wrongful death of deceased by the company, and basing their right to damages on the ground that they were dependent on said decedent, at the time of his death, for a support.

William J. Hunt, at the time of his death, was in the employment of the receiver as section master, having charge of a hand car and hands on a section of the railroad at or near Callahan, in this state, and on the day of his death was ordered by the assistant road master of the receiver to join a construction train engaged at the time in distributing new steel rails along the track for the purpose of being placed thereon. It was in the evening, and before dark, that Hunt was ordered to join the construction train; and this order he obeyed by joining the train at a station where it had stopped in order to clear the track for a passing passenger train. The assistant road master had charge of the construction train when it stopped at the station, but he left on the passenger train, leaving the construction train in charge of a conductor. The testimony tends to show that while at the station, and before leaving on the passenger train, the assistant road master ordered Hunt to take out the middle stanchions in a flat car in the construction train loaded with the rails for distribution, so that the train would not be delayed in getting them out when it reached the point where the rails

were to be distributed; that, in obedience to this order, Hunt himself removed or assisted in removing all the stanchions in the car except two on each side near the ends of the car. When engaged in removing the stanchions he was told by an employé on the train, not the conductor or assistant road master, that it was dangerous, and replied that he was doing it in obedience to orders. The assistant road master testified that he ordered Hunt to loosen the stanchions, but did not think he directed the stanchions to be taken out; as to this he was not positive. Other testimony tends to show that he ordered Hunt to take out the middle stanchions on the car. The number of pockets for stanchions was four or six on each side, and it appears that the rails loaded on the flat were about the same length as the car. After the passenger train had gone by, the construction train, in charge of the conductor, moved out slowly, at the rate of six or eight miles an hour, for the place where the rails were to be distributed, Hunt and three or four other employés taking their position on the rails on the car from which the stanchions had been removed. Before reaching the point where they were to commence throwing off rails, one worked out from the stanchion on the front end of the car, and, falling to the ground, the other end was projected up, and, coming back onto the car, hit Hunt, and killed him instantly. It was late in the evening when the construction train left the station, and before going a mile and a half the occurrence happened, at which time it was dark. The testimony shows that two other section masters and their crews were on this train for the purpose of distributing the rails; and it also tends to show that Hunt, while engaged generally in the work of a section master, was subject to be called upon to perform such services as he was engaged in at the time of his death. He had before that time aided the assistant road master in distributing rails on six or eight miles of the road, but it does not appear whether such service was rendered in connection with the same construction train.

The court instructed the jury for the plaintiffs as follows: "That if you believe from the evidence that William J. Hunt is dead; that his death was caused by the wrongful act, negligence, carelessness, or default of the defendant; and that the plaintiffs were dependent upon said William J. Hunt for support,—it is your duty to find a verdict for the plaintiffs, providing you find that the said William J. Hunt did not, by his own negligence, contribute to his own death." The court also instructed the jury for plaintiffs as to the duty of the company to furnish reasonably safe cars, properly equipped, and also that it was the duty of the company to have had upon the flat car loaded with iron rails a sufficient number of stanchions in place to hold the rails on the car. The court charged further for the plaintiffs that "the

plaintiffs allege that the death of said William J. Hunt was caused by a bar of railroad iron falling off from a flat car while in motion in such manner that one end struck the ground, and the other end struck said Hunt with such force as to cause his death; that the bar of railroad iron fell off the car in consequence of there being an insufficient number of stanchions on the car to hold the iron rails on it; and that the failure to provide and have in place a sufficient number of such stanchions was carelessness and negligence on the part of the receiver, or his subordinate officers and agents; and if you believe these allegations of the plaintiffs are sustained by the evidence, the plaintiffs are entitled to recover damages, provided you find that the said William J. Hunt's own fault, negligence, or wrongful act did not contribute to his death."

The defendant requested the following charge, viz.: "If you believe from the evidence that the deceased, William J. Hunt, was in possession of all of the information in connection with the condition of the car upon which he rode, that it was loaded with railroad iron, that there was an insufficient number of stanchions on the car, and with that information went upon the car in his usual character as an employé for the distribution of the iron loaded thereon, then under the law the deceased, William J. Hunt, is deemed to have assumed the risks incident to the service, and to have waived any claim for damages in case injury ensued to him; and the plaintiffs, if such be the facts, cannot recover." The court gave this charge with the following addition: "Unless you find that the said Hunt went on said car under orders of a superior officer." The following charge requested by the defendant was refused, viz.: "Even though you find that the defendant was negligent in not having four stanchions on each side of the car, yet, if the deceased, William J. Hunt, was negligent in respect to riding on the car with an insufficient number of stanchions thereon, or might have avoided the consequences of an insufficient number of stanchions, then the plaintiffs cannot recover." The court refused to give other charges requested by the defendant on the subject of contributory negligence by the plaintiff, but a reference to them will not be necessary.

It will be observed that the court, in the charges given for plaintiffs, instructed the jury that they should find for plaintiffs on a given state of facts, provided the deceased, William J. Hunt, did not, by his own negligence, contribute to his death. The qualification of the right to find for plaintiffs on account of contributory negligence on the part of the deceased was in general terms, without reference to any particular conduct on his part from which contributory negligence might be inferred. When requested by defendant to charge in effect that if the decedent, with full knowledge of the dangerous

condition of the car by reason of the absent stanchions, went upon it while acting in his usual capacity as an employé in distributing iron, he thereby assumed the risks incident to such service, the court excluded the right to find for defendant on such a state of facts if the jury further found that Hunt went on the car under orders of a superior officer. There was undoubtedly testimony upon which the jury could have found that Hunt took the stanchions out of the car, or assisted in taking them out, and went upon the construction train, in obedience to the orders of the assistant road master; and the question is presented whether the orders of such road master can legally relieve or excuse Hunt from the consequence of his own fault or negligence in putting the car in a dangerous condition and riding thereon, if the jury should so find from the evidence. Under the rule before the adoption of the statute of 1887 (chapter 3744) an employer was not responsible to those in his employment for injuries caused by the negligence or misconduct of a fellow servant, when the injured and injuring servants were engaged in the same common enterprise, and both employed to perform duties tending to accomplish the same general purpose. Railroad Co. v. Weese, 32 Fla. 212, 13 South. 436. It has never been decided here whether or not the doctrine of vice principal, or alter ego, obtains in this state; and, as the death of William J. Hunt, for whose alleged wrongful killing this suit was instituted, was subsequent to the passage of the act of 1887 (chapter 3744), we find, in construing this statute, that it does not become necessary to decide what would be the rule independent of the statute. The act of 1887 was designed to give a remedy to a railroad employé under certain conditions where none existed before. Since the adoption of the statute, if such employé is injured by the fault or negligence of another employé, the injured employé may maintain an action for damages resulting from the injury against the company, provided he was without fault or negligence in reference to the injury received. The remedy against the company for damages caused solely by the fault or negligence of a fellow servant is an innovation upon the old rule, and is harsh; but in giving such remedy against the company for damages caused by the fault of another employé the statute requires that the injured employé must himself be without fault or negligence. Our statute is identical with the Georgia statute on the same subject, from which ours no doubt was borrowed, except the last clause in the second section, which is: "And no contract which restricts such liability shall be legal or binding." The Georgia courts, in construing their statute, before ours was enacted, held that an employé cannot recover damages from a railroad company for injuries sustained on account of the negligence of another employé unless free from fault,

even though in performing the act which results in the injury he was acting under the orders of a superior. That court says that the statute makes no distinction between the grades or classes of employés of the company, and the courts are not authorized to recognize any such distinction. Railroad Co. v. Adams, 55 Ga. 279; Baker v. Railroad Co., 68 Ga. 699. We adopt the construction of the statute along with it, and, this being the case, the court was not authorized to instruct the jury that the deceased was relieved from the consequence of his own fault, if such was the case, in consequence of the order of a superior officer. The superior officer, as shown by the evidence in this case, was the assistant road master, who was another employé of the company, and the jury could not have understood the charge as applying to any other officer. There is nothing in any of the charges given to obviate the effect of the charge that the jury should not find for defendant, although they may have believed that Hunt was not without fault in riding upon the car put in a dangerous condition by him, if they further found that what he did was in obedience to the orders of a superior officer. This was a vital point in the case affecting the question of defendant's liability, and the qualification of the charge was calculated to, and, for aught we can know, may, have turned the scale in favor of plaintiffs on the point of liability.

The first charge given for plaintiffs, above set out, was correct as a general proposition. Whether the second one, under the declaration in this case, unwarrantedly assumed the existence of facts, I do not consider, but, assuming its correctness for present purposes, the court was in error in charging the jury, in effect, that defendant would be liable, although Hunt may have been at fault, if he acted, under the circumstances, in obedience to the order of the superior officer. Whether or not Hunt was at fault was a question of fact for the jury under the circumstances, and it cannot be doubted that defendant had the right, on the testimony, to have the jury pass upon this question under proper instructions from the court.

As to the right of plaintiffs to maintain the action, the court instructed the jury as follows, viz.: "If you believe from the evidence that the plaintiffs were near relatives of the deceased,—one the mother, three the sisters, and one a niece, of the deceased,—and in that relation had become, by the usual and ordinary course of conduct among persons so related, dependent upon the deceased for support, then the plaintiffs are entitled to recover, so far as the question of their being dependent upon him is concerned, the damage they have sustained by reason of the death of Hunt." "The amount of damages, if you find for the plaintiffs, rests in your judgment and discretion. There is, in such a case as this, no fixed rule or standard to measure the damages that should be awarded

the plaintiffs, if you find in their favor. You should take into consideration the age, health, habits, industry, capacity for business, and probable time deceased would have lived, in the ordinary course of events, and award the plaintiffs, if you find in their favor, such an amount as will compensate them for the damages they have sustained by reason of the death of William J. Hunt." For the defendant the court instructed the jury that: "You must further find that the plaintiffs were and are dependent on the said Hunt for their support. That dependence means actual dependence, and has no relation to a provision for such support to those as have the means of providing actual support for themselves, either in money or property, or as the result of their labor." The following instruction, requested by defendant, was refused, viz.: "The law will not assume that one of either sex in good mental and physical health, and who has attained their majority, is such a dependent on the daily wages of a laboring man, or that he should be entitled to a support from the laborer in his lifetime, or entitled to be considered such a dependent as would entitle him to suit and recovery under the statutes."

The plaintiffs base their right to recover damages in the case here upon the ground that they were dependent upon the deceased, William J. Hunt, for a support, and such right, if they have any, is entirely dependent upon the statute, as they had no remedy in such a case at common law. Our statute (chapter 3439, Acts 1883) has given a remedy for damages whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness, or default of any individual or corporation, and the act of negligence, carelessness, or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof. The persons entitled to bring the suit are: First, the widow or husband of the deceased, as the case may be; second, where there is no surviving widow or husband of the deceased, minor children may maintain the action; third, where there is neither surviving widow or husband, nor minor child or children, then the action may be maintained by any person or persons dependent on the person killed for a support; and, fourth, where none of the foregoing classes exist, the action may be maintained by the executor or administrator, as the case may be, of the deceased; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. We are concerned in the case now before us with the third class. When death has been caused by the wrongful act of an individual or corporation under such circumstances as to give a right of action under the statute, in the absence of a surviving widow or husband or minor child or children, then the action may

be maintained by any person or persons dependent upon the person killed for a support. Age may properly be considered, in connection with other facts, in determining whether a plaintiff is a dependent within the meaning of the statute, but minority is not made an essential condition of the right to sue as a dependent. If dependency in fact upon the deceased for support be shown, in my opinion the suit may be maintained whether it be instituted in behalf of a minor or by an adult. The language of the statute is too clear to admit of any doubt that any person or persons dependent upon the person killed for a support may maintain the action in the absence of the other preferred classes of persons entitled to sue. The fact that the statute has given to minor children the right to sue without reference to their dependency as a matter of fact does not limit the right of dependents upon the deceased for a support to sue to the period of minority. The dependency referred to in the statute must depend upon the circumstances of each case, without reference to any fixed age. Dependence is defined to be the state of deriving existence, support, or direction from another; the state of being subject to the power and operation of extraneous force,—as, dependence is the natural condition of childhood; the dependence of life upon solar heat. A dependent is one who depends on or looks to another for support or favor; a retainer. In law the word "dependent" has reference usually to the quality of being conditioned on something else; as the covenant of the purchaser of land to pay for it is usually so expressed in the contract of purchase as to be dependent on performance of the vendor's covenant to convey. Our statute gives the right to sue to dependents upon the deceased for support, and this, in my judgment, means an incapacity in the dependent on account of age, mental or physical infirmity, or inability by reason of opportunity to support himself, and a reliance upon the deceased, who had in his lifetime contributed such support. Whether or not one was dependent for support upon a person whose death is alleged to have been wrongfully caused must be determined by the facts and circumstances of each case, and when it is shown that the person or persons suing were, as a matter of fact, dependent upon the person killed for a support, he or they have the right, under the statute, to sue. The measure of recovery is defined by the statute to be such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. The damages referred to are compensation for pecuniary loss sustained, and are to be estimated by taking into account the avocation of the deceased, and his sources of revenue, his health, age, capacity, habits, past success, and future prospects, and also the amount of aid or support in money or otherwise which he was accustomed to furnish the dependent,

and the expectancy of its continuance. *Hutchins v. Railway Co.*, 44 Minn. 5, 46 N. W. 79. When a husband or widow sues, the rule seems to be established that the prospective damages, or the damages to be considered as resulting from the death, are to be estimated during the joint expectancy of life of the deceased husband and wife, as the case may be, and the survivor. *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884. In case of suit by a minor child or children, where the remedy is given to them as such, it appears from the statute that the expectancy of life, so far as the minors are concerned, will stop at majority; but whether the expectancy of life of the deceased must also be considered in connection with childhood minority it is not necessary to say, as we are not now dealing with such class of persons. The statute provides in every such action that the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. In reference to dependents, the damages sustained by reason of the death must be such as result to them as dependents.

Turning to the testimony, we find that William J. Hunt left no widow or children, and was killed on the 21st day of September, 1888. He had living with him at Callahan, at the time of his death, a widowed mother, three sisters, and a niece. How old the mother was we do not know, but at the time of trial, in November, 1889, the niece was 16 years old, the youngest sister was 20 years old, the next sister was 23, and the oldest 24. William J. Hunt was 35 years old, in good health, physically strong, of good habits, and was earning wages from the railroad company at the rate of \$42.50 per month. He commenced labor with the company as a day laborer, and had been promoted to the position of section master. The father of Hunt had been dead for about 15 years when the son was killed, and the proof shows that the latter had taken care of and provided a support for the mother, sisters, and niece since the death of the father. The niece had a living father, but had been raised from infancy by the grandmother, and had been provided for by the deceased uncle as one of his mother's family. The father of the niece is shown to have a family, but had no property, and permitted his mother to raise and care for his daughter. The sisters of William J. Hunt were in good health, and able physically to work, but were entirely destitute of property, and relied upon their brother for a support. It is shown that the brother was industrious, economical, and devoted his entire earnings to the support of himself, mother, sisters, and niece. This he had done since his father's death. It also appears that he had lived at Callahan for one year and a half before his death, and that, while the girls were able to sew and work, there was no sewing or work for them to do at Callahan. After the death

of the brother they tried to make a living at Callahan by keeping a boarding house, but failed, because they could not secure enough boarders. The entire family moved from Callahan to the city of Jacksonville, and it appears that they had been in Jacksonville about two months when the trial took place. At the time of trial one of the adult sisters was earning \$8 per month, and the other \$12. On this state of the evidence the court was justified, in my opinion, in submitting to the jury the question whether or not the mother, sisters, and niece were dependent upon William J. Hunt for a support at the time of his death, and the finding of the jury that they were so dependent should be sustained. The first charge of the court on the subject of dependents, taken in connection with the one given for the defendant, was not error. The statement that if the plaintiffs had, by virtue of near relationship, become, by the usual and ordinary course of conduct among such relations, dependent upon the deceased, may not, standing alone, be correct; but in connection with it the jury were told that the dependence must be actual, and has no relation to a provision for support for those who have means of providing actual support for themselves, either in money, property, or the result of their labor. Taking the two charges together, the defendant has no right to complain. The charge requested by the defendant and refused by the court, on the same subject, should, I think, have been given. The law does not assume, under the circumstances stated in the charge, a state of dependency, but it is a question of fact to be proven by the plaintiff, where the right to recover is based upon that ground, and proper issue is formed on it by plea. On the facts before the jury, and in connection with the other charges on the subject, the charge refused could properly have been given.

I think the charge given on the subject of damages was incorrect, and was calculated to mislead the jury. The first position contained in it—that the amount of the damages rested in the judgment and discretion of the jury—is not correct. While there is no fixed rule or standard for measuring the damages in such cases, still the verdict must be for compensatory damages as shown by the evidence. If we consider the first sentence of the charge as limited by the following portion of it, the rule is not correctly stated there. It is proper to take into consideration the age, health, habits, industry, capacity for business, and probable time deceased would have lived in the ordinary course of events, in awarding the damages which plaintiffs may have sustained by reason of his death; but such considerations are not all that are to be regarded in estimating plaintiffs' pecuniary loss resulting from the death. Plaintiffs sue as dependents, and the damages which they sustained must result from that condition. The court instructed the jury that they were to consider the age, habits, prospects of life,

etc., of the deceased, and award plaintiffs such damages as they had sustained by his death, without any reference to their condition of dependency, or the amount they had a right to expect from deceased had he lived. It is true that the court was not requested to give any instruction as to the status of plaintiffs' dependency at the time of William J. Hunt's death, and its continuance in the future; still a charge should not submit a partial case to the jury, and direct a finding on it.

So far it is necessary to go, I think, in disposing of the case as presented on the record, and I am not disposed to go any further for the present.

The judgment should be reversed, I think, for the reasons above indicated.

(71 Miss. 451)

LOUISVILLE, N. O. & T. RY. CO. v. WHITEHEAD.

(Supreme Court of Mississippi. Feb. 19, 1894.)

INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Under Code 1892, § 732, prohibiting judges from commenting on the evidence, or charging as to the weight thereof, it is error to instruct that the evidence of a certain witness is to "be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous," whether the witness is an expert witness or not.

Appeal from circuit court, Franklin county; W. P. Cassedy, Judge.

Action between T. J. Whitehead and the Louisville, New Orleans & Texas Railway Company. From a judgment for Whitehead the railway company appeals. Reversed.

Mayes & Harris, for appellant. Cassedy & Cassedy, for appellee.

WOODS, J. The first instruction given for appellee is justly obnoxious to the criticism of containing a comment on the testimony of the two chief witnesses for the appellant, and as charging the jury on the weight of the evidence. The jury was informed by the court that the evidence of these witnesses was to "be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous," etc. The singling out of the witnesses supposed to have been expert witnesses (whether they were or not it is unnecessary for us to determine) for discrediting remark by the court, and the unfavorably contrasting their evidence with the other evidence in the case, was in disregard of section 732, Code 1892. The evidence of expert witnesses is to be received and treated by the jury precisely as other testimony. Its value may be very great, or it may be of little worth. It may be conclusive, or it may not be even persuasive. Its weight will be determined by the character, the capacity, the skill, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by

the jury, and, it should be added, by the nature of the case, and all its developed facts. *Lawson, Exp. Ev. 240; Humphries v. Johnson, 20 Ind. 190; Railroad Co. v. Thul, 82 Kan. 255, 4 Pac. 352; Thompson v. Ish, 99 Mo. 160, 12 S. W. 510; Carter v. Baker, 1 Sawy. 512, Fed. Cas. No. 2,472; Stone v. Railroad Co., 66 Mich. 76, 33 N. W. 24.*

Reversed.

(71 Miss. 725)

BARBER et al. v. MANIER et al.
(Supreme Court of Mississippi. March 12, 1894.)

APPOINTMENT OF RECEIVER.

An order appointing a receiver, made on Sunday, without notice and before the complainant has filed his bill, is invalid.

Appeal from chancery court, Newton county; S. Evans, Chancellor.

"To be officially reported."

Bill by Manier & Co. and others against Barber Bros. & Co, for the appointment of a receiver. From a decree for complainants, defendants appeal. Reversed.

Hamm, Witherspoon & Witherspoon and Miller & Baskin, for appellants.

COOPER, J. The chancellor erred in making the order for the appointment of a receiver. The order was made on Sunday, without notice, and before the complainant had commenced his suit by filing his bill in court. There was no pending suit when the order was made. *Hardy v. McClellan, 53 Miss. 507; Pressley v. Harrison, 102 Ind. 14, 1 N. E. 188; Beach, Rec. § 117.*

Decree reversed, and cause remanded.

(71 Miss. 965)

MARX v. LOGUE.

(Supreme Court of Mississippi. April 9, 1894.)

ACTION ON FOREIGN JUDGMENT—PLEADING AND PROOF—LIMITATIONS—REVIEW ON APPEAL.

1. The plea of *nil debet* in an action on a foreign judgment is demurrable, as the only general issue plea is *nil tiel record*.

2. Where a statute provides that actions on foreign judgments shall be brought within seven years after the rendition thereof, but, if the judgment debtor shall be a resident of the state at the time of the institution of the action, it shall be commenced within three years (Code 1892, § 2744), a plea setting up the three-years statute of limitation, which fails to state that the judgment debtor was at the time of the institution of the action a resident of the state, is demurrable.

3. In an action on a foreign judgment, by an assignee thereof, the defense that there was no evidence of the transfer of the judgment is not available on appeal.

4. The plea of *nil tiel record* does not raise the issue whether the judgment in suit has been transferred to plaintiff.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

"To be officially reported."

Action by Charles Logue against Martha Marx. There was a judgment for plaintiff, and defendant appeals. Affirmed.

S. R. Coleman, for appellant. Rush & Gardner, for appellee.

CAMPBELL, C. J. The demurrer to nil debet was properly sustained. The only general issue to an action on a judgment is nul tiel record.

The plea of statute of limitations of three years is bad, because it does not aver that the person against whom the judgment was rendered was at the time of the institution of the action a resident of this state. Code 1892, § 2744.

The record of the judgment was properly authenticated, and the objection to its being read in evidence was properly overruled.

The point that no evidence of the transfer of the judgment to the plaintiff was produced is of no avail, for this specific objection was not made on trial, and the presumption is to be indulged that if it had been thus made it would have been successfully met; and, besides, the plea nul tiel record did not put in issue any such question. It should have been pleaded specially. Affirmed.

(108 Ala. 1)

JONES v. STATE.

(Supreme Court of Alabama. June 20, 1894.)
HOMICIDE—EVIDENCE—DECLARATIONS OF DEFENDANT.

On a trial for murder by shooting, it is error to exclude declarations of defendant before the shooting showing that he believed the gun was not loaded.

Appeal from circuit court, Pike county; John R. Tyson, Judge.

George Jones was convicted of murder, and appeals. Reversed.

The testimony for the state tended to show that while the defendant was on one of the cars of the Alabama Midland Railway Company, at the fertilizer works in Troy, Ala., the deceased being in company with some other negroes, one of the negroes, Walter Hines by name, said, "Look yonder at the buzzards," referring to defendant; that, upon this statement by the said Hines, the defendant shot at said Hines with a Winchester rifle; that the ball from the rifle missed the said Hines, and struck Hartsfield, who was standing a short distance behind Hines, and from the effects of the shot he died instantly. The defense set up in this case was that there was no intent to shoot, on the part of the defendant prior to, and at the time of, the shooting, and that he did not know, at the time he pointed the gun at said Hines, in the direction of the deceased, that it was loaded. The testimony for the defendant tended to substantiate this defense. One of the witnesses introduced for the defendant testified that he was on the train that was going to Troy the morning of the shooting, and that one Friday Morrison, who sat opposite him in the coach, had the Winchester rifle with which the shooting was afterwards done.

That said Morrison went to sleep, and the gun fell down. That the witness called to George Jones, the defendant, and told him about the rifle falling down, whereupon the defendant replied that there was no danger in it; that it was not loaded. The solicitor objected to this testimony of the witness Alexander, and moved to exclude it. The court sustained the objection, excluded the testimony, and the defendant duly excepted. This is the only ruling of the trial court which is reviewed on this appeal.

D. A. Baker, for appellant. Wm. L. Martin, Atty. Gen., for the State.

PER CURIAM. We are of opinion that the declaration of the prisoner to the witness Alexander that the gun was not loaded, and there was no danger in it, was admissible in evidence, and should not have been excluded from the jury. The degree of the guilt of the prisoner depended on the inquiry whether, at the time of the homicide, he believed the gun was unloaded, and the reasonableness of the belief. The declaration was uttered a few hours before the homicide, on the train on which the prisoner was an employé, in the course of continuous travel to the station at which the homicide occurred. It was a natural, instinctive response to the direction of his attention by the witness to the falling of the gun, intended to allay the apprehension of danger he reasonably supposed had been excited in the mind of the witness. The declaration may not, strictly speaking, form part of the *res gestae*; but it is connected with, and cannot be disconnected from, the inquiry, what was the state of the prisoner's mind at the time of the homicide,—did he then believe the gun was unloaded? The evidence, without conflict, shows that he saw the gun unloaded on the night before, and did not know, and had no opportunity of knowing, that it was subsequently reloaded, when the declaration was uttered. The truth and spontaneity of the declaration are apparent, and it is corroboratory of the evidence of the prisoner that, at the time of the homicide, he did not believe the gun was loaded. We have no purpose to relax the general rule that declarations made by defendant in his own favor, not forming part of the *res gestae*,—self-serving declarations, as they are termed,—are inadmissible as evidence for him. But when, as in the present case, the inquiry is as to the state or condition of the mind of the defendant, his declarations uttered instinctively, with no purpose of producing a particular effect in the future, and which have a tendency to elucidate or illustrate his mental condition, are admissible. The declaration becomes a fact which the jury must consider in connection with the other evidence, giving to it such weight as they may deem it entitled to receive. If, as there is evidence tending to show, after the utterance of the declaration,

and before the homicide, the prisoner ascertained and knew the gun was loaded, the declaration loses all significance, and becomes wholly immaterial. Upon this point, the evidence was not free from conflict. If the jury were not satisfied, beyond a reasonable doubt, that the prisoner had, before the homicide, ascertained, or had reason to believe, the gun was loaded, the declaration is a fact which may aid the jury in determining the mental condition of the prisoner at the time of the homicide.

Let the judgment be reversed, and the cause remanded, the prisoner remaining in custody until discharged by due course of law. Reversed and remanded.

(103 Ala. 80)

SPIGNER v. STATE.

(Supreme Court of Alabama. June 20, 1894.)

ASSAULT—INSTRUCTIONS—MITIGATING CIRCUMSTANCES.

1. Where, upon a trial for assault, it is conceded that defendant committed the same, and the defense is justification, a charge assuming the assault is not error.

2. It is error to refuse to charge that abusive words used by the person assaulted at or near the time of the assault might be considered in extenuation or mitigation.

Appeal from circuit court, Coffee county; J. M. Carmichael, Judge.

Jesse Spigner was convicted of assault and battery, and appeals. Reversed.

The testimony in behalf of the state tended to show that the defendant and the said Johnson had some words in reference to the return of a mule which the defendant had gotten from Johnson, and that upon Johnson saying to defendant, "You shall not call me dishonest," he grabbed Johnson by the neck, and hit him on the head with his fist. The defendant testified in his own behalf that Johnson said to him, "You acted dishonest in keeping the mule;" that upon the said Johnson saying to him, "You are a d—d liar," and several other like words, the defendant then slapped Johnson, and this ended the fight. The defendant asked the court to give to the jury the following charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The jury may look to any evidence in the case tending to show that Johnson used opprobrious words or abusive language to defendant at or about the time of the fight, together with the other evidence in the case; and, if they believe such words or language were used, they may consider the same in justification or extenuation of the offense, and may acquit the defendant." (2) "If the jury believe from the evidence that, at or about the time of the difficulty, Johnson used abusive language or opprobrious words to defendant, they may justify the assault and battery, if one is proven, on account of such

language or epithets, and find defendant not guilty."

M. Lallie, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. In prosecutions for assaults, assaults and batteries, and affrays, the defendant may show in extenuation or justification of the offense charged that the person assaulted or beaten used opprobrious words or abusive language at or near the time of the assault or affray. Code, § 3749; *Brown v. State*, 74 Ala. 42; *Prior v. State*, 77 Ala. 56. Whether the person alleged to have been assaulted here used opprobrious words or abusive language towards the defendant at or about the time of the assault was the sole matter at issue on the trial below. All the evidence, including the testimony of the defendant himself, concurred to establish, and the defendant made no pretense of denying, the fact the assault and battery alleged was committed by him. On the issue as to the use of opprobrious words by Johnson, the person assaulted, the evidence was directly conflicting. With this state of case before it, the trial court committed no error in instructing the jury that if they believed from the whole evidence that, at or about the time defendant struck Johnson, said Johnson did not use any opprobrious words or abusive language to defendant, they should find the defendant guilty. The court had a right to assume in this charge that "the defendant struck Johnson" (this was not only proved, but also confessed); and as to the use by Johnson of opprobrious words, as being defensive matter, in respect of which the burden was upon the defendant to reasonably satisfy the jury, the charge was not bad for that it failed to require belief beyond a reasonable doubt. Indeed, it was too favorable to the defendant in this regard. It should have required conviction unless the jury were reasonably satisfied that Johnson did use abusive language, etc., at or near about the time of the assault.

Two charges requested by the defendant were addressed to this issue, and were intended to instruct the jury that if opprobrious words or abusive language were used by Johnson towards the defendant at or near the time of the assault, and the defendant struck on account thereof, they might consider the use of such words or language in extenuation or justification of the assault, as they might determine; and that if, in their judgment, the opprobrium or abuse was sufficient to justify the blow, they could find the defendant not guilty. These instructions were not abstract. The evidence for the defendant tended to support every fact postulated in each of them. The first of them, when referred to the evidence, and the second, by its own terms, postulates every essential ingredient of the statutory defense, and each of them should have been given. Reversed and remanded.

(108 Ala. 90)

BOND v. STATE.

(Supreme Court of Alabama. June 19, 1894.)

CRIMINAL LAW—DISMISSAL OF APPEAL.

An appeal will be dismissed where no exceptions were reserved upon the trial.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Charlie Bond was convicted for burglary, and appeals. Dismissed.

Peyton G. Thompson, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The indictment charges the defendant with burglary in the usual and proper form. Upon proceedings strictly regular there were verdict of conviction and sentence, all duly shown by the record. There was not an exception reserved upon the trial. This is not a case for an appeal, and it is dismissed. Appeal dismissed.

(108 Ala. 92)

CARTER et al. v. STATE.

(Supreme Court of Alabama. June 19, 1894.)

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

On a criminal trial it is error to refuse to charge that each juror must be satisfied beyond a reasonable doubt that accused are guilty before they can convict.

Appeal from circuit court, Butler county; J. R. Tyson, Judge.

William Carter and Major Gibson were convicted of larceny, and appeal. Reversed.

Gamble & Powell, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The defendants, William Carter and Major Gibson, were tried and convicted of the larceny of a hog. William Carter testified as a witness in his own behalf, giving evidence tending to exculpate himself. The state introduced a witness who testified that Carter's character was bad for truth. The other defendant was not impeached, but he gave evidence of his good, general character for honesty. The court instructed the jury that "the evidence of the defendant's good character is not evidence of his truthfulness as a witness." Carter did not reserve an exception to this instruction, but Gibson did. No error was committed available to Gibson. His character as a witness had not been put in issue. He put in issue his general character for honesty, as touching the question of his guilt or innocence. That evidence could not be considered to add to his credibility as a witness. This was the effect of the instruction, so far as he was concerned.

The defendants requested in writing the following charges, separately: "Unless each of you is convinced beyond a reasonable doubt of the guilt of the defendants, from the evidence in the case, then you should not con-

vict them." "Before you can convict the defendants, you should each be convinced beyond a reasonable doubt of their guilt from the evidence and the evidence alone." These charges were severally refused, and the defendants excepted to each refusal. That the court erred seems too plain for argument. There is nothing better settled in our jurisprudence than that the concurrence of all the jurors is essential to a verdict in all cases, civil and criminal; as well settled as the other principle that the jurors in a criminal case must be satisfied beyond a reasonable doubt of the defendant's guilt before there can be a conviction. It is logically impossible to apply these principles, and hold that a conviction on a criminal charge may be had although one of the jurors may not believe beyond a reasonable doubt that guilt has been established. Each juror must be satisfied beyond a reasonable doubt that the accused is guilty before there can be a conviction. This right is so securely guarded that when a verdict of conviction is read the defendant may have the jury examined by the poll, to make sure that it is the verdict of each juror. For the refusal to give the charges the judgment is reversed, and the cause remanded. Let the prisoners remain in custody until discharged by due course of law. Reversed and remanded.

(108 Ala. 550)

SAMPSON v. JACKSON.

(Supreme Court of Alabama. June 19, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHO MAY QUESTION.

1. A general assignment giving preference to creditors can only be attacked by a creditor who has not assented thereto.

2. The assignee holds the property for the benefit of those mentioned in the assignment, and cannot complain that its terms are unfair, or that it gives preferences.

3. Where, shortly before making a general assignment, the assignor indorses a note to a creditor, the assignee cannot interpose in an action to collect the note, as only a creditor of the assignor can question the title derived from such indorsement.

Appeal from circuit court, Colbert county; H. C. Speake, Judge.

Action by A. W. Jackson against Ella T. Newson on a promissory note. James N. Sampson, as assignee of the Tuscumbia Banking Company, intervened. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

The defendant, in answer to the summons in said cause, paid into court the money due upon said note, and suggested that James N. Sampson, the assignee of the Tuscumbia Banking Company, claimed the money due upon said note; and prayed that said Sampson be required to make himself a party to the said suit, and to defend the same. Summons was regularly served upon the said Sampson, who interposed his claim, and upon the hearing of the cause the justice of

the peace rendered judgment for the plaintiff, and from said judgment an appeal was taken to the circuit court. In the circuit court the said James N. Sampson filed his claim to said money, averring therein that on June 10, 1893, the Tuscumbia Banking Company made a general assignment of all of its property to him, James N. Sampson, for the benefit of all of its creditors, and among other property assigned to him was the note due from Ella T. Newson, and that he claims the said money as such assignee. In response to this claim, the plaintiff replied that the Tuscumbia Banking Company, being indebted to her, transferred said note in settlement of said indebtedness, and that the general assignment to said James N. Sampson was made after such transfer, and that the assignee cannot set up any right or claim to said note, except such as could have been interposed by the Tuscumbia Banking Company.

The evidence introduced in behalf of the plaintiff, as is shown by the bill of exceptions, tended to show that before June 10, 1893, the Tuscumbia Banking Company, a partnership composed of Hinton E. Carr and his wife, Emma Carr, did a general banking business in the city of Tuscumbia, and that the plaintiff was a depositor therein to the amount of several hundred dollars. That on June 8, 1893, James Jackson, as agent of the plaintiff, went to the Tuscumbia Banking Company for the purpose of drawing out from said bank for the plaintiff the amount she had on deposit. That one Harrington, the assistant cashier, was in charge of the bank, and told the said James Jackson that he did not have the money to pay to him that morning. That thereupon the said Jackson said that he would accept notes or other security as collateral for said debt. That at the time of this request, Hinton E. Carr, who was the president and had control of the business of the Tuscumbia Banking Company, was in the city of New York. On his departure, the said Harrington was left in entire control of the business, and instructed by said Hinton E. Carr that, in the event he, Harrington, was in doubt as to what to do or how to act in any matter connected with the said business, to consult with said Carr's brother, Dent Carr, and whatever he said to do would be all right, and he could go ahead and do it. That these instructions having been received from Hinton E. Carr, Harrington, before delivering the securities to said Jackson, told Jackson to wait until he consulted with Dent Carr. After such consultation Harrington delivered to said Jackson the notes belonging to the Tuscumbia Banking Company, among which was the note executed by Mrs. Ella T. Newson, now sued upon. The receipt given by Jackson upon the delivery of these notes shows that they were not in payment of the indebtedness, but were received as collateral security for the debt of

the bank to the plaintiff. Two days after this, James Jackson carried the said notes to Mrs. Emma Carr, a partner in the Tuscumbia banking business, and she indorsed them to the plaintiff, as transferred by the Tuscumbia Banking Company. A few minutes after this indorsement, Mrs. Emma Carr executed a deed of general assignment to James N. Sampson of the property of the Tuscumbia Banking Company, for the benefit of its creditors. This deed of general assignment was written by the said James Jackson, who testified that at the time of the indorsement of the notes to the plaintiff by Mrs. Carr he knew of the intended assignment, which was executed a few moments afterwards. James N. Sampson testified in his own behalf that the Tuscumbia Banking Company was insolvent six months before it closed its doors, on June 10, 1892, and that a few days after the assignment Hinton E. Carr, who had returned from New York, turned over to him, the said Sampson, as assignee, the assets of the banking company, and also the list of notes said Harrington had delivered to said James Jackson for the plaintiff, A. W. Jackson, and in the list of notes so delivered to him was the note now sued upon. The cause was submitted without the intervention of a jury, and upon the hearing of all the evidence judgment was rendered for the plaintiff, declaring that he was entitled to the money which had been paid into court, and that the said James N. Sampson was not entitled thereto. This judgment is appealed from, and the same is here assigned as error.

J. B. Moore, for appellants. Thos. R. Roulhac and William H. Sawtelle, for appellee.

HARALSON, J. 1. It will be remembered that a general assignment by an insolvent debtor is not prohibited,—is not declared void by the statute. Its only effect is in its operation. The statute was designed, merely, to deprive such assignments of the character of a particular security for a particular debt, converting it into a general security for the equal benefit of all creditors who come in and claim under it. And, as we have heretofore held, an assignment of all of a debtor's property, by which preferences among his creditors are made, is perfectly good, as between the debtor and his transferees or assignees, and will be allowed, in the absence of objection by creditors, to be executed according to its terms. Creditors not named in it, or those who have not assented to it, alone, have the right to claim that it shall inure to the benefit of all the creditors. 3 Brick. Dig. p. 49, § 16; *Rapier v. Paper Co.*, 64 Ala. 342.

2. The assignee, under a general assignment, whether preferences are established in it or not, if he accepts the trust, takes the property under the deed and holds it for the exclusive benefit of those mentioned in

it, as its beneficiaries. And, as it was said by us in another case, "he is bound, and affected by all the equities, and subject to all the defenses which would have affected the assignor. In no just sense is he a purchaser for value, or the representative of the creditors." He is certainly not their representative further than to faithfully execute the trust conferred on him, according to the terms of the instrument by which he was appointed, and pay the proceeds of the property to those provided for. He has no right to find fault with the assignment because he thinks it unfair, or gives preferences or does not distribute the property, as he would have done. *Rapier's Case*, supra; *Davis v. Swanson*, 54 Ala. 277; *Insurance Co. v. Kamper*, 73 Ala. 346; *Walker v. Miller*, 11 Ala. 1067; *Hatchett v. Blanton*, 72 Ala. 434; *Burrill, Assignm.* 621, § 391.

3. The question at issue, under the facts of this case, finds solution in the foregoing principles. It is disputed that the cashier of the banking company, Mr. Harrington, had the capacity under the general authority which attached to his office, or under any special authority conferred on him, to transfer the assets of the bank to plaintiff, or to any one else, as collateral security for a debt of the bank. Without reference to any such authority, it is not denied that the banking company, after the note in question had been delivered to the plaintiff's agent, and before the general assignment was executed and delivered, indorsed the same to the plaintiff, and thereby cured what defect there was in the previous transfer, if any, so that, the legal title to the note was transferred to, and was in the plaintiff, which entitled her to maintain this action. The only person or persons who could question plaintiff's right to said note, by questioning the validity of her title as acquired to it, or by seeking to have the assignment of it to her declared a part of the general assignment, must be a creditor or creditors of the insolvent assignor, and not the assignee in the deed of assignment, who, as to this action, stood in the place of the assignor and did not represent the creditors. If none of them complained, the plaintiff should meet no legal impediment in proceeding to collect said note under her assignment of it to her; and the claimant, as assignee in said deed, went beyond the limits of his authority under said deed, to put himself forward as the representative of the creditors, to do what we have no reason to believe they desired to do for themselves. They may have good reasons for not litigating with plaintiff, with which claimant should not seek to interfere. *Rapier v. Paper Co.*, supra. It may be added, just here, that trusts arising under general assignments for the benefit of creditors, are peculiarly the objects of equity jurisdiction. 2 Story, Eq. Jur. § 1067; 2 Perry, Trusts, § 594; *McFerran v. Davis*, 70 Ga. 661; *Carriage*

Works v. Ward (Ala.) 14 South. 418. It is manifest, the appellant mistook his rights and duties, in instituting this claim, and that in the finding and judgment of the court, there is no error of which he can complain. Affirmed.

(103 Ala. 608)

MORRIS v. LAGERFELT.

(Supreme Court of Alabama. June 20, 1894.)

CONTRACTS—CONSIDERATION—OPTIONS—LIQUIDATED DAMAGES.

An agreement to sell is sufficient to support a promise to pay an agreed amount for an option to purchase a mining claim, though the contract provides for liquidated damages in a like amount in case of refusal by the vendor to complete the sale, as the vendee may insist upon a specific performance.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by C. O. Lagerfelt against E. W. Morris to recover \$100 due on a contract. There was a judgment for plaintiff, and defendant appeals. Affirmed.

The complaint, as originally filed, contained but one count, claiming an amount due on said contract. By leave of the court, the complainant amended his complaint by adding a second count, in which he set out in full the written contract sued upon, averring that he had performed his part of the contract, and the defendant had failed to pay the amount agreed in said contract, and that the same was now due and unpaid. The contract so set out in the complaint, and which forms the basis of the present suit, is as follows: "This option and memoranda of agreement, this day entered into between C. O. Lagerfelt, party of the first part, and E. W. Morris, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one hundred (\$100.00) dollars, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, sells to the party of the second part an option of the purchase by the party of the second part, of the party of the first part, of fifty-one per centum interest in and to the following described gold-mining claim, situated in Organ mining district, in Dona Ana county, in the territory of New Mexico, said mining claim being located and described as follows: That certain lead, lode, or mining claim known as the 'Dagmar Gold-Mining Claim,' situated in the Organ mountain mining district, territory of New Mexico, distant about twenty-seven miles from Las Cruces, New Mexico, and lying between two mining claims known respectively as the Alabama Bell gold-mining claim and the Oro Fino gold-mining claim, said Dagmar claim being a parallelogram 600 feet wide by 1,200 feet long, and more particularly described as follows: Beginning at a monument of stones at the westerly end center of said claim, thence three hundred feet to a monument of stones at the northwest cor-

ner of said claim, thence three hundred feet to a monument of stones at the easterly end center of said claim, thence three hundred feet to monument of stones at the southeast corner of said claim, thence twelve hundred feet to a monument of stones at the southwest corner of said claim, thence three hundred feet to a monument of stones at the westerly end center of said claim, the point of beginning. This option to continue for 30 days from the date hereof. The terms of the purchase of said interest in said mining property, if above option is carried out, is twelve thousand and five hundred (\$12,500.00) dollars, to be paid as follows: Six thousand two hundred and fifty (\$6,250.00) dollars to be paid by the party of the second part, to the party of the first part, within thirty days from the date hereof, and the remainder, six thousand two hundred and fifty (\$6,250.00) dollars, to be paid in the same way two months from the date hereof. If the party of the second part fail to make the second payment as when the same falls due, then this agreement shall be utterly null and void, and the first payment of six thousand two hundred and fifty dollars (\$6,250.00) shall remain and continue the property of the party of the first part as liquidated damages for the breach of this agreement, and not as a penalty, and the party of the second part hereby relinquishes all right to the same, or any part thereof. If the said first payment of six thousand two hundred and fifty dollars (\$6,250.00) shall be made or lawfully tendered to the party of the first part within the said thirty days, hereinbefore mentioned by the party of the second part, and the said party of the first part shall fail or refuse, on said payment or tender, to assign and transfer to the party of the second part said fifty-one per centum interest in said mining-claim property, then, and in that case, the party of the first part hereby agrees to pay to the party of the second part the sum of one hundred dollars (\$100.00) as liquidated damages for the breach of this agreement, and not as a penalty; and he hereby waives all exemptions as to said liquidated damages, and the party of the second part, in order to secure the payment of said six thousand two hundred and fifty (\$6,250.00) dollars, hereby gives the party of the first part a lien on said fifty-one per centum interest in said mining claim and property until said sum is paid. In duplicate, this 25th day of July, 1891. [Signed] C. O. Lagerfelt. E. W. Morris." The defendant demurred to this amended count of the complaint, on the ground that the contract therein set out does not show any consideration for the defendant's promise to pay the \$100 sought to be recovered. This demurrer was overruled, and the defendant duly excepted. Upon the trial of the case, as is shown by the bill of exceptions, the plaintiff offered proof of the execution of the contract sued upon, and intro-

duced the same in evidence, against the objection and exception of the defendant. The plaintiff proved that he had made demand upon the defendant for the payment of the \$100, which demand had been refused; and he testified, in his own behalf, that, at the time of selling the option, he was lawfully seised of all right, title, and interest in and to said property, as described in the complaint stated above, and had the right to sell the same.

Walker Percy and James Weatherly, for appellant. Hibbard & Miles and W. T. Hill, for appellee.

HEAD, J. Assuming the validity of the contract brought to view, in this case, as a mutually binding obligation, the \$100 therein recited to have been paid by the appellant was a cash consideration, payable at the time of the execution of the contract. The same not being paid upon the delivery of the instrument, a right of action for its recovery at once arose. Recitals in written contracts in reference to the payment of the consideration, like that in the present contract, are always open to explanation by parol. Neither the allegations of the present complaint, nor the evidence, vary the legal effect of the writing. We think the contract was mutually binding upon the parties. For the consideration of \$100, the appellee bound himself, at any time within 30 days, to sell to the appellant the specified interest in the gold mine, upon terms and considerations particularly expressed, if, within that time, appellant should exercise his option to make the purchase, and comply with the prescribed terms on his part. The contract stipulates that if the vendor, the appellee, shall refuse to make the sale or transfer, upon compliance with the terms by the appellant, the vendee, within the time stipulated, he, the vendor, will pay to the vendee \$100 as liquidated damages; and from this it is argued that no obligation was imposed upon the vendor to make the sale, but that the legal effect of the instrument was that it was left purely to his option whether he would make the sale, or repudiate it by simply restoring the consideration received. If, under the agreement, properly interpreted, it be true that the vendor had the right to repudiate the promise to sell, and, in that event, incur no other responsibility or obligation than the payment of the liquidated damages of \$100, we would unhesitatingly declare the instrument a mere nudum pactum, for the obvious reason that, the sum fixed as liquidated damages being that sum which was paid for the option to purchase, the payment of such damages would be no more than the mere restoration of the consideration paid for the option to purchase, placing the vendor precisely where he was when the agreement was made, with no other obligation whatever resting upon him. But we do not so interpret the agreement. It

clearly evidences a promise to sell and convey the specified interest in the mine, upon specified conditions and terms. It is true liquidated damages are stipulated for the breach of that promise, and the vendee, relying, for his redress, upon the payment of damages for the breach, would be limited in his recovery to the stipulated sum; but the fact that the damages are liquidated by the contract for the sale of realty, as in the present case, does not affect the right of the vendee to insist upon a specific performance of the contract. In all breaches of this kind, the vendee has his election to enforce specific performance of the contract, or, waiving that, sue at law for damages for the breach. If the latter redress is elected, and the damages have not been liquidated by the agreement of the parties, they will be assessed by the jury according to the known principles of law; if liquidated by the agreement, that will be the measure of recovery. 22 Am. & Eng. Enc. Law, p. 999, and cases cited in note 4; Id. p. 970, and note 6; Haynes v. Farley, 4 Port. (Ala.) 528; Eads v. Murphy, 52 Ala. 520; Micon v. Ashurst, 55 Ala. 607; Cotton v. Cotton, 75 Ala. 345. We therefore hold, in this case, that the appellant, Morris, upon compliance with the conditions and terms of the agreement upon his part, could have enforced performance, on the part of the other party, of his agreement to convey; wherefore the contract was mutually obligatory, and the appellee entitled to receive the \$100 agreed upon as its consideration. Affirmed.

(108 Ala. 614)

KILGORE v. KILGORE et al.

(Supreme Court of Alabama. June 20, 1894.)

PARTITION—SALE—JURISDICTION—RES JUDICATA.

1. The sale of lands in partition cannot be ordered where defendant holds adversely to plaintiff under a claim of title founded on disputed facts.

2. Where, however, such sale is only a part of the relief sought, and under the bill plaintiff is entitled to other equitable relief, the court will entertain the bill for all purposes.

3. A decree of the probate court that a decedent's estate is insolvent, made in a proceeding to which the heir was not a party, does not estop the heir from claiming in an action for partition that the estate was not insolvent, and that the decree was obtained by fraud.

Appeal from chancery court, Walker county; Thomas Cobbs, Chancellor.

Action by James Kilgore and others against Robert Kilgore to set aside a deed and for partition of land. Defendant moved to dismiss the bill for want of equity. The motion was denied, and defendant appeals. Affirmed.

The bill in this case was filed on May 17, 1893, by the children and grandchildren of William Kilgore, deceased, and Margaret Kilgore, his wife, against Robert Kilgore. The complainants and the respondent are all the heirs of the said William Kilgore.

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The allegations of the bill are sufficiently stated in the opinion. The prayer of the bill was, that a deed executed from Margaret Kilgore to Robert Kilgore, the respondent, be canceled and annulled as a cloud on the title to the land of which the said William Kilgore died seised, and that said land be decreed to be sold for partition among the complainants and the respondent, as joint tenants thereof. The appellant moved to dismiss the bill for the want of equity, and upon the submission of the cause upon this motion the chancellor adjudged that the motion was not well taken, and decreed that the same be overruled. The appellant brings the present appeal, and assigns as error this interlocutory decree of the chancellor.

Coleman & Sowell, for appellant. Appling, McGuire & Collier, for appellees.

HARALSON, J. 1. The intestate, William Kilgore, died, 6th of December, 1881, leaving a widow and one minor child, the defendant, Robert Kilgore. His estate consisted of his homestead, in which there were 140 acres of land, of value less than \$2,000, and personal property less in value than \$1,000. Under the law which existed at that time (section 2821 of Code of 1876), such a homestead and the personal property, were exempted from the payment of debts, contracted after the 23d of April, 1873, in all cases during the life of the widow, and the minority of the child,—the personalty to be delivered to the widow, to be employed by her in the maintenance of herself and her minor child, and the homestead exempted for their benefit, to be retained by the widow, until it was ascertained whether the estate was solvent or insolvent, and, if the estate was insolvent, it vested in her and her child absolutely. Code, 1876, §§ 2826, 2827. The ascertainment of insolvency contemplated by the statute, was a regular declaration of insolvency by proceedings in the probate court,—judicial ascertainment according to the statutory practice regulating such a proceeding. *Munchus v. Harris*, 69 Ala. 506; *Baker v. Keith*, 72 Ala. 127; *Smith v. Boutwell* (Ala.) 13 South. 569; *De Armond v. Whitaker*, Id. 615.

2. It is shown by the bill, that the intestate, William Kilgore, died, owing no debts contracted by him to be paid by an administrator; that on the application of his widow, his estate was administered on by the then general administrator of the county, one R. H. Smith, for the purpose of collecting a debt of \$200 due to decedent, at his death, by one H. A. Lollar, which, without administration, could not be collected, and that no claims against the estate were ever presented to said administrator for payment. It is further averred, that in 1883, on the written application of said widow, to the probate court of Walker county, the lands described in the bill, by the order and

decree of said court, were set apart to her and her minor son, Robert, the defendant, as a homestead, and all the personal property, belonging to the said estate, including the \$200 in money, which had been collected by the administrator from said Lollar, except just enough of that money to pay the costs and expenses of the administration,—was also set apart to said widow and minor son, as exempt to them, leaving no property belonging to said estate, to be administered, and no debts contracted by the decedent, to be paid by said administrator.

3. It is further made to appear, that said administrator, on the 27th of August, 1889, filed his application in the probate court, in which he gives a list of the real and personal property of his intestate, showing that the lands were 140 acres, and less in value than \$2,000, and the personal property,—including said \$200 collected on the only debt due his intestate,—was of value less than \$1,000, all of which property, real and personal, he stated, was exempted to the widow and minor child, except such part of the said \$200, as it took to pay costs and expenses of administration, leaving as he stated "nothing to pay any debts." The only creditor on the list of creditors filed, was Mrs. Kilgore, the widow, who is put down as claiming \$155. On this showing, he asked the court to declare the estate insolvent, and the court appointed the 7th day of October, following, to hear and determine the matter; and on that day, as it would seem, from the recitals,—“none of the creditors of said estate [of whom it was not shown there were any], and none of the heirs of decedent, William Kilgore, appearing or contesting said report,”—it was ordered that said estate be, and it was declared insolvent; and, it was further ordered, that said administrator file his accounts and vouchers for a final settlement on the — day of November, 1889. On that day he filed his account and vouchers, showing that he had received \$200 and paid out a like sum, and had turned over and delivered to the widow for the use of herself and minor child, the defendant, all the personal property of the estate. His account shows, he paid the whole of this \$200 in cash, less the costs and expenses of administration,—the balance amounting to \$150,—to Mrs. Kilgore for herself and minor child, on the 14th day of December, 1883. We have presented; therefore, the unheard-of proceeding of the estate of an intestate, who owed no debts, being reported to and declared insolvent by the probate court. It bears on its face the evidence of collusion between the widow and the administrator, if not of the minor child, who is shown to have been of age at the filing of this bill, to procure a judicial ascertainment and declaration of insolvency, when the estate was solvent, in order to vest the fee in this homestead in her and her minor son. As corroborative of this fraudulent purpose, it is aver-

red, that on the 19th July, 1889, Mrs. Kilgore commenced a suit against said administrator for \$150—money, as averred in the complaint, had and received by him for her use, the same being the balance due her of said \$200 collected from said Lollar, after paying costs and expenses of administration. On the summons and complaint, the administrator accepted service and consented for the case to stand for trial at the following August term, at which time she recovered a judgment, as is averred, for \$150. Yet, as we have seen, and as appears by voucher No. 1 in his account filed for final settlement of the estate, he paid the money for which this judgment purports to be a recovery, on the 14th December, 1883, more than six years before said judgment was rendered, and there was nothing really owing at the time for which said judgment could have been properly rendered. If the money had not already been paid to her, it was hers, having already been exempted and ordered to be paid to her by the probate court, and no action for the money had and received could properly have been brought and maintained for it against the administrator, as such. It needed no judgment for its recovery, after the order of that court to pay it to the widow as exempt, and, if suit could have been brought against him at all for its payment, it must have been against him personally, and not as administrator. *Lowery v. Daniel* (Ala.) 13 South. 528. As further corroborative of such a purpose, Mrs. Kilgore, on the 17th day of August, 1893, executed and delivered to her son, the defendant, a fee simple conveyance of said homestead lands, which, as she therein declares, had been set apart to her, “as a homestead in the estate of my [her] late husband, which said estate by the decree of the probate court of Walker county has been duly declared insolvent.”

4. It has been more than once decided by this court, in construction of section 3262 of the Code conferring on the chancery courts “concurrent jurisdiction with the probate court * * * to sell for division or partition any property, real, personal or mixed, held by joint owners or tenants in common,” that said court has no jurisdiction to sell lands for division or partition, where the defendant holds adversely under a claim of title founded on disputed facts. *Sellers v. Friedman* (Ala.) 14 South. 278; *Johns v. Johns*, 93 Ala. 239, 9 South. 419; *McEvoy v. Leonard*, 89 Ala. 455, 8 South. 40. And it is conceded by counsel for appellees, that if this bill had no other foundation to rest upon, than being an application to the court of equity to sell the lands described, for division or partition, it cannot be maintained. It is also conceded by them, that if the appellees had a plain and adequate remedy at law, to recover the lands from the defendant, it cannot be maintained; but, in either case, as is claimed, if the bill will lie on some other equitable ground, the court will entertain it

for that, and all other purposes, not rendering it multifarious.

5. In the proceeding in the probate court to declare this estate insolvent, the appellees were not parties, and there was no statute requiring them to be made parties. The administrator, in filing his report, purporting to be and treated by the court as a report of the insolvency of the estate of his intestate, did not give a list of the heirs of the intestate (Code, § 2224), nor was notice required to be given, or given to them, of the filing of said report. The statute required notice to be given only to creditors: Code, § 2226. The bill avers, that the appellees "had no sort of notice or knowledge of said report or decree of insolvency or of said settlement when made, till a few days ago,"—prior to filing the bill. Section 2228 of the Code provides, that "any creditor, or other person interested in the estate, may make an issue as to the correctness of such report" of insolvency, and have the same tried by a jury. But, it is plain, if an heir intervenes for any such purpose, as he may, he must do so, voluntarily, on such information of the proceedings as he may chance to pick up. Neither the court, nor the administrator, is required to give him any notice. Touching such a proceeding as respects heirs, devisees or legatees, we have held, that "a decree of insolvency in the court of probate merely ascertains, as between the personal representative and the creditors, the status of the estate, and its operation is to transfer to the court of probate exclusive jurisdiction of all claims against the estate,—claims of creditors, of course, not the claims of legatees or next of kin, for the whole proceeding is founded on the fact that the assets are insufficient for the payment of the debts to which they are primarily liable. There are no other parties, or were not under the statute existing when this decree was rendered, than the personal representatives and the creditors. As to the next of kin, or legatees, the record is *res inter alios acta*, not affecting their rights, and not evidence against them of any fact as ascertained by it." *Randle v. Carter*, 62 Ala. 103; *McGuire v. Shelby*, 20 Ala. 456; *Bank v. Ellis*, 30 Ala. 478; *Edwards v. Gibbs*, 11 Ala. 292; *Lambeth v. Garber*, 6 Ala. 870.

6. The complainants in the bill, not estopped by said decree of insolvency set up such a state of facts as shows that a fraud was practiced by the widow of said Kilgore and his administrator, in the rendition and procurement of said decree of insolvency,—the one in pretending to be a creditor and the other admitting that fact, which, as shown, was known by each of them to be an incorrect claim, thus imposing on the court which rendered it. If these averments are true, the court of chancery has jurisdiction of this case, to establish and quiet complainants' title to the land, and to this end, to annul said decree of insolvency and sweep it out of the way of the claim of complainants below for

partition of said homestead lands, and a sale of them for that purpose, on the ground, as alleged, that they cannot be equitably divided in kind. *Watts v. Frazer*, 80 Ala. 188; *Noble v. Moses*, 74 Ala. 618; *Cromelin v. McCauley*, 67 Ala. 542; *Barclay v. Plant*, 50 Ala. 509; 2 Story, Eq. Jur. §§ 1574, 1575; *Kerr, Fraud & M.* 353; 12 Am. & Eng. Enc. Law, 142-144. If this decree were allowed to stand, it would effectually block any action the complainants might bring against defendant for the recovery of said lands.

The motion to dismiss the bill for want of equity was properly overruled, and the decree of the court below is affirmed.

SUDDETH v. ELLIS.

(Supreme Court of Alabama. June 20, 1894.)

FENCES.

Acts 1892-93, p. 492, entitled "An act to prevent stock from running at large in Marengo county," and which provides for the maintenance of certain fences, does not require that a fence be maintained along the southerly boundary of the Linden stock district.

Appeal from circuit court, Marengo county; James T. Jones, Judge.

Action of detinue by Buster Suddeth against W. M. Ellis to recover a cow. A demurrer to plaintiff's reply was sustained, and plaintiff appeals. Affirmed.

This was an action of detinue commenced by the appellant, as plaintiff, before a justice of the peace, against the appellee, as defendant, for the recovery of a red heifer cow. Judgment having been rendered for the plaintiff against the defendant, the cause was removed by appeal taken by the defendant, to the circuit court of Marengo county, and was there tried by the court without a jury, by consent of parties, on an agreed state of facts, and the court rendered judgment in favor of the defendant and against the plaintiff for the costs of the suit. There is no bill of exceptions in the cause, and it is brought to this court on the appeal of the plaintiff to reverse the rulings of the court on the pleadings, which are assigned as error. The defendant for answer to the complaint, pleaded the general issue and a special plea, No. 2, as follows: "That he resided within the limits of the Linden stock district, within which stock was prohibited from running at large, and that he is cultivating lands lying within said district, and that the stock sued for were trespassing upon the lands of the defendant and were doing damage to the crops of the defendant, and that defendant took up and impounded said stock while they were trespassing upon his lands as aforesaid, and defendant says he is allowed by law to charge pound fees, and he says he is holding said stock for his lawful pound fees, which the defendant avers are due and unpaid, and that after demand the plaintiff refuses to pay defendant his lawful

pound fees." The plaintiff replied to his plea as follows: "And now comes the plaintiff and replies to the second plea of the defendant, and says that the law creating a stock district for Linden beat, requires that a line fence be kept up along the southern boundary line of said stock district, and plaintiff says said line fence is down, and is not kept up as required by law, and plaintiff says by the failure to keep up said line fence, the Linden stock district is null and void, and that the defendant has no right to impound his stock and charge fees therefor." The defendant demurred to this replication on the grounds, (1) that said replication is not in accordance with the provisions of the special law made and provided in this case, on the 11th day of February, 1893, entitled "An act to prevent stock from running at large in certain parts of Marengo county;" (2) because the failure to keep up a line fence is no defense under the law to this action; (3) because the law establishing the stock district of Linden beat, did not require the said district or any precinct therein to keep up any line fence, and the matters set up in said replication are no defense to this action and are irrelevant to the issue; (4) because the law creating the Linden stock district made by the commissioners' court, on the 19th day of November, 1888, does not allow the defense set up in plaintiff's replication; (5) because the act of February 11, 1893, does not require a line fence to be kept upon the southern boundary of Linden stock district, and the replication makes no defense under the law to the said plea of the defendant. The court, as stated above, sustained the demurrer to the replication, rendered judgment against plaintiff for costs, discharging defendant. The error assigned is the sustaining the demurrer to the replication.

Taylor & Elmore, for appellant. O. K. Abrahams, for appellee.

HARALSON, J. It is agreed on both sides, that this cause is before the court involving simply a construction of the act, "To prevent stock from running at large in certain parts of Marengo county," approved February 11, 1893 (Acts 1892-93, p. 492). The second section of that act gave the defendant the right to impound the animal sued for; and that the facts set up in his second special plea, if proved, constituted a good and sufficient defense to the action, is not denied. The sole ground on which the plaintiff bases his right to recover, is the fact set up in his replication, to which a demurrer was sustained, viz., "that the law creating a stock district for Linden beat, requires that a line fence be kept up along the southern boundary line of said stock district, and * * * said line fence is down and is not kept up as required by law, and * * * by the failure to keep up said line fence, the Linden stock district is null and void, and * * * the defendant

has no right to impound his stock and charge fees therefor." There is to be found in the said act, no such provision as that set up in said replication. What is provided is, that "no line fence or fences shall be abolished by this act which were required to be kept up under any law heretofore existing, or by any order of court establishing districts in which stock was prohibited from running at large, within the territory covered by this act, and a failure to keep said required line fence or fences shall annul this act as to the particular district or precinct heretofore required to keep up said fences." This is a very different matter from that set up in the replication. We have been referred to no act of the legislature authorizing such a replication to defendant's plea. Neither the act approved February 20, 1866, "To establish the Canebrake agricultural district," nor the one "To prevent stock from running at large in certain parts of Marengo county," approved February 12, 1887, nor the one approved February 28, 1889, to which we have been referred, contains any such provision. These are public acts, of which we take judicial notice. It may be inferred from the brief of the counsel for defendant, that the commissioners' court of Marengo county, under statutes authorizing them to do so (Acts 1880-81, p. 163, and Acts 1886-87, p. 849), established a stock district, covering the part of the county in which defendant lived, with some provision for the maintenance of a fence on its southern boundary, but of this we can take no notice. If there were anything in such an act of the commissioners, which would prevent the defendant from impounding the plaintiff's cow for trespass on his land and crops, it ought to have been set up by appropriate pleading, which was not done. The provision of the act of 1892-93 alone was relied on, and it was not applicable. The demurrer to the replication was properly sustained. Affirmed.

(103 Ala. 641)

BAILEY et al. v. SMITH.

(Supreme Court of Alabama. June 21, 1894.)

REAL-ESTATE AGENTS—SALE BY OWNER—RIGHT TO COMMISSIONS.

Where an agent's authority to sell lands upon certain terms is revoked, and the owner, in good faith, thereafter sells upon less favorable terms to one who had declined to purchase from the agent, such agent is not entitled to commissions.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by Bailey, McConnell & Howard against T. R. Smith to recover commissions. Judgment for defendant. Plaintiffs appeal. Affirmed.

This was an action of assumpsit, brought by the appellants against the appellee, T. R. Smith, to recover commissions, which they claimed as real-estate agents. The testimony

is without conflict, and showed that the plaintiffs were real-estate agents or brokers in the city of Birmingham, and that in July, 1892, the defendant placed in their hands for sale a house and lot; that the terms of sale were \$3,000,—one-half to be paid in cash, and the balance in one and two years, in equal installments, with interest from the date of sale. The property was to be sold in its then unfinished condition, and the plaintiffs were to receive 5 per cent. of the purchase price as their commissions. No time was agreed upon in which the plaintiffs were to make the sale. The house was in an unfinished condition, there being no plumbing in it, no fences, and no closets. After the property was placed in the hands of the plaintiffs, they carried several prospective purchasers to look at the property. Among those to whom the property was shown by the plaintiffs was one McClintock and his wife, who were introduced to defendant by the plaintiffs when at said house. After looking at the property, the said McClintock told one member of the plaintiffs' firm that he would not buy the property. The day after this statement by McClintock, the defendant told the plaintiffs that, if the property was not already sold, he would take it off the market; and, upon the plaintiffs telling him that they had not been able to sell the property, the defendant took the property out of their hands, as real-estate agents. Two or three weeks after the property was withdrawn from the plaintiffs, the said McClintock approached the defendant, and offered to buy the property from him, but only on condition that the plumbing was put in and the house was completed. To complete the house, as required by the said McClintock, would cost about \$200. After this proposition from McClintock, the defendant called on the plaintiffs, and asked them whether they would claim any commissions of him if he sold the property to McClintock. The plaintiffs replied that they would, and proposed to take \$125 as commissions, but finally said they would take \$100. The defendant declined to pay said commissions, and finally the defendant sold the house and lot in question to the said McClintock, after having completed the house, at an additional cost of \$223. The purchase price of the house and lot was \$3,050,—one-half cash, and the balance in one, two, and three years, in equal installments, without interest. The plaintiffs then brought the present action to recover the \$100,—the amount of commissions which they proposed to accept from the defendant. The cause was tried by the court, without the intervention of a jury, and, upon the hearing of all the evidence, judgment was rendered for the defendant. The plaintiffs appeal, and assign as error the judgment thus rendered.

E. J. Smyer, for appellants. Lane & White, for appellee.

HEAD, J. Action by appellants, real-estate brokers, against appellee for commissions. Tried by the court, without a jury, who found for defendant. The material facts will be set out by the reporter. Plaintiffs, while they had the property for sale, procured Mr. McClintock and others to look at it with a view of buying, but, after making every effort, were unable to induce any of them to agree to defendant's terms. The next day after McClintock looked at the property, the plaintiffs' authority to sell was revoked by defendant. McClintock notified plaintiffs he would not buy. Some three or four weeks afterwards, he (McClintock) began negotiations with defendant himself, which resulted in a sale. The evidence shows that the terms of the sale, as made, were materially different from those upon which plaintiffs were authorized to sell, and far less favorable to the defendant, and that they were the best terms defendant could obtain. The evidence clearly repels all suspicions of collusion between owner and purchaser to deprive plaintiffs of their commissions. All parties acted in good faith. If defendant is now required to pay plaintiffs what they claim and are entitled to, if entitled to anything, he will have realized quite that sum less for his property than he would have realized had they found a purchaser on the terms upon which they were authorized to sell. The defendant's agreement to pay commissions was upon condition that a sale was made upon the terms prescribed. He had a right to revoke the brokers' authority at any time; and having revoked it, and it being impossible to sell to McClintock except upon terms much less favorable to defendant, and good faith being exercised throughout (no intent to defraud plaintiffs of their commissions), defendant had the right to make the sale to McClintock, without incurring liability to plaintiffs for commissions. Affirmed.

(108 Ala. 44)

BARNES v. STATE.

(Supreme Court of Alabama. June 21, 1894.)

LARCENY.—INSTRUCTIONS.

1. Where defendant is charged in one count with altering the mark of a sheep with intent to defraud, and in another count with larceny of such sheep, an instruction requiring acquittal if there is a reasonable doubt of defendant's intention to steal the sheep is properly refused.

2. An instruction asserting that the case involved a bona fide claim of defendant to the sheep alleged to have been stolen invades the province of the jury.

3. An instruction that if defendant took or re-marked the sheep openly, in the presence of others, and there was no subsequent denial or concealment of the act, such act was not larceny, is properly refused.

4. On indictment for larceny of a sheep, the property of A., where defendant claims the sheep as his own, refusal of an instruction to acquit if the sheep belonged to any one else except A., or if defendant honestly believed the sheep to be his own, is erroneous.

Appeal from circuit court, Crenshaw county; John R. Tyson, Judge.

Joe Barnes was convicted of larceny, and appeals. Reversed.

The charges of the indictment under which the appellant was tried and convicted are sufficiently stated in the opinion. On the trial of the cause, the testimony for the state tended to show that the sheep which was the subject of the larceny and the re-marking with which the defendant was charged was the property of Elisha Armstrong, and that it was marked in the mark of said Armstrong's uncle, who gave the sheep to him. The several witnesses introduced for the state testified that the sheep in question was the one which had been given to said Elisha Armstrong by his uncle, and that when it was found, after having been out of the actual possession of said Elisha Armstrong for some time, the marks on the sheep were changed into the marks of the defendant; that, when the sheep was brought to the home of Armstrong, the new marks on the ears had not healed up. The testimony for the defendant was in direct conflict with this, and he and the several witnesses introduced in his behalf testified that the sheep in question was his property, and had never belonged to Elisha Armstrong; that it was at first marked in the mark which he had formerly used, and that, upon his changing the mark for his sheep, the sheep in question was re-marked in his new mark, and when taken from defendant by said Elisha the new mark had not healed. The defendant, in his own behalf, testified as a witness that he had always owned the sheep, and it was identified by him and his witnesses as his property. It was also shown by defendant's evidence that the sheep in question was marked by defendant openly and in the presence of several of his neighbors. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (2) "The court charges the jury that the question presented in this case involves a bona fide claim or claims in good faith by the defendant to the ownership of the sheep in question. The line of demarkation between crime and the mere civil tort in this class of cases is, in many cases, very difficult of distinction, and if you believe from all the evidence that the defendant, at the time he took or re-marked the sheep, had an honest belief that it was his own property, then the defendant could not be found guilty under this indictment." (3) "The court charges the jury that if they believe from all the evidence that the defendant took the sheep, or re-marked the sheep, openly and in the presence of other persons, and that there was no subsequent denial or concealment of the act, then this carries with it evidence only of a trespass,

because done openly and in the presence of others, and lacks the felonious intent which is an essential element of larceny." (5) "The court charges the jury that unless they believe from all the evidence, to a moral certainty and beyond a reasonable doubt, that Joe Barnes intended to steal the sheep at the time he re-marked or had possession of the sheep, then they must find the defendant not guilty." (7) "The court charges the jury that if they believe from all the evidence that the sheep, the subject of this prosecution, belonged to any one else except Elisha Armstrong, then you must find the defendant not guilty; and even if it did belong to Elisha Armstrong, and the defendant, at the time of taking or re-marking the sheep, honestly believed that it was his own sheep, although he might have been mistaken, then he could not be guilty as charged in the indictment, and you must find the defendant not guilty."

Gamble & Bricken, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The indictment against Barnes, the appellant, contains two counts. In the first count it is charged that he altered or defaced the mark of a sheep, the property of Elisha Armstrong, with the intention to defraud; and in the other the charge is that he feloniously took and carried away one sheep, the personal property of Elisha Armstrong. Upon the evidence for the state, the jury might have found him guilty under either count of the indictment. To the offense laid in the first count an intent to steal is not essential,—an intent only to defraud is a necessary ingredient of that offense,—and therefore charge 5, requested by the defendant, which required an acquittal if the jury had a reasonable doubt that the defendant "intended to steal the sheep," was properly refused; they might well have reasonably doubted that he intended to steal, and at the same time have been convicted beyond a reasonable doubt that his intention was to defraud the owner of the animal by altering or defacing its marks. Charge 2 requested by the defendant is argumentative and directly invades the province of the jury, in that it asserts that the defendant's claim that the animal belonged to him is "a bona fide claim or claim in good faith," when whether it was such claim or not was one of the main questions for the consideration and determination of the jury. Charge 3 refused to the defendant in effect declared that there cannot be a larceny when the capture is open and in the presence of other persons, and there is no subsequent denial or concealment of the act. This is not the law, and the charge was well refused. *McMullen v. State*, 53 Ala. 531. The seventh instruction requested by the defendant should have been given. It was not abstract, and in its first proposition, as might at first glance

be supposed, there was evidence tending to show that the sheep alleged to have been stolen or re-marked belonged to another than Elisha Armstrong, in whom the property therein was laid by the indictment, namely, the defendant himself; and no conviction could be had, of course, if the jury found according to this tendency of the evidence. The second proposition of the charge is clearly not abstract, and is manifestly sound. If the defendant honestly believed the animal belonged to him, obviously he could not have had the criminal intent necessary to guilt under either count of the indictment. For the error committed in refusing the seventh charge, the judgment must be reversed. The cause is remanded. Reversed and remanded.

(103 Ala. 568)

CONLEY et al. v. MAHONEY.

(Supreme Court of Alabama. June 19, 1894.)
RIGHTS OF HUSBAND IN DECEASED WIFE'S LAND.

Section 2351, Code, makes all the property of the wife, except such as may be conveyed to an active trustee for her benefit, her separate property, subject to all the provisions of the Code. Section 2353 provides that if a married woman having a separate estate dies intestate, leaving a husband living, he is entitled to the use of the realty during his life. Land was conveyed to plaintiff's wife, "to her sole and separate use, free from the control, debts, or contracts" of her husband, and she died intestate. *Held*, that her husband was entitled to a life estate in such land, notwithstanding the provision in the deed.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Bill by Eugene Mahoney against Mary Conley and others to establish a life estate in certain property, and to sell the same. From a decree overruling a demurrer to the complaint, defendants appeal. Affirmed.

The bill in this case was filed by the appellee, Eugene Mahoney, on March 8, 1893, against the appellants, praying for the establishment in certain property of a life estate in the complainant, and for the sale of said property. The bill shows that in 1885, Bridget Mahoney, the wife of the complainant, and the mother of most of the respondents, contracted for the purchase of a lot, to be conveyed to her by Moses Bros., the owners thereof; that there was executed by said Moses Bros. to the said Bridget Mahoney a bond for title, by which the said Moses Bros. agreed upon the payment of \$8,000 to convey the said property by warranty deed to Bridget Mahoney, "to have and to hold to her sole and separate use, free from the control, debts or contracts of her present or any future husband;" that there were several payments made in compliance with the contract of purchase; that on the death of Bridget Mahoney, on October 8, 1890, there was due upon said property, \$4,000; that after the contract of purchase, there had been placed upon her said property, by the purchaser, permanent improvements, and that the property was worth in

the real-estate market of Montgomery, where it was situated, about \$15,000. The bill avers that Moses Bros., the original vendors, subsequent to said contract of sale, made a general assignment for the benefit of their creditors, and that Janney and Cheney, the regularly appointed trustees under said general assignment, had succeeded to the right of Moses Bros. in the property involved in this controversy. The bill further averred: "That though orator is, under the laws of the state of Alabama, entitled to the use of said realty for his life and the fee thereof will vest in the children and heirs at law of said Bridget Mahoney, as aforesaid, yet, owing to the condition of said property and its small rental value and said taxes, insurance and repairs, it is, and must continue to be absolutely profitless to your orator, and, as there are no assets of said Bridget Mahoney's estate out of which to pay the installments of purchase money aforesaid as they fall due, the interest thereon and the necessary taxes, repairs and insurance, for and on said real estate, there is great danger that the improvements thereon may become so impaired as to work great damage to the value of said real estate, and probable failures to meet and pay said installments of purchase money, as they fall due, may and will, in all probability, result in the assignees of said vendors hereinafter to be named, declaring and insisting on the forfeiture of said purchase, as provided for in said agreement or contract of sale; which will work great and irreparable damage and loss, both to your orator and to the major and infant heirs and distributees of the estate of said Bridget Mahoney; to the extent of their being entirely deprived of said real estate." The parties respondent to the bill were the children of said Eugene and Bridget Mahoney, and the children of such of their children as had died, and the trustees of the Moses Bros. estate. The prayer of the bill was as follows: "That the said real estate be sold under the decree and direction of this honorable court; and that the title thereto of the heirs and distributees of the said Bridget Mahoney and the title thereto of the said J. O. Cheney and G. O. Janney, as trustees of said Moses Bros., be vested in the purchaser thereof. That it be referred to the register of this court to take and state an account of what is still due as the purchase money for said real estate under said contract of purchase aforesaid, interest and principal. And that out of the proceeds of such sale of said land be first paid in full the principal and interest ascertained to be due said Cheney and Janney, as trustees of said Moses Bros., for the purchase money of said real estate and that the balance of the proceeds of said sale be, under the directions of this honorable court, invested in such reliable and interest bearing securities as may appear safe and just to all concerned. That the interest thereon and therefrom be decreed and ordered to be paid to orator or his as-

signs by the register of this court, for and during the natural life of orator, on the receipt thereof by orator, or his assigns, and that after orator's death the principal of said proceeds be paid over to said heirs and distributees of said Bridget Mahoney, or whoever may be then entitled to the same." The respondents moved to dismiss the bill for the want of equity, and demurred to the bill upon the following grounds: (1) That it shows that the complainant is not entitled to file said bill. (2) Because the bill shows on its face that the complainant has no interest in the lands described therein. (3) That it is shown by the bill that the estate of Bridget Mahoney in said land was a separate estate, and all of the marital rights of said complaint were thereby excluded. (4) That the bill shows that Bridget Mahoney was not seised in an estate of inheritance in fee of the land described in the bill, and that complainant has no estate by curtesy therein. On the submission of the cause, upon the motion and the demurrer, the court overruled the motion to dismiss for the want of equity, and also overruled the demurrer. The respondents bring this appeal, and assign as error this decree of the chancellor.

Lester C. Smith, for appellants. Kirkpatrick & McDonald and B. C. Turner, for appellee.

HARALSON, J. 1. The act of 28th February, 1887, carried into the Code of 1886, is a complete revision of the old, and the institution of a new system of law regulating the rights and liabilities of husband and wife. It prescribes, or rather creates, two kinds of separate estate,—equitable and statutory. Section 2351 defines these two estates. It reads: "All property of the wife, whether acquired by descent or inheritance, or gift, devise, or bequest, or by contract or conveyance, or by gift from a contract with the husband, is the separate property of the wife within the meaning, and is subject to all the provisions of this article, saving and excepting only such property as may be conveyed to an active trustee for her benefit."

2. Construing this act, we have held, that the distinction which had theretofore been made and preserved between statutory and equitable separate estates, has been abrogated, except in cases where the property is conveyed to an active trustee, for the wife,—a trustee having some duties to perform in reference to the property,—and that with this single exception, equitable separate estates are now statutory. *Rooney v. Michael*, 84 Ala. 583, 4 South. 421; *Maxwell v. Grace*, 85 Ala. 579, 5 South. 319; *Marshall v. Marshall*, 86 Ala. 389, 5 South. 475.

3. To make these sweeping changes in the law, to abolish the husband's trusteeship of statutory estates of the wife theretofore existing, and thereby vest her with the legal title, and to bring all such estates under the operation and dominion of the new system, there existed no legislative incapacity. This trusteeship and these estates were created by statute, and might have been abolished by statute, the only prohibition on legislative authority in such connections being, that no law can be given a retroactive effect, so as to interfere with the rights which have become vested in third persons, or with any right created by contract. *Railroad Co. v. Bynum*, 92 Ala. 338, 9 South. 185; *Ramage v. Towles*, 85 Ala. 589, 5 South. 342; *Rooney v. Michael*, supra; *Jordan v. Smith*, 83 Ala. 301, 3 South. 703.

4. The only question we need consider in this case, as presented by counsel for appellant, is, whether under the provisions of the married woman's law of 1887 (Code, §§ 2341-2556, inclusive), the husband is entitled to distribution in the estate of his wife who died intestate, and to the use of her realty during life. We have quoted above, section 2351 of the Code, which makes all the property of the wife, however acquired, her separate property, subject to all the provisions of the Code, saving and excepting, only, such property as may be conveyed to an active trustee for her benefit. This provision covers the property held by Mrs. Mahoney at her death. She did not hold it by the intervention of an active trustee, a condition necessary to withdraw it from the dominion of the said act of 1887, as found in the Code. Nor does the contract under which she acquired it, vest in her any right, which, under constitutional guaranties, relieves it from the operation and effect of that act.

5. Section 2353 of the Code provides: "If a married woman having a separate estate die intestate, leaving a husband living, he is entitled to one-half of the personalty of such separate estate absolutely, and to the use of the realty during his life." Here then, we have an estate acquired by purchase by the wife during her life, which is her statutory property, under and subject to the provisions of the Code,—not held by an active trustee for her benefit,—and the wife dies leaving a husband and children. Such a condition is met as brings her estate for distribution under said section 2353 of the Code.

It is unnecessary to consider the question of the common-law right of curtesy of the husband in the lands of his wife. There was no error in overruling the demurrer to the bill. Affirmed.

(34 Fla. 186)

ADAMS v. STATE.

(Supreme Court of Florida. July 31, 1894.)

CRIMINAL LAW—FORMER JEOPARDY — DISCHARGE OF JURY BEFORE VERDICT — EXCLAMATIONS OF CHILDREN AS PART OF RES GESTAE INADMISSIBLE, WHEN — WHEN PARTY MAY IMPEACH HIS OWN WITNESS.

1. Section 1093, Rev. St., providing as follows: "When a jury, after due and thorough deliberation upon any cause, shall return into court without having agreed on a verdict, the court may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but if they shall return a second time without having agreed on a verdict, they shall not be sent out again without their consent, unless they shall ask from the court some further explanation of the law."—is applicable alike to both civil and criminal cases, and confers upon juries the legal right to be discharged from any cause when, after due and thorough deliberation, they come into court for the second time, after being recharged, and avow their inability to agree upon a verdict, without requesting further explanation of the law. The statute is designed to put a limitation upon the right of the court to detain a jury indefinitely in any cause after it is ascertained that, on due and thorough deliberation, it is impossible for them to agree upon a verdict. A plea interposed by the defendant in a criminal cause, claiming an abatement of the prosecution on the ground of former jeopardy, that shows upon its face that the discharge of the jury before verdict, at the trial urged as the former jeopardy, was done in conformity to the provisions of this statute, is properly overruled upon demurrer thereto, particularly where the same plea shows that, before their discharge, the jury reported some of their number to be sick.

2. Where a little child who, at 3½ years of age, was a bystanding spectator of a homicide, proves, nearly two years subsequent to the occurrence, not to be possessed of sufficient comprehension and intelligence to be competent then to testify as a witness, its exclamations and utterances at the time of the homicide, even though they may have been part of the *res gestae*, are not admissible in evidence through the mouth of a third person who heard such exclamations at the time; and this upon the ground that a child of such tender years, so lacking in intelligence and discrimination, cannot comprehend passing events with anything like such accuracy as to render its exclamations or observations in reference thereto at all reliable or admissible as evidence.

3. Under section 1101, Rev. St., that permits a party producing a witness to impeach him when he proves adverse, a witness cannot be impeached who simply fails to testify to beneficial facts that were expected from him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. When a party's witness surprises him by not only failing to testify to beneficial facts expected of him, but by giving harmful evidence, that is contrary to what was expected, then, as is the purpose of this law, he is permitted to counteract the prejudicial effect of such adverse testimony from his own witness, by proving that he has made statements on other occasions that are inconsistent with such adverse evidence.

4. Even where a party's own witness is properly impeached, under this statute, by proof of conflicting statements made on other occasions, the conflicting statements as made to and detailed by the impeaching witness should not be considered as substantive evidence in support of the party's cause who produced such impeached witness, but has weight only for the purpose of counteracting or annulling the harm-

ful effects of the adverse testimony given in the cause by the impeached witness that is inconsistent with his statements shown to have been made on other occasions. It was never the purpose of the law to permit a party to produce a witness, and upon his simple failure to testify to expected facts, without giving prejudicial evidence, to permit another witness to be produced, ostensibly for the purpose of impeachment, but in reality to introduce into the cause, as substantive independent evidence, the hearsay conflicting statements of the impeached witness alleged to have been made on other occasions.

(Syllabus by the Court.)

Error to circuit court, Columbia county; John F. White, Judge.

William Adams was convicted of murder, and brings error. Reversed.

Blackwell & Rees and A. J. Henry, for plaintiff in error. W. B. Lamar, Atty. Gen., for the State.

TAYLOR, J. This is the second appearance of this case upon writ of error before this court. 28 Fla. 511, 10 South. 106. After the reversal of the former conviction, the plaintiff in error was again tried at the fall term, 1893, of the circuit court for Columbia county, upon the same indictment, and was convicted of murder in the first degree, with recommendations to mercy, and sentenced to imprisonment in the penitentiary for life. From this latter conviction he takes this his second writ of error.

Before going into the last trial, the defendant interposed the following plea of "former jeopardy": "That the said state of Florida is barred and precluded from further prosecuting him herein, because he says he has once been in jeopardy under a former trial of said cause, for that heretofore, to wit, on the 29th day of November, A. D. 1892, at the regular fall term of this court, duly organized and held according to law, said cause came on for trial; and, this defendant having been arraigned and pleaded not guilty, a jury was duly chosen, impaneled, and sworn according to law. That the state's attorney, prosecuting for said state of Florida, to maintain the issues in said cause, produced the witnesses in behalf of said state, who were duly sworn and testified and gave evidence in said cause before said jury; and the said state's attorney, prosecuting in behalf of said state, as aforesaid, having concluded the testimony for and in behalf of said state, this defendant produced witnesses on his behalf, who were duly sworn, and who testified and gave evidence in behalf of this defendant, before said jury and after said evidence was closed on behalf of the state and the defendant; and, after argument of counsel both on behalf of the state and the defendant, the court delivered in writing its charge to the jury, and submitted to the said jury the said cause; and thereupon the said jury retired from said court, in charge of their bailiff, to their room, under

instructions of the court, at 5 o'clock p. m., on the 7th day of December, A. D. 1892. That at 6 o'clock, on the same evening, the jury were escorted by their bailiff to supper 100 yards from the court house. At 7:30 o'clock the jury retired to their room, at which time bedding was carried into said room, by leave of and in the presence of the court, for the use of the jury. At 7 o'clock the next morning thereafter, the jury were escorted by their bailiff to breakfast, and at 8 o'clock the jury retired to their room. At 9 o'clock on said morning, said jury came into court, and asked the court for the written charge, which was delivered to the jury, and they retired to their room. At 11 o'clock on the same morning, the jury came into court, and stated to the court that they could not agree. Then the court did not explain to them anew the law applicable to the case, but sent them back without so doing. At 3 o'clock p. m., on the same day, said jury came into court again, and stated to the court that they could not agree, and further stated that three of the jurymen were sick, and that several others were worn out; whereupon the court discharged said jury, against the consent of the defendant, and without any good and sufficient cause. That said jury was discharged in the afternoon of the 8th day of December, 1892, and said term of court did not expire by operation of law until the 12th day of December, 1892; whereupon the defendant prays the judgment of this court that said state of Florida is barred and precluded from further prosecuting this defendant for said charge of felony." To this plea the state interposed a demurrer that was sustained by the court.

The ruling upon this demurrer is assigned as error. A very strict rule was formerly applied prohibiting the discharge of a jury in a capital case, without the prisoner's consent, before an agreement upon a verdict; many of the courts holding that where they were thus discharged, simply because of their inability to agree upon a verdict, it constituted a bar to any further prosecution for the offense. The absurdity of this doctrine, however, afterwards became generally apparent, and the much-relaxed and far more reasonable rule prevailed that when, after a reasonable confinement and after full instructions, the jury avow an utter inability to come to an agreement in respect to their verdict, the judge, in the exercise of a sound discretion, might discharge them, and that such discharge would not operate as a bar to further prosecution; and it is further held that the necessity for the discharge of the jury, whatever it may be, must appear upon the record, and it must be adjudged by the court, from proper evidence, that such necessity existed which made a discharge of the jury imperatively necessary. *Proff. Jury*, §§ 184-491, inclusive, and citations.

These rules have been further relaxed here by the following provisions of our statute:

"When a jury, after due and thorough deliberation upon any cause, shall return into court without having agreed on a verdict, the court may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but if they shall return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they shall ask from the court some further explanation of the law." *Rev. St.* § 1093.

This statute relieves the judge of much of his discretion in the adjudication of the question as to when the necessity has arisen for the discharge of the jury because of inability to agree upon a verdict, and confers upon the jury the legal right to be discharged when, after due and thorough deliberation, they come into court, after being recharged, for the second time, and avow their inability to agree, unless they shall then ask some further explanation of the law. This provision was first enacted as section 27 of chapter 1628, approved July 28, 1868, entitled "An act relating to jurors." Counsel for plaintiff in error contends that it does not apply to criminal cases, but relates to the trial of civil causes alone. Such is not our construction of its provisions. It was originally embodied as part of a general statute relating to jurors in all causes, civil and criminal, and was and is designed to put a limitation upon the right of the court to detain a jury indefinitely in any cause, civil or criminal, after it is ascertained that, on due and thorough deliberation, it is impossible for them to agree upon a verdict. It cannot be successfully argued that the discharge of a jury before verdict, when done under and in accordance with the provisions of this statute, can have the effect of precluding further prosecution under the constitutional inhibition against a second jeopardy for the same offense.

The plea of the defendant shows upon its face that the provisions of this statute were substantially complied with in the discharge of the jury to whom the cause had been submitted at the former trial. It shows that the jury had the case under deliberation nearly, if not quite, 24 hours; that they came into court without having agreed upon a verdict, and requested that the written charge of the court be delivered to them, which was done. This was tantamount to a repetition to them by the court of its charge. It shows that, after this, they came into court, and avowed their inability to agree; that the court again sent them back for further deliberation; that, several hours afterwards, they came into court for the third time, again avowing their inability to agree upon a verdict, whereupon the court discharged them. The plea, showing, as it does, that the discharge of the jury at the former trial was done in conformity to law, because of their inability to agree upon a verdict, does not disclose any legal bar to further prosecu-

tion, and the state's demurrer thereto was properly sustained. Besides this, the plea shows that, before their discharge, the jury reported three of their number to be sick, which, of itself, would have justified their discharge.

The deceased was called to the door of his house at night, and received his death shot while standing in the partly-opened door. His little son (according to the testimony of the widow of the deceased), who was then only $3\frac{1}{4}$ years old, followed his father to the door, and, immediately after his father was shot, ran out on the front porch, while his mother remained inside the house with his wounded father, whom she assisted in getting to his bed. Over the objection of the defendant, the court permitted Mrs. Minnie Moore, the widow of the deceased and mother of this little child, to testify at the trial that, when the child ran out on the porch when his father was shot, he (the child) exclaimed, "Oh, man, why have you shot my papa?" and that she then called the child to her, and that he then said: "Oh, mamma, there's two men out there. There's a white man and a negro. The white man's face was all covered with beard," etc. The objection to this testimony was that the little child, whose exclamations are here attempted to be given through the mouth of its mother, was incompetent to testify. We think the court erred in admitting this evidence. In 3 Rice, Ev. p. 291, it is said: "The admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. It is a question addressed to the good sense and discretion of the judge whether the child is competent or not; but neither the testimony of the child without oath, nor evidence of any statement which he has made to any other person, is admissible. This is now the established rule in all cases, criminal and civil." Com. v. Hutchinson, 10 Mass. 224; Reg. v. Nicholas, 2 Car. & K. 246; Reg. v. Perkins, 2 Moody, Cr. Cas. 135. The record shows that this little child was afterwards offered as a witness for the state, and, after being examined by the court as to his competency, the court ruled as follows: "I don't think this child's comprehension is sufficiently developed to testify. I don't think he is sufficiently developed to understand the obligations of an oath. I don't think he is a competent witness." Upon excluding the child as a witness, the court, of its own motion, required the stenographer to read the evidence of Mrs. Moore. The stenographer read therefrom as follows: "The child ran out on the porch when his father was shot, and said, 'Oh, man, why have you shot my papa?' The court then stopped him, and ruled as follows: 'Gentlemen of the jury, that much of the testimony I allow to go to you. After reflection, I am satisfied with that statement made by the little boy and rehearsed in Mrs. Moore's testimony. The balance of what he said to his mother is

withdrawn from you, not to be considered by you in making up your verdict.' This ruling was no doubt intended to withdraw from the consideration of the jury all of the little boy's utterances except the one exclamation, "Oh, man, why did you shoot my papa?" but the ruling, as represented to have been made in the record before us, is confusing, and did not make it entirely clear to the jury what part of it they were to consider, and which part not to entertain. We think the whole of the child's exclamations and utterances on the occasion should have been excluded. If, nearly two years after the occurrence, this child, with its increased age, was found by the court not to have sufficient comprehension and intelligence to be competent as a witness, it would seem to be superfluous to say that, at the time of the occurrence, when he was two years younger, he would hardly have been possessed of sufficient discrimination or intelligence to comprehend passing events with anything like such accuracy as to render his exclamations or observations in reference thereto at all reliable, or admissible as evidence, even though they may have been part of the res gestae. The whole of this child's exclamations and sayings should have been excluded.

Frank Walker, a witness produced by the state, testified that he remembered the circumstance and time of the killing of the deceased; that, on the night of the homicide, he was over at one Jim Wright's, and, in going over there, he had to cross a creek called "Falling Creek," the place of crossing being about a quarter of a mile from Wright's; that he crossed the creek, going to Wright's, about 7 o'clock; that he left Wright's to go home about half past 7; that his brother, Hardy Walker, married a sister of the deceased; that he went to Jim Wright's house twice that night; that he did not see any one there at the creek that night; that he had never stated to any one theretofore that he had seen two men there at the creek that night. For the avowed purpose of impeaching this witness as to that part of his evidence wherein he states "that he did not see any one at the creek that night, and that he had never told any one that he had seen two men at the creek that night," the court, over the defendant's objection, permitted the state's counsel to ask the witness the following questions, as a predicate for the impeaching evidence: "Didn't you tell Will Prevatt, at White Springs, Florida, in the spring, after Will Adams had been tried the first time, sitting on the back steps at Mr. Ogden's store, that you saw two men at Falling creek, or near there, on the night that Jim Moore was killed, and that you took it to be Ike Spanish and Will Adams? Didn't you, at the same time and place, in answer to a question from Will Prevatt say you would go into court and swear to that, answer that you would do it?" To both of these questions the witness answered that he

had never made any such statements. The court then permitted the state's attorney, over the defendant's objection, to elicit from Will Prevatt the following evidence: "At White Springs, in the spring, shortly after the first trial of this case, on the back steps of Mr. Ogden's store, Frank Walker was telling me why he left home, and told me that he saw Ike Spanish and Will Adams right there, by Falling creek, on the night Jim Moore was killed. I asked him if he would go into court and swear to that, and, with an oath, he told me that he would. We were alone when he told me this." The defendant's counsel objected to the admission of all this evidence, upon the ground that Frank Walker, the state's witness, sought to be impeached thereby, was not an adverse witness, and assigns its admission as error.

Our statute on the subject of the impeachment of a witness by the party producing him is as follows: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness prove adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement." Rev. St. § 1101. It is very erroneous to suppose that, under this statute, a party producing a witness is at liberty to impeach him whenever such witness simply fails to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. The impeachment permitted by the statute is only in cases where the witness proves adverse to the party producing him. He must not only fail to give the beneficial evidence expected of him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. When a party's witness surprises him by not only failing to testify to the facts expected of him, but by giving harmful evidence that is contrary to what was expected, then, as is the purpose of this law, he is permitted to counteract the prejudicial effect of the adverse testimony of such witness, by proving that he has made statements on other occasions that are inconsistent with his present adverse evidence. It never was the purpose of this statute to allow a party to put up a witness for the purpose of endeavoring to get from him beneficial evidence, and, upon his simple failure to testify to the desired facts, to permit him to get the benefit of those expected facts, as substantive evidence, through the mouth of another witness, under the guise of impeachment. Evidence adduced in this manner is nothing more than the veriest hearsay, and is inadmissible. Even where a witness is properly

impeached by proof of conflicting statements made on other occasions, the conflicting statements as made to and detailed by the impeaching witness should not be considered as substantive evidence in sustenance of the party's cause who produced the impeached witness, but has weight only for the purpose of counteracting or annulling the harmful effects of the adverse testimony in the cause given by the impeached witness that is inconsistent with his statements testified to have been made on other occasions. *Bennett v. State*, 24 Tex. App. 73, 5 S. W. 527; *White v. State*, 10 Tex. App. 381; *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Hull v. State*, 93 Ind. 128; *People v. Safford*, 5 Denio, 112; *People v. Jacobs*, 49 Cal. 384; *Com. v. Welsh*, 4 Gray (Mass.) 535; *Smith v. Price*, 8 Watts, 447. It is very evident from the record before us that the witness Frank Walker did not give any evidence that was at all prejudicial to the state's case, but simply failed to testify to given facts that it was supposed that he knew, and that would have been beneficial; and it is further evident that he was introduced by the state's attorney with the expectation, from the experience of the former trial of the cause, that he would not testify to having seen Ike Spanish and the accused at the crossing of Falling creek on the night of the homicide; and it is equally evident that the testimony of the witness Will Prevatt, detailing Walker's former declarations to him on that point, was introduced ostensibly to discredit and impeach Walker, but in truth for the purpose of operating as independent evidence, to establish the fact that Spanish and Adams were seen together at that time and place. It was never the purpose of our statute to permit the proof of facts to be accomplished in any such manner. The error in the admission of this evidence is fatal to the propriety of the conviction had. The only direct positive evidence on the part of the state that places the accused at the scene of the homicide is that of Ike Spanish, an indicted accomplice. He testified that Will Adams, the accused, fired the fatal shot, and that he and Adams were there together alone; that, in going there and returning, they passed by Jim Wright's place, and crossed Falling creek at the crossing near his place (that is, not far from the scene of the homicide) at about the time that it was attempted to be shown that Frank Walker saw them there. Could it have been proven by proper evidence that Spanish and Adams were seen together at this time and place, it would have been strongly corroborative of Spanish's evidence. This highly material corroborative proof was conveyed to the jury illegally, as we have seen. How much weight it had in the production of the verdict found it is not for us to surmise. It was fraught with capacity for harm to the accused, and the presumption is that it wrought its hurtful effect. *Hawkins v. State*, 32 Fla. 248, 13

South. 353. The witness Ike Spanish was permitted, over the defendant's objection, to testify to various conversations had by him with one T. P. Bethea (who is also indicted as an accessory before the fact with the accused) that occurred prior to the homicide, while the accused was not present; and the admission of these conversations, held in the absence of the accused, is assigned as error. There is no merit in this assignment. It has been repeatedly held here that an accomplice is a competent witness, and that a conviction may be had upon his uncorroborated testimony where it satisfies the jury beyond a reasonable doubt. *Jenkins v. State*, 31 Fla. 196, 12 South. 677, and cases there cited. If the accomplice is competent to establish any phase of the case, he is competent to prove all essential and pertinent facts therein within his knowledge. By the evidence of this witness, if true, it is shown that there was a conspiracy between Bethea, Adams, and himself to commit this homicide. The existence of the conspiracy having been shown by him, it was not error to permit him to testify to declarations made to him, in the absence of the accused, by another conspirator, when made prior to the completion of the common design, and in reference to and in furtherance of such common design. *Hall v. State*, 31 Fla. 176, 12 South. 449. While we do not now decide as to whether the objectionable features in the charges of the court hereafter to be pointed out would, of themselves, be cause for reversal, yet, as the case has to go back for another trial, because of the error already found, we will suggest such corrections in the instructions given as we think to be proper.

In the charge upon reasonable doubt we think the following formula should be omitted, viz.: "Nor are you at liberty to disbelieve as jurors if, from the evidence, you believe and are satisfied, beyond a reasonable doubt, as men. Your oaths impose on you no obligation to doubt where no doubt would exist if no oath had been administered." It adds nothing to the charge in explanation or elucidation of what character of doubt must exist in order to justify an acquittal, but, on the contrary, is confusing in its tendency, and tends to impress upon the minds of the jury the idea that their oaths as jurors do not impose upon them the duty to give the evidence any more grave, careful, or solemn consideration than if they were forming conclusions upon it as citizens, without the obligation of their oaths as jurors. The following clause of the same charge, viz.: "But if, after a careful consideration of all the evidence, you feel an abiding conviction in your minds that the accused is guilty as charged, then, in law, you have no reasonable doubt, and you should find a verdict of guilty,"—should be amended by inserting therein, after the word "minds," the words "to a moral certainty." To the following in-

struction, viz.: "In the case at bar, if you are satisfied from the evidence, under these instructions, that the defendant, at the time and place mentioned in the indictment, shot and killed James Moore, the deceased, as charged in the indictment, and that, before or at the time the fatal shot was fired, the defendant had formed in his mind a willful purpose and intention to take the life of the deceased, and the fatal shot was fired in furtherance of such unlawful purpose, and that the deceased, James Moore, was killed then and thereby, then you may and should find the defendant guilty of murder in the first degree, in which case the form of your verdict may be, 'We, the jury, find the prisoner at the bar guilty of murder in the first degree; so say we all,' one of you signing as foreman and dating it,"—it would have been better to add that such killing must have been done "without justification or excuse," and from it to omit telling the jury what particular degree of murder their verdict should find; and, too, we think it would have been better to have omitted from it the form that the verdict should be, especially as the court had, in a formal charge, already given formulas for verdicts in such cases. The following clause of the charge upon the question of an alibi, viz.: "And, when an alibi is established by the evidence to the satisfaction of the jury, it is conclusive evidence of the innocence of the person accused; and in the case at bar, if you find from the evidence and are satisfied that the defendant, William Adams, was not present at the time and place the deceased was killed, you should find a verdict of not guilty. But, to make the defense of an alibi available as a perfect defense, the evidence of its existence must cover the whole time when the presence of the defendant was required to commit the criminal act,"—is decidedly faulty in requiring the evidence of the alibi to satisfy the jury that the accused was not present at the time and place of the crime. Proof of an alibi is sufficient to acquit if it, considered in connection with all the testimony, raises a reasonable doubt in the minds of the jury of the presence of the accused at the commission of the crime. It is not necessary that it should satisfy the jury that he was not so present. *Murphy v. State*, 31 Fla. 166, 12 South. 453.

The last clause of this charge would more accurately express the law as to the time to be covered by the proof of the alibi by the addition thereto of the following: "Or it should locate the accused at some other point, at such a time, either before or after the commission of the crime, as made it impossible for him to be present at its commission." The following clause at the conclusion of the charge on alibi, viz.: "For obvious reasons, the evidence for as well as against the defense of an alibi in the case at bar demands your most careful and

thoughtful consideration,"—we think, should have been omitted. It would have been well enough to impress the jury with the idea that the entire evidence in the cause, touching all of the issues therein, demanded their most careful and thoughtful consideration; but to single out the defendant's effort to establish an alibi, and to concentrate the jury's most careful and thoughtful consideration upon that phase of the case alone, might have had a tendency to impress the jury, unfairly, with the idea that the court viewed that phase of the case with suspicion.

The following charge upon the evidence of accomplices, viz.: "The principle upon which the evidence of accomplices has been and is received in evidence, and considered legal and competent, is that in many cases, were it otherwise, it would hardly be possible, if not altogether impossible, to prove the guilt of one who violates the law under cover of darkness or secrecy. Where the evidence of an accomplice is corroborated by facts and circumstances proven, tending to connect the defendant with the homicide, or by the evidence of other credible witnesses, it is entitled to more weight than when not so corroborated, and the corroborating testimony should tend to connect the accused with the crime,"—we think, should have been omitted. As ruled upon so often by this court in other cases, the court has no right to instruct the jury upon the weight to which any evidence in a cause is entitled. *Wheeler v. Baars*, 33 Fla. 696, 15 South. 584, and cases cited.

The following clause of the charge upon the evidence of the accomplice Ike Spanish is decidedly objectionable, for the same reason last mentioned, and should not have been given, viz.: "If, from the evidence, you should believe that the witness Ike Spanish was reluctant to participate in the killing of the deceased, or to be present when he was killed, and should further believe that his presence at the time and place the homicide was committed was secured by threats of personal violence made by the defendant, or by threats made by the defendant T. P. Betha, in the presence or in the absence of the defendant, if made as testified to, then you would be justified in giving to his evidence more weight than if, from the evidence, you should believe that he went of his own free will and choice and participated in the homicide; and, in the determination of the question as to whether he was present at the killing of the deceased willingly or unwillingly, you have the right to inquire from the evidence what motive incited him to be present at the killing, if any has been shown in the testimony that induced him to be present when the homicide was committed."

For the errors pointed out, the judgment of the court below is reversed, and a new trial awarded.

(108 Ala. 658)

ANDERSON v. WHITAKER et al.

(Supreme Court of Alabama. June 21, 1894.)

JUDICIAL SALE—REVERSAL.

The fact that the execution plaintiff and the purchaser of land at a sheriff's sale knew that defendant intended to appeal is not sufficient, on reversal of the judgment, to set aside the sale, where the supersedeas bond was filed on the day after the sale, though before the price was paid, but was not accepted by the clerk until after the money was paid.

Appeal from circuit court, De Kalb county; John B. Tally, Judge.

Motion by R. E. Anderson against Whitaker & Jeffries to vacate an execution sale. The motion was overruled, and movant appeals. Affirmed.

This was a proceeding to vacate and set aside a sale made by the sheriff under a venditioni exponas regularly issued, and was commenced by motion made by the defendant in judgment and execution. It was alleged in said motion that the appellees, Whitaker & Jeffries, on January 30, 1891, obtained a judgment against the appellant, R. E. Anderson, in the circuit court of De Kalb county, in an action instituted by them against the said Anderson to establish a mechanic's lien on certain real estate, and upon the recovery of that judgment an order was issued, commanding the sheriff to sell the specific property described, which was real estate. In obedience to the writ of venditioni exponas thus issued, the property was sold by the sheriff on July 6, 1891, and was purchased and paid for by J. C. Anderson. The purchaser was notified before the sale, and before he paid the amount bid, that the cause would be appealed to the supreme court. The other facts are sufficiently stated in the opinion. The motion to set aside said sale was overruled, and the movant now brings this appeal, and assigns as error the overruling of his motion.

Haralson & Davis and Tompkins & Gray, for appellant.

HEAD, J. We are unable to see any ground upon which the circuit court could properly have set aside the sheriff's sale in this case. The sale was regularly made on the 6th day of July, 1891, under a venditioni exponas duly issued. J. C. Anderson, a stranger to the writ and record, became the purchaser, who, on the next morning, paid the purchase money and received the sheriff's deed. The defendant in execution, the present movant, for the express purpose of saving his right of redemption, surrendered possession to the purchaser, and leased the property from him. The grounds of the motion to vacate the sale are that the plaintiff in execution knew at the time the sale took place that the cause wherein the venditioni exponas issued would be appealed to the supreme court of Alabama, and that said J. C. Anderson, the purchaser, was notified by defendant before the sale, and before he had

paid the amount bid on said sale, that said cause would be appealed to the supreme court; that the cause was appealed, and the judgment reversed and the cause remanded. 11 South. 919. By an amendment of the motion it was alleged that a supersedeas bond was filed in the cause before the payment of the purchase money by said J. C. Anderson. We take this last averment to mean that the bond was filed and approved before the purchase money was paid, or else there is nothing in the whole motion upon which it is conceivable a material issue could be formed.

We remark, in the first place, that the argument upon which counsel for appellant seem to rely mainly—that the purchase was the result of collusion between the plaintiff in execution and the purchaser for the plaintiffs' benefit—has no support in any allegation of the motion, even if there was sufficient evidence to support it, which there was not. The undisputed evidence shows that while the supersedeas bond was handed to the clerk on the morning of the 7th of July, before the purchase money was paid and sheriff's deed executed, yet, as he had the right to do, he demanded time to investigate as to its sufficiency, and did not satisfy himself and accept the bond until several days afterwards. Without deciding, therefore, what its effect would have been upon the sale made the day before, and consummated the next by payment of the bid and delivery of the deed, if the bond had been approved before the latter took place, we are compelled to hold that no supersedeas had been effected prior to the payment of the money and delivery of the deed. There is no valid ground for the motion. *Affirmed.*

(104 Ala. 236)

**FRANCIS CHENEWORTH HARDWARE
CO. v. GRAY.**

(Supreme Court of Alabama. June 21, 1894.)

SALES OF PROPERTY TO BE APPRAISED—WHEN TITLE PASSES.

Claimant, being surety for defendant on certain notes, paid them in consideration of a sale to him of defendant's stock of goods, the goods to be thereafter appraised, and any excess or deficiency in amount made good to the proper party. The goods were delivered to claimant, but before completion of the appraisal plaintiff levied an attachment against defendant thereon. *Held*, that title had passed to claimant.

Appeal from circuit court, Tallapoosa county; N. D. Denson, Judge.

Action by Francis Cheneworth Hardware Company against William Gray, claimant in attachment. Judgment for claimant. Plaintiff appeals. *Affirmed.*

The appellant sued out an attachment, and caused it to be levied on a stock of goods as the property of defendants in attachment, Pogue Bros. William Gray claimed them under the statute, and the trial below was between the plaintiff in attachment

and the claimant, on issue joined on the allegation of the plaintiff that the goods levied on were the property of the defendants in attachment. The evidence showed, without conflict, that Pogue Bros., the owners of the stock of goods, were indebted to the plaintiff and other creditors, at the time of the levy of said attachment, in a sum exceeding \$4,000; that several of their creditors were insisting on the payment of their claims; that in addition to the indebtedness above referred to, defendants owed the Tallapoosa County Bank \$3,252.50, evidenced by five notes payable at said bank, four of which were past due, and the other, for \$745.50, was not due until the 15th December thereafter, 1891, and that on each of said notes William Gray, and J. T. Pogue,—the former the uncle, and the latter the brother of defendants,—were indorsers. The plaintiff also proved the attachment and the return of the sheriff showing the levy, and the value of the goods. The sheriff testified that he made the levy at night, about 9 o'clock; that the store was closed up, and when he knocked for admittance, the door was not immediately opened, but it was finally opened by Andrew Pogue, one of the firm, when he found several persons engaged in taking an inventory of the goods, and among those present were the Pogue brothers; that an inventory of about one-third of the goods had been taken when he entered and made the levy; that Mr. Corpnew told him, that the goods belonged to claimant, asked him for his authority and he showed him the attachment, and Corpnew told him, that the goods belonged to claimant, and that they were making an inventory for him; that witness took an inventory and they aggregated in value at cost prices, with 10 per cent added, to something over \$4,000, and were worth, in his opinion, 80 cents on the dollar. William Gray, the claimant, testified, that he was being pressed that day, the 4th of December, 1891, by the bank for the payment of the four notes on which he was indorser for defendants, and he sought an interview with them and insisted upon their paying them, and Andrew Pogue told him they had no money, but proposed to claimant, that if he would pay said bank notes, including the one not due, they would sell him their stock of goods in settlement of the amount so paid for them, to which proposition claimant consented and purchased the stock of goods from said Pogue in settlement of the debt; that there was a disagreement between them as to the value of the stock, said Andrew contending the goods were of value greater than the debt, and claimant, that they were not of value sufficient to pay the debt, whereupon witness and defendants agreed that each of them should select a man as appraiser, to fix the price of the goods, and that if, under the appraisal of these two, the value of the goods should exceed the amount to be

paid by the witness to the bank, the overplus should remain as the property of the defendants, but, if they should fall short of that amount, then the defendants were to make good the shortage, by the transfer of notes and accounts due to them by customers; that pursuant to this agreement, witness selected C. M. Corprew and defendants selected W. C. Stone as their appraisers, and witness and said Pogue then went to the bank, and there in the presence of its cashier, stated to him the terms and details of their agreement as above stated, and after ascertaining the exact amount of said five notes, the witness, at that time, or shortly afterwards, drew his check on said bank for that amount and delivered the same to the cashier in payment of said notes; that he then had more than the amount for which the check was drawn, to his credit in the bank; that said check was accepted and charged to his account in payment of said notes, which were delivered to him; that he then returned them to the cashier to be kept, along with the other papers of the claimant deposited in the vault of the bank for safe-keeping. The witness further testified, that at his request, the said Corprew, and at the request of the defendants, Andrew Pogue, the said Stone and others, who were to assist them as clerks, together with the witness and T. J. Wright, the cashier of the bank, assembled at the desk in the business house of defendants, and there the witness and defendant Andrew Pogue stated to said appraisers the details of their agreement touching the sale of the goods, and told them that Pogue Bros. had sold claimant the stock of goods in payment of the debt, and that Corprew and Stone, as arbitrators, were to fix the price on the goods, and that he, claimant, then took charge of the goods, and requested Andrew Pogue to deliver the key to the store to Corprew for claimant, which Pogue did, and then claimant left the store and did not return until attracted by the efforts of the sheriff to gain admittance to the room for the purpose of levying this and other attachments on the goods. He further testified, that he was to have the stock of goods for \$3,252.50, the sum paid by him to the bank for defendants. Witness also testified, that in his opinion, the goods were not worth more than 65 cents on the dollar, and that when the appraisers completed their inventory and appraisal, it amounted to \$2,600 only, or \$600 less than the amount he paid for them, and Pogue Bros. did not get any of the goods back. The defendant Andrew Pogue, being examined, testified in substance to the same things as were stated by claimant in his testimony as to what occurred between them as to the details of the sale, what occurred at the bank and at the store. Said Corprew also testified substantially, to what occurred at the store, the same as claim-

ant did in his testimony. All three expressed their opinion that the goods were worth only \$2,600, or 65 cents on the dollar, and this was a fair value for them. Upon this evidence, the plaintiff, after the court had given its charge to the jury, requested the court to charge, that, "If the jury believe the evidence; they will find the issue in favor of the plaintiff," which charge the court refused to give, and the plaintiff excepted. The refusal of the court to give this charge, is the only error assigned.

H. J. Gillam, for appellant. Henry A. Garrett, for appellee.

HARALSON, J. The rule is too well settled, to require further discussion, that the title to personal property may and will pass to a vendee, without fixing an absolute price, if the circumstances attending the transaction satisfactorily show that such was the intention of the contracting parties. And, if the articles sold, were to be afterwards weighed or measured, so as to adjust and fix accurately the price to be paid, and it is clear from the terms of the contract, that the parties intended that the sale should be complete before the weighing or measuring should take place, the title to the property will be held to have passed before this was done. An actual delivery of the property sold, such as the evidence establishes, without conflict, was done in this case, manifests an intention of the parties to effect a completed sale, and the inventory provided to be afterwards taken, must be held to have had reference to the adjustment of the price, and not as a part of the contract of sale, without the performance of which it was not completed. So, the title passed at once; and, if, for any reason, the inventory had not been afterwards taken, and the parties could not agree on the price, such happenings, as we have held, would have made no difference in the character of the transaction. *Foley v. Felrath* (Ala.) 13 South. 486; *Greene v. Lewis*, 85 Ala. 221, 4 South. 740; *Wilkinson v. Williamson*, 76 Ala. 163; *Shealy v. Edwards*, 73 Ala. 175; *Allen v. Maury*, 68 Ala. 10. There was no error in the ruling of the court below. Affirmed.

(108 Ala. 473)

HERTZFELD v. BAILEY et al.

(Supreme Court of Alabama. June 14, 1894.)

EVIDENCE—DEED—VENDOR'S LIEN.

1. Under Acts 1888-89, p. 41, providing that deeds theretofore executed according to law, but not recorded within the time required by law, if recorded within two years after its passage, shall "have the same force and effect in all things" as if recorded in due time, a deed recorded under such act is admissible in evidence without proof of execution.

2. A vendor's lien cannot be enforced against a purchaser from the vendee without notice of the lien.

Appeal from chancery court, Tallapoosa county; S. K. McSpadden, Chancellor.

Action by Reuben Hertzfeld against J. J. Bailey and others to enforce a vendor's lien. Judgment for defendants, and plaintiff appeals. Affirmed.

Acts 1888-89, p. 41, provides that conveyances of any kind, executed according to law prior to its passage, but not recorded in the time allowed by law, may be recorded within two years after its passage, and, when so recorded, will have the same effect as if recorded as required by law at date of its execution.

The foundation of the claim for a vendor's lien was a note or bond which was executed by J. J. Bailey & Co. to one D. L. McAllister, which recites that it was given for the purchase money of the lands upon which the lien is sought to be fastened. The individual members of the firm of J. J. Bailey & Co. and the members of the firm of Garrett & Sons are made parties defendant, and the bill alleged, as to the latter, that they set up "some of interest in" the property sued for, but did not allege the character of their interest. There was a decree pro confesso against the individual members of J. J. Bailey & Co., and the other respondents filed their answer to the bill of complaint, setting up the defense therein that they were innocent bona fide purchasers for value without notice of the claim sought to be enforced by the complainant. The testimony taken on the hearing of the cause tended to show that D. L. McAllister on December 29, 1885, sold and conveyed by deed to J. J. Bailey & Co. the lands involved in this controversy, Bailey & Co. executing at the time of the purchase the note which is the foundation of the complainant's claim, for one of the deferred payments of the purchase money, and that said note was duly indorsed and transferred to the plaintiff, and has never been paid. The testimony for the defendants further tended to show that J. J. Bailey & Co., being indebted to the firm of Garrett & Sons in the sum of \$2,160 for merchandise sold to them, executed on February 25, 1888, a mortgage to said Garrett & Sons to secure the payment of said indebtedness, conveying in said mortgage, among other property, the lands involved in this controversy. This mortgage was executed by the individual members of the firm of J. J. Bailey & Co., jointly with their wives; execution thereof was duly acknowledged on February 27, 1888; and it was filed for record in the office of the judge of probate on March 28, 1888. The mortgage debt not having been paid at maturity, Garrett & Sons, through their agent, George E. Driver, sold the lands conveyed in the mortgage, under the power contained therein; and at said sale George J. Garrett, one of the members of the firm of Garrett & Sons, being the highest bidder, became the purchaser. At the request of Garrett & Sons, after said purchase by George J. Garrett, J. J. Bailey & Co., on

November 27, 1888, executed a deed to the said purchaser, George J. Garrett, conveying the lands sold under the mortgage, and purchased by said Garrett. This deed was executed by the individual members of the firm of J. J. Bailey & Co., together with their wives, was duly acknowledged on the date of its execution, and was filed for record in the office of the probate judge on January 14, 1890. This mortgage was attached, as "Exhibit A," to the cross interrogatories to George E. Driver. The taking of the mortgage, the foreclosure thereof, and the making of the deed to George J. Garrett were attended to by George E. Driver, the agent of Garrett & Sons. In the deposition of said Driver, he testified that he was not aware of the ownership by the complainant of the note which is the foundation of his claim for a vendor's lien until the evening of the day the land was sold under the mortgage, after such sale had been made, and that neither he nor any member of the firm of Garrett & Sons had any notice of such claim by the complainant before the execution of the mortgage to them by J. J. Bailey & Co., or before the purchase by, and the conveyance of the land to, said George J. Garrett. The complainant objected to the introduction in evidence by the defendants of the deed dated November 27, 1888, from J. J. Bailey & Co. to George J. Garrett, because "said deed is not self-proving, and its execution was not properly proven." He also objected to the introduction of the mortgage made by Bailey & Co. to Garrett & Sons, on the ground that the execution thereof was not properly proved, and that the mortgage was not actually offered in evidence. The complainant also objected to the consideration by the court of the deposition of George E. Driver, and of the said deed and mortgage just mentioned, because they were not, "by the note of submission, offered in evidence." The note of submission recited that the respondents submitted their cause "(1) upon their answer and amended answer, and exhibits thereto attached; (2) upon the depositions of George E. Driver, and Exhibit A attached to the cross interrogatories to this witness; (3) upon the original deed, dated December 29, 1885, from D. L. McAllister and wife to J. J. Bailey & Co., a copy of which is attached as Exhibit A to respondents' answer; and upon the original deed, dated November 27, 1888, from J. J. Bailey & Co. to George J. Garrett, a copy of which is attached to respondents' answer as Exhibit B." On the hearing of the cause, upon the pleadings and proof, and the objection of the complainant to certain portions of the evidence introduced, the chancellor overruled the objection to the introduction of the deed, mortgage, and the deposition of George E. Driver, and, upon the consideration of the evidence, decreed that the complainant was not entitled to the relief prayed for, and dismissed his bill.

W. D. Bellger, for appellant. H. J. Gil-
lam, for appellees.

HEAD, J. There is no merit in the objection to the introduction, or consideration by the court, of the mortgage of Bailey & Co. to Garrett & Sons, their deed to Garrett, and the deposition of Driver. The note of submission shows they were regularly introduced. The mortgage was duly acknowledged and recorded within 12 months after execution. The deed was duly acknowledged and recorded within the time allowed by the act approved February 21, 1889 (Acts 1888-89, p. 41).

Garrett & Sons were bona fide purchasers without notice of complainant's vendor's lien. Having a debt of \$2,160 against Bailey & Co., presently due, they extended payment thereof for more than seven months, upon the execution of a mortgage upon the land to secure it. The debt not having been paid, they foreclosed the mortgage, and procured the mortgagors to convey by absolute deed to Garrett, one of the mortgagees, in satisfaction of the debt. All of this took place without any notice to either of the mortgagees, or any one representing them, of complainant's equity. There seems to us no possible ground on which complainant can claim a decree. *Thames v. Rembert's Adm'r*, 63 Ala. 561; *Insurance Co. v. Randall*, 71 Ala. 220.

Affirmed.

(103 Ala. 664)

TOBIAS et al. v. TREIST et al.

(Supreme Court of Alabama. June 21, 1894.)

ATTACHMENT—INTERVENTION—EVIDENCE—JUDGMENT.

1. Where, in proceedings by a claimant to establish his right to attached property, consisting of merchandise, there is evidence of its value six months prior, and of the amount of goods bought subsequent thereto, and that the amount of the sales was always deposited in bank, evidence of the amount of such deposit is admissible to prove the present value of the goods.

2. Where claimant claims under a bill of sale "per inventory," evidence that the inventory could not have been taken within the alleged time is admissible.

3. The extent to which a witness may be cross-examined for the purpose of testing his credibility is within the discretion of the court.

4. Omissions to reserve exceptions to instructions cannot be cured by a motion for a new trial so as to render them reviewable on appeal.

5. Where the verdict is rendered for the attachment plaintiff before he has recovered judgment against defendant, a personal judgment against the claimant is erroneous.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Attachment by Treist & Co. against M. Nathan, and T. Tobias & Co. interposed their claim to the property. From a judgment against claimants, they appeal. Corrected and affirmed.

The proceedings in this case were had upon the statutory trial of the right of property, which was instituted by T. Tobias & Co.

interposing a claim to certain goods and merchandise which had been levied upon as the property of M. Nathan, doing business under the firm name of M. Nathan & Co., under an attachment sued out by the appellees, Treist & Co. The claimants based their right to the property levied upon under said attachment upon a bill of sale which had been made and executed by M. Nathan to them in payment, as recited in the said bill of sale, of an indebtedness to T. Tobias & Co. of \$3,737. This indebtedness was evidenced by four notes, and in payment thereof the said Nathan conveyed a portion of the stock of goods contained in his store at Bessemer, Ala. He also, about the same time, conveyed the rest of his stock of goods to Ida Levy and A. Klosky in payment of indebtedness to each of them. The bill of sale of the claimants in this case, T. Tobias & Co., was executed on December 26, 1892. At the time of the execution of this bill of sale, said M. Nathan was indebted to the firm of Treist & Co. for goods which had been sold by them to him, and it was for the collection of this indebtedness that the writ of attachment was sued out. The main issue of fact in this case, as is shown by the bill of exceptions, was as to the value of the goods owned by said M. Nathan on December 26, 1892, the day of the execution of the bill of sale to the claimants. Bob Crook, one of the witnesses for the plaintiffs, after testifying that he had worked for Nathan in November and December, 1892, and had been engaged in the dry-goods business for several years, further testified that the market value of the goods in the store of Nathan between December 20 and 26, 1892, was from \$18,000 to \$20,000. During his examination he testified that he had seen several stocks of goods worth \$10,000, and that Mr. Rosenbaum's stock was worth over \$10,000. He was then asked by the claimants, "How much more?" The plaintiffs objected to this question on the ground of its being immaterial. The court sustained the objection, and the claimants excepted. One Hardin Cobbs, a witness for the plaintiffs, testified that he was assistant cashier of the bank with which the firm of M. Nathan & Co. did its business and made their deposits. He also testified as to the amount of his deposits during the months of August, September, October, November, and December, which was to the effect that his deposits in September, 1892, were \$500 less than in August, his October deposits \$300 or \$400 less than the September, and the December deposits \$1,600 less than the July deposits. The claimants objected to this testimony, and moved to exclude the same, on the ground that it was immaterial to the issue in this case. The court overruled their motion, and the claimants duly excepted. Upon the examination of the insurance agent with whom the said Nathan took out policies of insurance upon his goods during the year 1892, he was asked: "What was the amount

of policies on his stock of goods in Bessemer?" The claimants objected to this question on the ground of its being irrelevant and immaterial, and duly excepted to the court's overruling their objection. The witness answered that the amount of the first insurance was \$25,000, which expired in January, 1893, and that between July and October he had \$6,500, which was on all his dry goods. M. Nathan, in his testimony as a witness for the claimants, testified that the cost of the goods sold to T. Tobias & Co. was \$4,651, and that their actual worth on the market would not exceed \$3,235. It was also shown that the inventory of the goods sold to claimants, which was attached to the bill of sale, was made after T. Tobias, a member of said firm, arrived in Bessemer, the day before the execution of the bill of sale, and that upon Tobias agreeing to take the goods in payment of his indebtedness against the said M. Nathan & Co. the inventory was taken, and the bill of sale made the day following his arrival in Bessemer. There was much testimony introduced to show how long it would take to make out an inventory of a stock of goods the size of that of M. Nathan & Co. The testimony for the plaintiffs tended to show that it would take much longer than the time in which the witness for the claimants testified that an inventory in this case was taken. To this portion of the testimony introduced by the plaintiffs the claimants objected, and duly excepted to the court's overruling their several objections. Upon the return of the verdict for the plaintiffs the claimants moved the court to set aside the said verdict, and to grant them a new trial. The grounds of this motion were that the verdict was contrary to the evidence, and that it was contrary to the charge of the court to the jury. It is not shown that there was any evidence introduced in support of this motion. The motion for a new trial was overruled, and the claimants duly excepted. The judgment entry contained the following recital: "It is therefore considered by the court that the plaintiff have and recover of the defendant the sum of \$4,651.16, the value of the property so assessed as aforesaid, together with all the costs in this behalf expended, for which execution may issue." The claimants appeal, and assign as error the several rulings of the trial court.

E. E. Webb, for appellants. John H. Miller, for appellees.

COLEMAN, J. Treist & Co., appellees, sued out an attachment against M. Nathan for \$590, which was levied upon certain goods and merchandise as the property of the defendant. The goods and merchandise levied upon were in three several parts or lots at the time of the levy, claimed, respectively, by Ida Levy, T. Tobias & Co., and A. Klosky, as vendees of M. Nathan. These vendees executed separate and distinct claim bonds for

the trial of the right of property. By consent of the parties the suits for the trial of the right of property were consolidated and tried together, with the understanding that a separate verdict should be returned as to each claimant, as if tried separately.

The goods and merchandise, a few days prior to the levy of the attachment, were in the possession of M. Nathan, and were his property. The bona fides of the debt of the attaching creditors, and that it was owing before the sale, were uncontroverted facts. The claimants claimed title by purchase in payment of antecedent indebtedness. Tobias was a brother-in-law, and Ida Levy a sister, of M. Nathan. The legal principles which apply are well settled. No exceptions were reserved to the instructions given by the court to the jury, and, whether correct or incorrect, these instructions, not being excepted to, are not revisable on appeal. There were some exceptions reserved upon questions of evidence, and also the overruling of a motion for a new trial. The action of the trial court upon these questions furnishes the grounds upon which the assignment of errors are based.

One material question at issue was the quantity and value of the goods of M. Nathan on December 26, 1892, the day of the sale. There was evidence showing the value of his stock in July, 1892, and also the quantity and value of the goods bought subsequently to that date, and prior to the sale to claimants. There was also evidence tending to show that the proceeds of all the goods sold in the intervening time were regularly deposited in the bank at Bessemer. The plaintiffs introduced the cashier as a witness to prove the deposits, including the months of July and December. This evidence was properly admitted. It tended, in connection with the other evidence, directly to establish the value and quantity of goods on hand when the sale was made to claimants. The assignments of error on this point are not well taken.

The claimants had introduced testimony tending to show that the goods sold were inventoried, and the time within which the inventory could be taken. It was competent for plaintiffs to show, if they could, that this testimony was not true. There was no error in admitting the evidence. Neither was there error in permitting plaintiffs to prove the amount of insurance carried by the insolvent debtor upon the goods. All these were facts to be considered by the jury in making up their conclusion.

One of the witnesses for plaintiffs, after stating facts to show his competency, testified that Nathan's stock of goods was worth about \$18,000 to \$20,000; that he had seen several stocks of goods worth \$10,000; that Rosenbaum's was worth more than \$10,000. He was asked, "How much more?" The plaintiffs objected to the question, "How much more?" We do not see what bearing the

question or answer could have on the issue. How far such an examination may be prosecuted is largely in the discretion of the court. *Noblin v. State* (Ala.) 14 South. 707.

There was no error in overruling the motion for a new trial. The transcript is not in good shape as to the motion for a new trial. The grounds of the motion are stated, but it does not appear that any facts were referred to, or offered in evidence, in support of the motion.

We have stated that there were no objections or exceptions reserved to the instructions given by the court to the jury. The omission to reserve an exception at the proper time cannot be cured by a motion for a new trial. We have considered the exceptions which were reserved to the rulings of the court upon questions of evidence, and hold that in this respect the court was free from error.

The judgment of the court, rendered upon the verdict of the jury, was not a proper judgment. On a trial of the right of property, the plaintiff in attachment is not entitled to a personal judgment against the claimant. Where the issue is found for the plaintiff by the jury, the judgment of the court is one of condemnation of the property to the satisfaction of the judgment, if judgment has been recovered against the defendant; and if the suit is still pending, and plaintiff's claim against the defendant has not been reduced to a judgment, then the court renders judgment that the property levied upon by the attachment is liable to the satisfaction of the plaintiff's claim, if plaintiff obtain judgment against the defendant. The record shows affirmatively that the bill of exceptions was not signed in time to constitute a part of the record, but, as no objection has been directed to its legality, we have considered it as if regularly signed according to law. The error of the judgment of the circuit court upon the verdict of the jury will be corrected here, and, as corrected, will be affirmed. *Myers v. Conway*, 90 Ala. 109, 7 South. 639; *Gray v. Balborn*, 53 Ala. 40; *Parker v. Wimberly*, 78 Ala. 64; *Kennon v. Adams* (Ala.) 14 South. 15.

Corrected and affirmed.

TOBIAS et al. v. WEIMAN et al.

(Supreme Court of Alabama. June 21, 1894.)

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Attachment by Weiman, Hirschman & Co. against M. Nathan & Co. T. Tobias & Co. interposed a claim to the attached property. From a judgment against claimants, they appeal. Affirmed.

This suit arose out of the same transaction as that shown in the statement of the case of *Tobias v. Treist*, 15 South. 914. The facts of the two cases were substantially the same, the only difference being in the plaintiffs, who, in this case, as in that case, attack a conveyance of the goods made by M. Nathan & Co. to the claimants, T. Tobias & Co. The cause was tried

by the court without the intervention of a jury, and the judgment was rendered in favor of the plaintiffs. The judgment entry in this case contained the following recital: "It is therefore considered by the court that the plaintiff have and recover of the defendants the said sum of \$337.00 [total value of the goods levied on in the attachment], so assessed as aforesaid, together with all the costs in this behalf expended, for which execution may issue." On motion of the plaintiffs in this case the minute entry of this judgment was amended so as to read as follows: "It is therefore considered by the court that the property levied upon by the plaintiffs' attachment in this case is, and was at the time of said levy, the property of defendant in attachment, and the same is liable to the satisfaction of plaintiffs' attachment. And it is further considered that the property levied upon under the plaintiffs' attachment be, and the same is hereby, condemned and made subject to the satisfaction of plaintiffs' claim, if plaintiffs shall obtain judgment against the defendant." The claimants excepted to the granting of this motion and the amendment of the judgment entry. The appeal is taken by the claimants, who assign as error the several rulings of the trial court.

E. E. Webb, for appellants. Trotter & McAdovy and Caboniss & Weakley, for appellees.

COLEMAN, J. Weiman, Hirschman & Co., creditors of M. Nathan & Co., sued out an attachment against him, which was levied upon a certain stock of goods. T. Tobias & Co. interposed a claim to the property, basing their title upon a purchase of the same from M. Nathan. An issue was made up under the statute to try the right of property. The case was tried by the court without the intervention of a jury. There are no new questions of law in the case. The case is wholly one of facts, and one of a number of cases between the creditors of M. Nathan & Co. and his alleged vendee. The court found the issue in favor of the plaintiffs, and held that the property was liable. The witnesses testified in the presence of the court. It had every opportunity to observe their manner of testifying, and could better determine their credibility than we can on appeal. In addition to this fact, which should not be disregarded, we have examined the record, and, after due consideration of all the legal evidence in the case, we have arrived at the same conclusion as that reached by the trial court. The error in rendering a personal judgment against the claimants has been cured by a motion made in the trial court. This was the proper practice. See the opinion in the case of *Tobias v. Treist* (rendered at the present term) 15 South. 914.

Affirmed

(103 Ala. 582)

HENRY v. HENRY et al.

(Supreme Court of Alabama. June 20, 1894.)

RECEIVER — COMPENSATION — COUNSEL FEES AND EXPENSES — WHEN ALLOWED — LEGACY — INTEREST — WAIVER.

1. Plaintiff sued the executrix of his father's estate, and other legatees, to collect a legacy, and for an accounting. The estate was badly involved, and plaintiff was appointed receiver, and the chancery court assumed jurisdiction of the estate. Plaintiff was given the powers of the executrix, except that he was not authorized to pay debts or defend suits against her. He realized assets to the amount of \$10,000. Held, that \$100 per month was ample compensation for such receiver.

2. Where a receiver employs counsel on his own responsibility, an allowance will not be made him therefor, unless he has actually paid such fees, though they were necessary, and such

as the court would have authorized if application had been made in advance.

3. Where a receiver pays a solicitor for services which are the ordinary duties which the receiver is presumed to know how to perform, he is not entitled to be reimbursed therefor.

4. Where a receiver undertakes to do that which is outside his powers, he cannot charge the estate for the expenses incurred thereby.

5. Where a receiver of a decedent's estate applies for an order to sell real estate to pay legacies and debts, and the court entertains the application, a reasonable solicitor's fee, if paid, should be allowed him. But where the court, at the expense of the estate, had previously required its register to report all claims against the estate, and the receiver's inventory and all the parties were already before the court, such fee should not be estimated by the charges usually made for obtaining such orders in probate.

6. Where such receiver lays before his counsel all the facts, ascertainable by diligent effort, respecting a claim of the estate against a legatee, he is entitled to reimbursement for reasonable fees paid in a suit to enforce the claim.

7. Where a suit by the receiver is without merit, and he knows it, but misleads his counsel, the estate should not bear the costs.

8. In a suit by a legatee to recover a legacy, it appeared that the court had required all persons having claims against the estate to file them with the register; that the legatees filed their claims, making no claim for interest; that the register reported the amount of each debt including interest, and each legacy without interest; that on motion of complainant the report was confirmed; and that the executrix and residuary devisee paid off the unsecured debts and legacies thus reported and confirmed. The bill did not claim interest on the legacy. *Held*, that complainant waived his right to interest.

Appeal from chancery court, Mobile county; W. H. Taylor, Chancellor.

Action by Thomas J. Henry against Mary Henry, executrix of the estate of Thomas Henry, deceased, and others, to recover a legacy, and for an accounting. From the decree rendered, complainant appeals. *Affirmed*.

On May 18, 1891, the appellant, Thomas J. Henry, filed the bill in this case against John Henry, Mary Ellen Ruffin, Frank G. Ruffin, Jr., her husband, and Mary Henry, the executrix of the estate of Thomas Henry, deceased. The prayer of the bill was that the chancery court would take jurisdiction of the administration of the estate of Thomas Henry, deceased, and that Mary Henry, as executrix of the estate of said Thomas Henry, deceased, be decreed to pay to the complainant the legacy bequeathed to him by the will of the decedent, and, if necessary to enforce the payment thereof, that the lands of the estate be decreed to be sold. The material allegations of the bill, and the grounds of relief prayed for, are sufficiently stated in the opinion.

On May 21, 1891, the complainant filed his petition for the appointment of a receiver for the estate of Thomas Henry, deceased; and on May 26, 1891,—all of the defendants joining in such petition, and consenting, in writing, that Thomas J. Henry be appointed such receiver,—the following order was

made, appointing the said Thomas J. Henry as receiver, and conferring the following powers and duties upon him: "It is ordered that Thomas J. Henry be and is hereby appointed receiver, to collect, by suit or otherwise, and receive, the rents, incomes, and profits of the real estate of the estate of Thomas Henry, deceased, and to receive and collect, by suit or otherwise, and get in, the personal estate belonging to said estate, pending this action. (2) That all deeds, books, and documents now in the possession of the defendants, and belonging to the real and personal estate of said Henry, deceased, shall be delivered over to the receiver so appointed, so that the same may be deposited in this court for the purpose of enabling such person or persons to refer to and use the same as may be necessary. (3) And it is further ordered that said receiver shall collect and get in all outstanding debts or monies due to said estate, and to take into possession all notes and drafts or bills of exchange due and owing to said estate, and that all the personal property belonging to said estate may be sold and converted into money by said receiver, by and under the direction of this court. (4) That said receiver shall give bond in the penal sum of five thousand dollars, with sufficient securities, to be approved by the register of this court, conditioned upon the faithful performance of his duties as receiver. (5) That the said compensation of said receiver shall be \$100 per month, payable monthly out of whatever moneys he may have in hand, and that the said receiver may, by proper order of this court, pay monthly, a reasonable amount of money to Mary Henry, executrix, for the proper support and maintenance of herself and household, and the said receiver may also, upon the proper order of this court, pay monthly to the said John Henry a proper amount of money for his personal support and sustenance, to be paid for his personal services rendered the estate, the said payments to be made and continued pending this litigation. (6) That said receiver shall forthwith prepare and file in this court a schedule of all the indebtedness of said estate, whether the same be secured by mortgage or not, and he shall also file in this court an inventory of all the property, both real and personal, belonging to said estate, whether the same be pledged to secure debts or not; and he shall take such steps as are necessary for an early winding up of the business, of every character, of the estate of the late Thomas Henry, deceased. (7) And it is further ordered that said receiver, from time to time, make report to the court of all his doings in this behalf, and that either of the parties to said cause, or said receiver, shall be at liberty to apply to the court, from time to time, for such further order or direction as may be necessary, and said receiver shall, upon filing his bond in this court, enter at once into the possession of the real property of the said estate, and

notify all the tenants of said estate of his authority, and shall cause to be published a notice of his appointment in some newspaper published in Mobile county. (8) That the said receiver shall have power to dissolve the firm of Thomas Henry & Son, and wind up the affairs of the said firm, and shall protect the interest of the estate of said firm, and shall have power to bring suit, if necessary for the protection of the interests of said estate in said firm, and he shall also have authority to pay taxes due on the real and personal estate belonging to said estate. And, until it is sold or disposed of, he shall keep all the property of said estate insured in good and solvent companies, and shall cause to be made all necessary repairs to the property of said estate."

On June 1, 1891, the court rendered a decree assuming jurisdiction of the estate. On June 13, 1891, by consent of all the parties, a decree was rendered calling in all the claims against the firm of Thomas Henry & Son and against the estate of Thomas Henry, deceased; and it was ordered in said decree that all claims not filed with the register within the time allowed would be barred, and all parties in interest were given a right to file exceptions to any claims filed, and the register was directed to "ascertain the valid, subsisting claims against the said firm and said estate, the amount of the principal of each claim, and the interest on each one to the date of reference, and the date from which each bears interest." Among the claims filed under this last decree was one of John Henry, one of the defendants. There were objections to this claim interposed by the said Thomas J. Henry, individually and as receiver, and the claim was withdrawn. The report of the register of claims, filed against said estate, included the claims of Thomas J. Henry and Mary Ellen Ruffin for their legacies under the will, of \$1,000 each. This report allowed no interest on said legacies, and gave no date from which interest could be computed. No exceptions were filed to this report, and it was duly confirmed by the chancellor on September 17, 1891.

In response to a motion by the receiver, filed June 15, 1891, the following order was made on June 17, 1891, enlarging the powers of the receiver: "This cause came on to be heard before the register of this court on Monday, June 15, A. D. 1891, after due notice, and was continued from day to day until this, the 17th day of June, A. D. 1891; and now coming on to be heard before the register of this court on an application to enlarge the powers and authority of the receiver heretofore appointed in this cause, and all the parties to this cause consenting that said application be granted, it is ordered, adjudged, and decreed that the receiver, Thomas J. Henry, have full power and authority to sell and dispose of, as rapidly as possible, all the personal property belonging

to the firm of Thomas Henry & Son, and to collect and realize, as fully as possible, upon all the rights, debts, and demands due the said firm of Thomas Henry & Son. (2) To settle, upon such terms and conditions as in his judgment may be to the best interests of all parties interested in this cause, all debts, claims, rights, and demands that may come into his hands as receiver, the collection of which may be or become doubtful; have full power and authority to accept, in payment or compromise of all such debts, claims, or demands, property, real or personal, whenever it may be to the best interest of all concerned. (3) To employ, at the expense of the parties in interest, such agents, clerks, and attorneys as it may be or become necessary for him to employ in order to properly manage the trust confided to him, and to advise him as to his rights and duties in regard thereto. (4) To allow the said receiver to have power to do all other acts that may be necessary to enable him to take possession of the property, and to enforce and collect the rights and debts due the estate of Thomas Henry, deceased, and to collect and enforce the rights and debts due the firm of Thomas Henry & Son. (5) To allow him to spend such sum or sums of money as in his judgment may be necessary, having a due regard to economy, in advertising for sale, in newspapers and otherwise, the goods, wares, merchandise, and other property of the firm of Thomas Henry & Son. (6) To allow the receiver to employ, at as early a date as possible, an expert accountant, for the purpose of ascertaining the exact interest of John Henry in the firm of Thomas Henry & Son, in order that the receiver may submit to this court at the proper time a balance sheet showing the account of each partner in said firm."

On October 7, 1891, the chancellor confirmed the report of the register as to the necessity for a sale of the real estate of the estate of Thomas Henry, deceased, and ordered that the same be sold. On November 13, 1891, a decree was rendered ordering the receiver to file his account and vouchers for a final settlement of his receivership. On December 1, 1891, Mary Henry filed her petition, alleging that she had paid all of the debts for which her property was to be sold, and asked a rescission of the order of sale made October 7, 1891, and that her property be restored to her, together with the leases, insurance policies, etc., relating thereto. The said Mary Henry also filed on December 24, 1891, a petition of like purport; and on December 28, 1891, the chancellor rendered a decree holding that the said Mary Henry was entitled to the relief asked for in each of her petitions, and ordered that the decree of sale rendered on October 7, 1891, be set aside and annulled, and that Thomas J. Henry, receiver, deliver to the said Mary Henry the real estate belonging to her, of which he had become pos-

assed by virtue of his receivership, together with the lease contracts, notes, and insurance policies relating to said property.

On November 17, 1891, Thomas J. Henry, as receiver, filed his petition asking for an order of reference to the register to ascertain and report what compensation should be allowed him for his services as receiver, and what compensation should be allowed his solicitors. In response to this petition the chancellor, on November 20, 1891, ordered a reference before the register. The facts disclosed on this reference, as to the duties performed by the receiver, are sufficiently stated in the opinion. In reference to the compensation of the receiver's solicitors, it was shown that McCarron & Lewis, a firm of attorneys, filed the original bill for Thomas J. Henry, to collect his legacy of \$1,000, and that upon the appointment of said Thomas J. Henry as receiver, as stated above, he engaged the said McCarron & Lewis as his solicitors. They represented him in the several steps taken as receiver which are stated above. The claim filed by said attorneys on this reference was as follows:

General retainer.....	\$ 700 00
Attending to matters of receiver in chancery court.....	1,800 00
Claim of Jno. Henry.....	900 00
Suit in city court vs. savings bank..	50 45
Suit in chancery court vs. Jno. Henry	700 00
Northwestern Railroad case.....	1,000 00

The item "Suit in chancery court vs. Jno. Henry," for which solicitors claim a fee of \$700, was for filing a bill to settle up the affairs of the partnership of Thomas Henry & Son, composed of Mary Henry and John Henry. Demurrers were interposed to this bill, as filed by the receiver, and it was dismissed by the complainant. As to the item "Claim of Jno. Henry," it was shown that on July 30, 1891, before the time allowed for filing claims by order of court, John Henry filed a claim on his own behalf, against the estate of Thomas Henry, for a very large sum. This claim, after remaining on file for several days, was finally withdrawn by the said John Henry. As to the item "Northwestern Railroad case," for attention to which the said solicitors claim \$1,000, it was shown that there was pending in the chancery court of Mobile county the case of the Mobile & Northwestern Railroad Company v. Lucy B. Gardner et al., in which Mrs. Mary Henry was a party defendant in said case, because she owned a portion of a judgment against the complainant railroad company, but the receiver was not, individually, a party to the suit there involved, nor in his capacity as receiver, and that the firm of McCarron & Lewis in no way represented the receiver in said cause.

On January 26, 1892, the register made his report as to the compensation of the receiver and his solicitors, and therein allowed the receiver \$600, and allowed the solicitors of

the receiver \$4,000, the said allowance being itemized as follows:

For general retainer, 1 % on \$70,000 \$	700 00
For filing the bill, and attending to all matters involved therein.....	500 00
For attending settlement of receiver's accounts, 1 % on \$10,456.....	104 56
For obtaining order of sale of property	450 00
For defending against the claim of John Henry.....	750 00
For suit against John Henry.....	500 00
For defending the suit of the M. & N. W. R. R. Co.....	1,000 00

On December 28, 1891, Thomas J. Henry and Mary Ellen Ruffin filed their petition asking to be allowed interest on their legacies, which had been previously paid to them. The facts in reference to this petition are stated above.

On the final submission of the cause, upon the pleadings and proof, the chancellor, on May 18, 1892, decreed that Thomas J. Henry and Mary Ellen Ruffin were not entitled to interest on their legacies, and dismissed their petition; that the report of the register as to the compensation to be allowed the receiver be confirmed, and that the said report, as to the compensation of the solicitors, be modified, and the compensation allowed them be fixed at \$1,500; and that, as it was shown by the accounts filed in said cause that said solicitors had been paid \$1,050, the said Thomas J. Henry pay the \$450 remaining due the said solicitors out of the funds ascertained by the register to be in his hands. It was also decreed that Mary Henry recover of said Thomas J. Henry the sum of \$542.82, the balance remaining in the hands of the receiver after the payment to the solicitors of the said sum of \$450. After the filing of this decree the said McCarron & Lewis petitioned the chancellor to make an order requiring Mary Henry, the executrix of the estate of Thomas J. Henry, deceased, to pay the petitioners the said \$450, the balance ascertained to be due them, on the ground that the said Thomas J. Henry was insolvent, and had not paid the said amount as decreed by the court. On November 17, 1892, the chancellor decreed that the petitioners were not entitled to the relief prayed for, and dismissed their petition. Thomas J. Henry now prosecutes this appeal, and his assignments of error are based upon the following rulings contained in the final decree of the chancellor: (1) The refusal to allow said Thomas J. Henry and Mary Ellen Ruffin interest on their legacies; (2) the refusal to allow the receiver more than \$600 for his services; (3) the refusal to allow the receiver's solicitors more than \$1,500 for their services. The appellant also assigned as error the decree of the chancellor refusing the petition of McCarron & Lewis, and dismissing the same.

McCarron & Lewis, for appellant. Overall, Bestor & Gray, for appellees.

HEAD, J. Thomas Henry, of Mobile, died February 9, 1886, leaving his wife, Mary, and three children, viz. Thomas J., John, and Mary Ellen. The latter afterwards married Frank G. Ruffin, Jr. He left a considerable estate, all of which, by will, he devised and bequeathed to his wife, except a pecuniary legacy of \$1,000 to each of his three children. She was named executrix without bond. She probated the will February 27, 1886, in the probate court of Mobile county, and received letters testamentary. Thomas Henry was a crockery merchant, in Mobile, in partnership with his son John, under the name of Thomas Henry & Son, but he furnished all the capital; and, it seems, in fact, that when he died he owned the whole business, if a settlement of the partnership had been made. After his death the widow (we suppose deeming herself the owner of her husband's estate, as she was, subject to debt and the pecuniary legacies) entered into copartnership with her son John to carry on the same business; and they did carry it on, under the same firm name of Thomas Henry & Son, until it was terminated by this litigation, in May, 1891. The testator left a large city real estate, but it was heavily incumbered by mortgages. The widow had the possession and use of it until dispossessed by this litigation, in May, 1891. Meanwhile, the estate was badly managed. The widow was old and infirm, and unable to give it much attention, and she relied chiefly on her son John to manage it. He did not prove a success. The mercantile business, under his charge, was unsuccessful. The stock and assets constantly declined, and debts accumulated. The real estate was suffered to grow into bad repair, and its annual rental income to be considerably diminished. Mortgages upon it to over \$30,000 were not discharged, and the interest on the mortgage debts not well kept paid up. Taxes were not all paid. Besides the mortgage debts, the testator owed some \$1,800 which remained unpaid. The legacies to Thomas J. Henry and Mrs. Ruffin were not paid. The executrix did nothing, in court, in the way of administering the estate, except to probate the will. She took no steps looking to a settlement. In this condition of affairs, Thomas J. Henry retained the law firm of McCarron & Lewis to collect his legacy, and on the 18th day of May, 1891, they filed this bill for him, for that purpose, making the executrix and other legatees defendants. Thomas J. Henry, of course, had no other interest in the estate than the collection of his legacy. So that was paid, it did not concern him, pecuniarily, what became of the rest; but the estate being involved, as we have indicated, it was indispensable to the coercive collection of his legacy that a full account of the assets, debts, and unpaid legacies be taken. Hence, the bill, as a means to the prime end, prayed for such an account, and, further, that the administration be removed to the chancery

court, and there settled. The court shortly afterwards passed a decree assuming jurisdiction of the administration and settlement of the estate. Ordinarily, in such cases, the personal representative, being brought before the court, is there, under the orders and decrees of the court, required to perform his office, retaining in his possession the assets of the estate, and administering them, as by law and the orders of the court he must; and in discharge of these duties he is allowed the benefit of necessary legal counsel, the reasonable costs of which the court will reimburse him from the trust estate, unless it appears the expense, though necessary, was superinduced by his own fault. In the present case, however, it was conceded by all parties, including the executrix herself, that she, by reason of her age and general incapacity, was incapable of performing the office well; and by consent of all the parties the complainant in the bill, Thomas J. Henry, a few days after the bill was filed, was appointed receiver in the cause. The powers and duties conferred upon him by the order of his appointment, and as they were subsequently enlarged by an additional order, will be set out by the reporter; and from them it will be seen that, by the consent of all parties in interest, this receiver was, for all practicable purposes of administration, substituted for the executrix, and clothed with all her powers, with the exception (which was an important one) that he was not authorized to pay debts or defend suits pending or instituted against the executrix.

The authority of the receiver having been specifically defined by the court, all other authority on his part was excluded, and the powers and duties of the executrix, which by law appertained to her office, were displaced, by his appointment and the specification of his authority, to the extent only that such specification expressed or fairly implied. She retained all powers and duties in reference to the administration not expressly, or by necessary implication, conferred upon the receiver. She could not, of course, have performed any act which might have conflicted with the authority of the receiver. Occupying this position,—substituted, as it were, within certain limitations, for the executrix,—he, like her, became entitled, upon his appointment, to the benefit of counsel to guide and assist him in the discharge of his duties, and for all sums reasonably paid out by him for such counsel the court should have reimbursed him from the trust estate. The assignments of error on behalf of the receiver, as such, involve, alone, questions touching the allowance of counsel fees and receiver's compensation. As to the latter, that was well settled by the order of his appointment. He accepted the office with a salary prescribed. That salary he received. It is undoubtedly true that, if unforeseen, extraordinary labor had developed, it would have been competent and proper in the court,

in the exercise of its discretion, to make him a further allowance. This was not a case for the exercise of that discretion. He evidently knew the condition of the estate when he accepted the trust. Practically, everything he did, in the line of his duty, was foreshadowed in the order of his appointment and the orders enlarging his powers made only a short time thereafter. The greatest liberality was extended him in the allowance of help. A most ample corps of men, at a cost enormous in proportion to the value of the stock, was employed to dispose of the old, badly-damaged stock of goods, which realized only \$8,000, or a little over. Attorneys collected the claims for him at a commission of about 25 per cent. Real-estate agents took charge of the real estate, rented it out, and collected the rents for him, at a commission of 5 per cent. An expert accountant was allowed him, at a cost of \$300, to make out his brother John's account, as surviving partner, from the books of Thomas Henry & Son. The gross amount of assets realized by him amounted to a trifle over \$10,000; and for his services and expenses in producing this result, and looking after the insurance and repairs of the property, the table thereof. in the printed brief of appellees' counsel (which we take to be correct without going through the voluminous record to verify it) shows that he paid and was allowed the unprecedented amount of \$4,665, besides the fees of his solicitors, for all whose services in and about the receivership an allowance of \$1,500 was made by the court. All this was done during a period of six months. These expenditures do not include insurance premiums and costs of repairs. We think \$100 per month to oversee a business of this size and character, and under these circumstances, a most abundant allowance, particularly to one whose services previously commanded only \$10 or \$15 per week and board. Let nothing more be said touching his claim for additional compensation.

We recur then to the allowance of counsels' fees claimed by the receiver. Fifteen hundred dollars were allowed by the court; \$2,500 more are claimed, making in all \$4,000. When a receiver is appointed, and property is committed to him, as such, he becomes the officer and custodian of the court. It is his duty to keep the property committed to him according to the directions and orders of the court. If the office be of an administrative character, or in the nature of a trust being administered by the court, or for the purpose of carrying on a business, it is his duty to administer it, likewise, under and in pursuance of the orders and directions of the court. Strictly speaking, he has no right to make any contract binding the property, or to pay out the funds in his hands, as receiver, without first obtaining the authority of the court. But it is clearly his right and duty, whenever it becomes necessary, in the performance of the duties of his office, to in-

cur an expense, or make a contract or obligation, or pay out funds, to apply to the court, and obtain an order authorizing him to do so, and prescribing definitely, when the court deems it necessary, the terms of the authorized undertaking, and the sum or sums to be paid, and that when he acts in accordance with this authority he will be protected by the court against personal loss or responsibility, and granted allowance for the sum or sums so paid out. In some jurisdictions the tendency is not to recognize any obligation or expense incurred or paid by a receiver, and to make him no allowance therefor, unless incurred or paid in pursuance of authority so previously obtained. We would adopt, however, the more liberal rule which generally obtains in reference to administrative trusts,—that if a receiver, without previous authority, but upon his own responsibility, incurs an expense in the discharge of his duties, which he shows to have been necessary, and such as the court would have authorized if application had been made in advance, to accord him the like indemnity which would have been accorded if the previous authority had been obtained. The attitude of the present receiver is such that he now comes before the court asking the allowance under the last-named condition, viz. allowance for counsel fees for solicitors whom he employed on his own responsibility, without previous authority, for services already rendered. He cannot claim to occupy any other position, for if the action of the court, appealed from, was upon an application in behalf of the solicitors themselves for an allowance of fees to be paid directly to them from the funds in the custody of the court, or to be charged upon the property in the custody of the court, he has no interest in, and is not prejudiced by, such action. The solicitors themselves are the parties to complain. Treating him, then, as claiming the allowance in his own behalf, has he shown a case entitling him to it? What are the principles which govern in the allowance of counsel fees to a fiduciary who has incurred them without the authority of the court? First, it is for necessary legal assistance that allowance may be made. A trustee has no authority to employ attorneys, at the expense of the estate, to perform the ordinary duties of the trust or office which any ordinarily competent business man is presumed to be capable of performing. Those are his duties, and he is paid for them. It is for services requiring special legal skill that he will be allowed counsel fees. To illustrate: He may have an attorney to obtain for him a necessary order of court to sell a stock of goods, but he can carry out the order as well as the attorney. He knows as well the character of the goods, their value, what salesmen and bookkeepers are reasonably necessary, and what he ought reasonably to pay for their services, and the best manner of disposing of the goods. His acceptance of

the trust presupposes that he is capable of performing all such duties, and, if he employs attorneys to advise and assist him in performing them, he must do so at his own expense. So, also, no legal skill is required in insuring and repairing storehouses, and renting them out and collecting rents. Any business man, also, can assess and pay taxes. If a demand is made upon the receiver, of questionable legality, he may have legal advice and aid in reference to it. If he has a demand upon another, whose legality is questioned, or which requires legal aid to enforce it, he may have an attorney. Secondly, it is for legal services for which he has paid the attorney that he can claim allowance from the estate. Indeed, this is true, if he had employed the counsel under an express order of the court previously obtained, prescribing the terms of the employment and the amount to be paid. In that case, when he comes to render his accounts, he would be required to show that the services had been rendered, and that he had paid for the same not in excess of the amount allowed by the court, before he would be allowed credit for the same. His position in this regard is the same as any other accounting officer or trustee. We have long since settled, in this state, in the case of an executor or administrator claiming credit for a disbursement alleged to have been made by him, that he must, if disputed, prove, not only the correctness of the demand, but that he has paid it. *Gaunt v. Tucker*, 18 Ala. 27; *Pearson v. Darrington*, 32 Ala. 227; *Bates v. Vary*, 40 Ala. 421; *Teague v. Corbitt*, 57 Ala. 529; *Harwood v. Pearson*, 60 Ala. 410; *Jenks v. Terrell*, 73 Ala. 238; High, Rec. § 805. The cases of *Bates v. Vary* and *Teague v. Corbitt*, supra, were upon the allowance of counsel fees. In the latter case the court say: "In this, as in all cases in which a trustee claims a credit, it must be shown he has paid the counsel the amount for which a credit is claimed." We think this rule is one wholesome in its influences, and should be upheld with a steady hand. When a trustee or receiver contracts for professional aid, it is his duty to act with the same care and prudence that a cautious and prudent man would, in making a like contract for his own benefit. He should seek to get competent counsel, upon terms most favorable to the estate. To secure this, not only in reference to counsel fees, but all other expenses of the trust which he takes upon himself to contract without previous authority of the court, he must know when he incurs them that he cannot obtain allowance for them until he shows that they were necessary, and that he has paid them, and the amount paid therefor was their reasonable value. In no case, except when the cestuis que trustent are sui juris, and waive it, should a court suffer a credit to stand or be entered upon the account of any trustee for expenses incurred without a previous order, whether for attorney's fees or otherwise, un-

til he satisfies the court, by proof, (1) that the expense was a reasonably necessary one, and for a service not within the ordinary duties which the trustee should himself perform; (2) that the amount claimed is the fair and reasonable value of the service; and (3) that the amount has been actually paid, in good faith, by the trustee. If the courts would vigorously enforce this rule, trust estates would not suffer as many have suffered in the past. The loose practice of executors, administrators, guardians, and other trustees, of employing counsel, generally, without regard to cost; without effort to obtain the best terms practicable for the estate; with no thought of personal responsibility, or expectation of payment until allowance is made, but too often upon the assumption, expressly or impliedly indulged by both, that the attorney shall receive only what he may induce the court to allow from the funds in hand, after the service has been rendered, —is fraught with evil, and should not be encouraged. Under its influence, estates have, not infrequently, been, in large measure, swallowed up in costs, and, in some instances, courts, created to protect the helpless, actually brought into public disfavor. We mean no reflection upon any one connected with this cause. Our observations are to emphasize the wisdom of the rule we reaffirm. We will not be understood as holding that, when the chancery court has a fund in gremio legis,—a fund in the hands of its officer,—it may not direct a claim shown to have been properly incurred by the trustee, although without previous authority, to be paid, from the funds in court, directly to the party in whose favor it was incurred. Cases may arise where this course will best conserve the rights of all. That is a question, however, which concerns the creditor. The trustee or receiver who has had the receipt and disbursement of the funds of the estate cannot complain of the court's refusal to exercise this power. If the claim is a proper one, he should have paid it himself, and asked allowance for it. The present appeal, as we have said, is by the receiver. He alone assigns errors. We cannot consider the rights of *McCarron & Lewis*, the solicitors, if any, upon their petition which the chancery court denied. They are not before this court. The case so stands before us that the receiver is here alone, as the complaining party, asking for allowance for an item of expense incurred by him, without previous authority, which he has not paid and may never pay. It cannot be allowed. If the case came before us from an application by the receiver to the court to raise a cash fund from the property of the trust estate to enable him to pay expenses necessarily and reasonably incurred in the discharge of his official duties, a different question would be presented. What our decision would be, if so presented, we need not indicate.

This disposes of the errors assigned by the receiver, as such; but the parties have elaborately argued the validity of the various items of fees claimed in behalf of his counsel, in respect—First, of the right of the receiver to incur them; and, second, the reasonableness of their amounts. It may not be amiss in us to lay down some rules governing the rights of the receiver to contract them. We shall say nothing as to the reasonableness of the amounts claimed.

1. The services of the solicitors, to the time the receiver was appointed, were, as a matter of course, rendered for their client, the complainant in the bill, their object being the collection of the legacy. This includes procuring the appointment of a receiver. The services, being rendered for the personal benefit of the complainant, were comprehended in his retainer of the counsel to collect his legacy. It was proper to allow the receiver, if he had paid it, a reasonable fee for such general legal advice as he obtained, and the nature of his duties made necessary. In making such allowance, careful discrimination should be observed, as we have already said, between the ordinary duties which the receiver is presumed to know how to perform, as well as one skilled in the law, and those duties which require such special skill. If he commanded the time and trouble of the attorneys to advise and assist him about matters which any good business man could perform, he must pay for it himself. Again, regard should be had to the receiver's authority. If he undertook to do that which was outside his charter of powers, he cannot charge the estate in his hands with expenses incurred therein. As we have said, he had, under the orders of his appointment, no authority touching the debts owing by the estate, except to pay the taxes. The office of executrix was not entirely superseded. She was before the court, and necessarily so. She retained all official functions not conferred upon the receiver, and, in their exercise, she could apply for and obtain the aid of the court, who had plenary power over the receiver, herself as executrix, and the trust estate. She thus had the means of looking after and caring for the debts which were pressing, and threatening sales of the property, to the same extent the receiver would have had if he had been authorized in that behalf. If he undertook to perform her retained functions, he did so upon his own responsibility, and must bear personally the expense incurred. Advice of his counsel, in such matters, should have been eliminated, in estimating the reasonable value of the general retainer.

2. The receiver applied to the court for an order to sell the real estate to pay legacies and debts, and the court entertained the application. For this service, a reasonable fee, if paid, should have been allowed. It would seem, however, that this fee should not be

estimated by the charges usually made for obtaining such orders in the court of probate, for the following reasons: At the expense of the estate, the court had required its register to ascertain and report all claims against the estate, which was done. The receiver's inventory of the assets was before the court. In a proceeding in the probate court, these—the existing debts, and insufficiency of personal assets to pay them—are jurisdictional facts, which must be skillfully set forth in order to a valid sale of the realty; and the petitioner, through competent counsel, must undergo the labor and skill of seeing that jurisdiction of the persons of all the interested parties is acquired, and producing the proper proof, in the proper way, in support of the desired order. But here the chancery court had already ascertained, and put upon its records, all necessary data. The parties were all before the court. The receiver's counsel had practically nothing to do but to invoke the record, and ask for the order.

3. A reasonable fee should have been allowed for attending to the settlement of the receiver's accounts, guided by the amount involved and the labor attending it. If there was litigation concerning items of the account, regard should be had to its result. A trustee cannot engage in unsuccessful disputes with the cestuis que trustent, over his accounts, and charge them with the cost.

4. It was within the receiver's duties to look after the estate's claim against John Henry, and he was entitled to counsel in the matter. It was his duty to be diligent to ascertain all the facts within his reach respecting the merits and value of the claim, and fairly lay them before his counsel; and if he did so, and his counsel, who are reputable lawyers, advised him that it was his duty to sue, he had a right to engage them to bring the suit, and should have been reimbursed the reasonable cost thereof. In fixing the amount, regard should have been had to the nature and probable value to the estate of the demand, the character of the proceeding necessary to enforce it, and the labor and skill attending it.

5. The same may be said of the suit against the savings bank. The indications of the record are that this suit was without merit, and that the receiver knew it, though his counsel were misled. Besides, the unfortunate letter of the receiver to his old mother, which we find in the record, betokens intense bitterness of feelings towards her and his brother in regard to this claim. We forbear to make public its contents. May we not hope the letter was no sooner sent than regretted? If he brought the suit to gratify such feelings, without properly informing his counsel of the facts of the case, the estate should not bear its cost.

6. As we have said, the receiver had nothing to do with the debts of the estate, or

suits against the executrix. Most clearly, he was entitled to no solicitor's fees for the M. & N. W. R. R. Co. case.

The complainant assigns as error the refusal of the court to allow him interest on his legacy. Conceding that he was at one time entitled to interest, he clearly waived it. By order of the court, all persons having claims against the estate were required to file them with the register, who was required to report them to the court. The legatees treated the order as embracing legacies, and filed their claims therefor, making no claim for interest. The register reported, giving the amount due on each debt, including interest, and giving each legacy at \$1,000, without interest. On motion of complainant, the report was confirmed. Without objections afterwards, the executrix and residuary devisee raised a sufficient sum of money to pay off the debts and legacies (which did not include the mortgage debts) so reported and confirmed, and paid the same; and the real estate was restored to her possession, whereby all the purposes of the litigation were accomplished. The bill did not claim interest on the legacy. After all this, the complainant came in, and asked for interest, to be charged on the real estate, the personal assets having all been exhausted. The chancellor properly disallowed the claim. Affirmed.

(34 Fla. 286)

JACKSONVILLE, T. & K. W. RY. CO. v. JONES.

(Supreme Court of Florida. July 31, 1894.)

RAILROAD COMPANIES—KILLING STOCK—PLEADING DAMAGES.

1. A declaration alleging that it was the duty of a railroad company to use good care in running and managing its locomotives and trains, and, disregarding its duty in that respect, so negligently and carelessly ran and operated a locomotive and train of cars on a day mentioned, and in a designated town on the road, as to strike and kill a mule of plaintiff, states a cause of action, and will be good on demurrer.

2. It is not required, in such case, to set out in the declaration the facts constituting the negligence; but an allegation of sufficient facts causing the injury, and that they were negligently and carelessly done, will be sufficient.

3. While the measure of recovery for personal property destroyed is its value at the time of destruction, and which is ordinarily fixed by ascertaining what was then its market value, yet it will be error to refuse to permit the defendant to show the cost of the property to the plaintiff, when it is made to appear that the latter purchased the property a short time before it was destroyed, and that the purchase price tended to fix the market value of such property.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; J. J. Finley, Judge.

Action by Henry Jones against the Jacksonville, Tampa & Key West Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. R. Parrott and T. M. Day, Jr., for appellant. Calhoun, Gilms & De Witt, for appellee.

MABRY, J. The appellee was plaintiff in the circuit court, and obtained judgment against appellant, at whose instance an appeal has been taken. The declaration was demurred to on four grounds, two of which were sustained, and the others overruled. The plaintiff amended by striking out the objectionable matter to which the grounds of the demurrer were sustained, and, after pleas filed to the amended declaration, a trial was had, and judgment rendered in favor of plaintiff below.

It is assigned for error here, and contended, that the court erred in that part of its decision overruling the two grounds of demurrer. The declaration, omitting that part stricken out on demurrer, alleges, substantially: That the defendant company, a railroad corporation existing under the laws of the state of Florida, on the 16th day of April, 1889, was possessed of, and had control of, a railroad running from the city of Palatka, through Putnam county, Fla., and had a right to run locomotives and cars upon said railroad, and did on the date mentioned operate its said line of road, and run locomotives and cars on the same, and in so doing it was the duty of defendant to use good and sufficient care. Nevertheless, the defendant, disregarding its duty to so use good and sufficient care and management of its locomotives and trains of cars, did so negligently and carelessly operate and use its said road for the passage of its locomotives and trains in the town of Palatka Heights, in said county, that a certain gray mule, the property of plaintiff, of the value of \$150, was then and there killed by the locomotive and train of cars of defendant, by reason of its negligence and carelessness aforesaid. That, by reason of the negligence and carelessness of defendant in operating its said locomotive and train of cars on the day and year and at the place mentioned, the same, with great force and violence, ran upon and struck the said mule of plaintiff, by means whereof it was killed. A demand for payment of the \$150, the alleged value of the mule, and a refusal to pay the same, are alleged.

The contention here is that the declaration does not set forth specific acts of negligence with sufficient particularity to put the defendant on its defense. Where negligence must be alleged as a basis of recovery, it is not required of the plaintiff that he should set out in the declaration the facts constituting the negligence; but an allegation of sufficient facts, the doing of which caused the injury, and an averment that such acts were negligently and carelessly done, will be sufficient. *Walsh v. Railway Co.*, 34 Fla. —, 15 South. 686; *Grinde v. Railroad Co.*, 42 Iowa, 376; 2 Thomp. Neg. p. 1246. The declaration

before us alleges, in substance, that it was the duty of defendant to use good care in the running and management of its locomotives and trains, and, disregarding its duty in that respect, it so negligently and carelessly ran and operated a locomotive and train of cars, on a day mentioned, in the town of Palatka Heights, in Putnam county, as to strike the mule of plaintiff, and kill it. This, in our judgment, is a sufficient allegation of negligence against the company.

On the trial the plaintiff testified that his mule was worth \$150; he knew about the market value of mules, and, from his knowledge of such values, thought that the mule was worth \$150. On cross-examination he was asked what he paid for the mule, and this question was ruled out, on plaintiff's objection that it was irrelevant. Plaintiff testified on cross-examination that the mule was 12 or 13 years old, but lively for its age, and that witness bought the mule four months before it was killed. He was again asked by the defense what he paid for the mule, and the court again excluded the question. The witness also stated that the mule was sound, and that he could not have bought another one as good for \$150. Being recalled by the plaintiff, the witness testified that in his opinion the mule was worth \$150. This was all the testimony offered on the question of value of the mule. The rulings of the court, excluding the right of defendant to inquire into what the plaintiff paid for the mule, were excepted to, and are assigned as error here. We think the court committed an error in not allowing the defendant to ask the question excluded. In the case of *Railway Co. v. Prior*, 34 Fla. —, 15 South. 760, we held that where the plaintiff and a disinterested witness testified that they were perfectly familiar with the market value of cattle killed by a railroad company, and the market value of the cattle, as given by the witnesses, was not controverted by any testimony, it was not error to exclude a general question propounded to the plaintiff on cross-examination,—what did he pay for the cattle, without reference to time or place, or that plaintiff had bought them. The measure of recovery is the value of the property at the time of its destruction, and this value, ordinarily, is fixed by ascertaining what was then its market value. We said: "There may be cases where an investigation into the cost of personal property destroyed may be proper, but where such property is not shown to have been removed from a locality, and has a demand and market value at the time and place of its destruction, its cost to the owner, without connecting such cost in some way with the market value, will not be proper. In order to make an investigation into the cost of property destroyed proper, it ought to appear that the cost was necessary in some way to fix the market value of the property when destroyed." In

the *Prior Case* the market value of the cattle was fully established by disinterested, uncontradicted evidence, and no error was apparent in excluding a general question, without reference as to time or place, as to what plaintiff paid for the cattle. The case before us is different. The plaintiff was the only witness that testified as to the value of the mule, and while he says he knew about the market value of mules, and, from his knowledge, thought his mule was worth \$150, still it appears that he bought the mule only four months before it was killed. Being recalled, the witness stated the value at \$150, as his opinion; and considering his former statement that he knew about the market value of mules, and thought his to be worth \$150, the character of the evidence, as to market value is not very direct or positive. We think the cost of the mule to the plaintiff at a time so near its killing was entirely proper, under the circumstances, as tending to fix its market value when destroyed, and that the defendant should have been permitted to ask the question excluded. It had a right to show, if such was the case, that the plaintiff did not pay as much for the mule just before it was killed as he was demanding of the company in the suit, upon the presumption that the price paid for the mule at that time by the plaintiff was not above its market value. As we said in the *Prior Case*, the court should be liberal in permitting an investigation into the value of property.

The other questions presented on the record do not, in our judgment, call for any consideration.

For the error mentioned the judgment will be reversed and a new trial awarded. Order to be entered accordingly.

(34 Fla. 203)

OLIVE v. STATE.

(Supreme Court of Florida. July 24, 1894.)

COMPETENCY OF JUROR—CRIMINAL LAW—WEIGHT OF DEFENDANT'S EVIDENCE—AMENDMENT OF RECORD.

1. Jurors stated that they had formed opinions of the guilt or innocence of the accused from having heard what purported to be a detailed statement of the facts of the killing, but not from the witnesses, and, if taken into the jury box, would carry in their minds the opinions they had formed; and, assuming the evidence to be as detailed to them, they were then ready to render a verdict, but that they could readily and unhesitatingly render a verdict according to the evidence in the case if taken on the jury, notwithstanding the opinions they then entertained. *Held*, that they were competent jurors.

2. Jurors stated that they could render a fair and impartial verdict according to the evidence; that they had no conscientious scruples against the infliction of capital punishment, but that they would not find a man guilty on circumstantial evidence only in cases where the penalty was death. The court excused the jurors on peremptory challenge of the state. *Held*, not to be error.

3. It is not error for the court to charge the jury that the statement of the prisoner is evi-

dence before them, to be allowed such weight, and such only, as they saw fit to give it.

4. The trial court has the power, during the term of court, to amend its record made at the former term so as to speak the truth as to what actually transpired at that term.

5. Evidence in this case considered sufficient to sustain the verdict.

(Syllabus by the Court.)

Error to circuit court, Jackson county; W. D. Barnes, Judge.

Jerry Olive was convicted of murder in the first degree, and brings error. Affirmed.

D. L. McKinnon, for plaintiff in error.
William B. Lamar, Atty. Gen., for the State.

MABRY, J. The plaintiff in error was indicted, tried, and convicted in Jackson county for the murder of Molly Olive, and has sued out a writ of error from the judgment of the court imposing the death sentence upon him.

The first error assigned is that the court erred in overruling defendant's challenge to three jurors named. The record recites that in impaneling the jury three jurors (giving their names) stated on their voir dire that they had formed opinions as to the guilt or innocence of the defendant from having heard what purported to be a detailed statement of the facts and circumstances of the killing, but did not hear said statement from the witnesses. They further stated that, if taken into the jury box, they would carry on their minds the opinions they had formed, and, assuming the evidence to be as detailed to them, they were then ready to render a verdict; but that they could readily and unhesitatingly render a verdict according to the evidence in the case if taken upon the jury, notwithstanding the opinions they then entertained. The defendant challenged the jurors for cause, and, his challenge being overruled, took an exception. It further appears that defendant used nine peremptory challenges before the panel was completed, and only one of the three jurors challenged by him sat upon the jury.

In *O'Connor v. State*, 9 Fla. 215, a juror was declared competent who stated that he had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion was based upon mere rumor; that he had not heard the witnesses or any one speak of the matter by detailing any of the facts or circumstances connected with the killing as of their own knowledge; that it would require evidence to remove the opinion so formed upon rumor, but that, if taken upon the jury, he could readily and without hesitation find a verdict according to the evidence, although that verdict might be contrary to the opinion so formed on rumor. The principle announced in *O'Connor's Case*, that where a juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial,

so as to be convinced according to the law and the testimony, he is not incompetent, was approved in the case of *Montague v. State*, 17 Fla. 662.

In *Andrews v. State*, 21 Fla. 598, a juror was held competent who stated that he had formed and expressed an opinion from rumor, and had not conversed with the witnesses; that his opinion would yield readily to evidence; but stated further that he would rather not have heard what he did hear, if he had to go into the jury box. In the same case another juror stated that he had formed and expressed an opinion as to the guilt or innocence of the accused, but such opinion was not formed from hearing or conversing with the witnesses in the case; that, if he went into the jury box, he would give a verdict according to the evidence; that it would take a reasonable amount of evidence; that it would take conclusive evidence to change his mind. He was held incompetent.

In *English v. State*, 31 Fla. 340, 12 South. 689, the juror stated that he had formed and expressed an opinion as to the guilt or innocence of the prisoner, but that his opinion was not of a fixed nature, and that he would be governed by the evidence. He further stated that it would require evidence to change his opinion, and, being asked if he would be influenced by the opinion he had, or would be guided entirely by the evidence which would be allowed to go to the jury, said he would be governed by the evidence allowed to go to the jury by the court. He was held competent.

The fixedness or strength of the existing opinion is the essential test of a juror's competency, and the court should look specially to such state of mind in passing upon the question of qualification. "If such impressions become fixed, and ripen into decided opinions, they will influence a man's conduct, and will create, necessarily, a prejudice for or against the party towards whom they are directed, and should disqualify him as a juror; but if, in obedience to the laws of his organization, his mind receives impressions from the reports he hears, which have not become opinions, fixed and decided, he would not be disqualified." *O'Connor v. State*, supra. It is contended by counsel for plaintiff in error, and correctly, too, that the statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence. The second juror referred to in the *Andrews Case* had formed an opinion, not from talking with the witnesses, and said he could render a verdict according to the evidence; but he also stated that it would take conclusive evidence to change his mind. If his opinion was so fixed as to require conclusive evidence to change it, it could not, in the nature of things, be

such as to readily yield to the evidence in the case. The jurors in the case before us had formed opinions from hearing what purported to be a detailed statement of the killing, but did not hear it from the witnesses; and they said that they would carry such opinions into the jury box, if accepted as jurors. They also stated that they could readily and unhesitatingly render a verdict according to the evidence in the case, notwithstanding the opinions they then entertained. If the above was all the evidence on the question of the jurors' competency, it is entirely clear that, according to the rule announced in the decisions referred to, they would not be disqualified. There would be nothing to show that the opinions formed from sources other than the witnesses were of such a character as would not readily yield to the evidence in the case, as the jurors in effect said they would. The jurors further stated in the same connection that, assuming the evidence to be as detailed to them, they were then ready to render a verdict. It will be noted that they did not state that they were ready to render a verdict on the opinions they had formed, but their readiness to act was upon the assumption that the evidence in the case was such as they had heard detailed. If the evidence in the case was not such as had been related to them, there is nothing to indicate that they would not act upon the evidence alone, and that their former opinions, based upon a state of facts shown to be incorrect, would not readily give way to the testimony on the trial. In our opinion, the statement of the jurors that, assuming the evidence to be as detailed to them, they were ready to render a verdict, is not sufficient to show that the opinions formed from hearing a detailed statement of the killing, not from the witnesses, were of such a fixed and settled character as not to yield readily to the evidence, and that they could not do what they state they could,—readily and unhesitatingly render a verdict according to the evidence, notwithstanding the opinions they had formed.

The second assignment of error is that the court erred in sustaining the state's challenge for cause as to two jurors named. It appears from the bill of exceptions that two jurors testified on their voir dire they could render a fair and impartial verdict according to the evidence; that they had no conscientious scruples against the infliction of capital punishment, but would not find a man guilty on circumstantial evidence only in cases where the penalty was death. The jurors were challenged by the state for cause, and excused by the court. They state positively that they would not find a man guilty on circumstantial evidence alone, in cases where the penalty was death. The statute (section 2850, Rev. St.) provides that "no person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be allowed to

serve as a juror on the trial of any capital case." The death penalty can be inflicted in cases of conviction on proper circumstantial evidence as well as on direct testimony, and a juror who would not find a verdict of guilt in such cases is excluded by the statute from serving as a juror on the trial of any capital case. *Metzger v. State*, 18 Fla. 481. The case before us depended largely on circumstantial evidence, and there was no error in the ruling of the court rejecting the jurors.

The third assignment of error is expressly abandoned.

Under the fourth assignment of error, which is the overruling of defendant's motion for a new trial, counsel discusses first the sufficiency of the evidence to sustain the verdict. After a careful examination of the evidence, we find no authorized ground for holding that it was not sufficient to sustain the verdict. That there was testimony sufficient, if true, to connect the accused with the killing is clear, and its credibility was a question for the jury. Under the well-established rules of this court as to the effect of a verdict, and when it can be set aside as against the evidence or not supported by the evidence, we are not authorized to disturb the verdict on the testimony in the record before us. In the next place, it is insisted that the court erred in giving the following portion of its charge to the jury, viz.: "The statement of the prisoner is evidence before you, to be allowed such weight, and such only, as you see fit to give it." In *Bond v. State*, 21 Fla. 738, it was decided that the statement of the prisoner is evidence for the consideration of the jury alone, and to be allowed such weight, and such only, as they see fit to give it. The objection urged to the portion of the charge mentioned is that the use of the words "such only," coming from the court, was calculated to cast discredit upon the statement of the accused. It is not shown or contended that any unusual or undue stress or emphasis was placed upon the words by the court, but the objection extends no further than that the words mentioned, coming from the court, naturally tend to discredit the prisoner before the jury. We do not think so. The court must not comment on the prisoner's statement, but we see no objection to stating to the jury just what the law authorizes; that is, that the prisoner's statement is evidence before them, and to be allowed such weight, and such only, as they see fit to give it.

The fifth and sixth assignments of error will be considered together. The fifth is that the court erred in hearing and determining the motion for a new trial without the presence of the accused; and the sixth is that the court erred in amending the record at a subsequent term of court so as to make it appear that the accused was personally present when the motion for a new trial was argued and denied. The record shows that

the jury returned a verdict against the accused during a term of court on the 17th day of November, 1893, and he was on that day remanded to the custody of the sheriff, to await the further order of the court. On the 28th day of the same month the minutes in the cause recite that: "This cause coming on to be heard upon motion for a new trial, and after argument of counsel, the court being advised of its opinion, it is ordered that said motion be overruled, to which defendant excepted, and gave notice of application for a writ of error." On a subsequent day, the defendant being in open court, sentence was passed upon him, and time was given to prepare and present a bill of exceptions. During the next term of the court, the defendant being present in person and by attorney, the state attorney made a motion that the minutes of the court made at the former term in reference to the motion for a new trial be amended so as to speak the truth, and to show that the accused was personally present in court at the time said motion was made, and the proceedings thereon. The record recites that the motion to amend the minutes having been argued by counsel for the state and defendant, and, it appearing to the court that the defendant was personally present in court when the motion for a new trial was made in November, 1893, it is ordered that the minutes of the term held in November, 1893, in said cause, be amended to read as follows, viz.: "Now at this day came the state of Florida, by her attorney, and the defendant being at the bar in custody, and the motion of defendant for a new trial coming on to be heard, after argument of counsel for the state and the prisoner, on consideration thereof, it was considered by the court that said motion for a new trial be denied, to which defendant excepted, and gave notice of application for writ of error." It was questioned in *Irvin v. State*, 19 Fla. 872, whether the presence of the accused was necessary during the hearing of a motion for a new trial, but, without stopping to decide this point, and without inquiring whether the recital in the original order denying the motion for a new trial that the defendant excepted thereto is sufficient of itself to show the personal presence of the accused at the time, we entertain no doubt about the power of the trial court during the subsequent term to amend its records so as to speak the truth, and to show what did actually take place during the hearing upon the motion. *Stephens v. Bradley*, 23 Fla. 393, 2 South. 667; *Brown v. State*, 29 Fla. 494, 11 South. 181. In the latter case it is said by Chief Justice Raney, for the court, that "it was entirely competent for the state to have had the record of that tribunal [the court that tried the cause], if it did not speak the truth, amended while the proceedings were pending here; and by bringing the amended record here they could have arrested our action on the original record before

we rendered judgment." The record in the case before us was amended on motion, and the defendant was present in person and by counsel, and, as it appears from the order of the court, the amendment was in accordance with facts as they existed at the time the original motion was heard and overruled. There was no error in this. There is no contention that the record, as amended, does not show a personal presence of the accused when the motion for a new trial was denied; and, considering the record as amended, as we must do, there is no error in the particular mentioned.

We have examined all the assignments of error presented by counsel for plaintiff in error, and find no error in them. The judgment will therefore be affirmed.

(71 Miss. 755)

YAZOO & M. VAL. R. CO. v. McLARTY.

(Supreme Court of Mississippi. April 23, 1894.)

TAX TITLE—EVIDENCE TO CONFIRM.

In a suit to confirm a tax title, the tax collector's list of the land sold to the state must be shown, as it is the foundation of a tax title, and the auditor's list is not sufficient.

Appeal from chancery court, Grenada county; B. T. Kimbrough, Chancellor.

"To be officially reported."

Bill by Yazoo & Mississippi Valley Railroad Company against J. W. McLarty. From a decree for defendant, plaintiff appeals. Affirmed.

This was a bill filed in chancery by the railroad company to remove clouds from title, and to confirm a tax title. The company claimed the lands in controversy through a sale made to the state in March, 1876, for the delinquent taxes of 1875, through a deed from the state to one Mann in 1885, and a deed by Mann to the company. Respondent below denied complainant's title generally, and denied, specifically, that the lands mentioned were sold to the state in 1876, and that the state conveyed to Mann; that any valid sale was ever made for taxes due at any date. The answer sets up adverse possession of 10 years. On the trial the following testimony was offered: Auditor's list of lands sold to the state March 13, 1876, made under the Acts of 1880, which includes this land; two deeds from the state to Mann, embracing this land; deed from Mann to the company; minutes of the board of supervisors making the county levies for 1875; extract from assessment roll, showing that these lands were assessed. The tax collector's list was not introduced, and the auditor's list was relied on as a substitute for it. On the hearing the chancellor held that complainant was not entitled to recover the lands, and remanded the cause, with directions to take an account of the taxes paid by the company, and the purchase money, and made the same a charge on the land. From this decree the company appealed.

Mayes & Harris, for appellant. I. T. Blount, for appellee.

COOPER, J. There is an absence of any evidence of title in complainant. The list of lands sold to the state for taxes was the foundation of the title it claims to hold, and was essential to be introduced or proved. *Clymer v. Cameron*, 55 Miss. 593; *Weathersby v. Thoma*, 57 Miss. 296. Decree affirmed.

(71 Miss. 790)

YOCONA COTTON MILLS v. DUKE, Tax Collector.

(Supreme Court of Mississippi. April 9, 1894.)

EXEMPTION FROM TAXATION.

Under the exemption ordinance (Const. Nov. 1, 1890), which provides that all permanent factories "hereafter established" shall be exempt from taxation, and that any factory which has been abandoned for not less than three years, and commencing operations within a certain time, shall also be exempt, a factory which has been in continuous operation since before the adoption of the constitution is not exempt.

Appeal from chancery court, Yalobusha county; B. T. Kimbrough, Chancellor.

"To be officially reported."

Bill by Yocona Cotton Mills against C. W. Duke, tax collector, to restrain the collection of taxes. From a decree for defendant, plaintiff appeals. Affirmed.

The Yocona Cotton Mills claimed that it was exempted from taxation under an ordinance of the constitution adopted November 1, 1890, and under the laws of the state (section 3744, Code 1892). The cause was tried on the following agreed statement of facts: That on the 19th day of May, 1881, complainant, a permanent factory, was duly chartered and incorporated and organized, under the laws of the state, for the purpose of manufacturing cotton yarn, cotton twine, and batting, in a finished state, and that by its charter nothing was exempted from taxation; that it immediately after began manufacturing said articles, and was so engaged long before the 1st day of November, 1890, and has continued to so manufacture up to this time, and is now so employed; that, on application of complainant, the auditor of public accounts determined that the property of complainant, as mentioned in the bill, was exempt from taxation, and so certified to the tax assessor of Yalobusha county, and said assessor declined to assess the property for the fiscal year 1892; that at its meeting to hear objections to, and correct, the assessment rolls for said year, the board of supervisors of Yalobusha county caused the property of complainants to be added to the rolls, and to be assessed, graded, and valued, and the sheriff was proceeding to collect the taxes when enjoined by restraint. On the hearing the chancellor dissolved the injunction and dismissed complainant's bill, from which decree it appealed.

The exemption ordinance adopted by the constitutional convention was printed and

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distributed with the constitution, but was not published in the Code of 1892 as an ordinance. Section 3744v is nearly identical with the ordinance. A copy of the ordinance is as follows: "Exemption Ordinance. Be it ordained by the people of Mississippi in convention assembled: Section 1. That all permanent factories hereafter established in this state while this section is in force, for working cotton, wool, silk, furs or metals, and all others manufacturing implements or articles of use in a finished state, shall be exempt from taxation for a period of ten years. Any factory which has been abandoned for not less than three years, and commencing operations within two years from the date of the adoption of this constitution, shall be entitled to such exemption. This section may be repealed or amended by the legislature after five years, and if not so repealed, shall remain in force until January 1st, 1900, and no longer. Adopted by the convention November 1, 1890.

I. T. Blount, for appellant. Geo. H. Lester, for appellee.

CAMPBELL, O. J. If ingenuity could raise a doubt, under the exemption ordinance of the constitutional convention, adopted November 1, 1890, as to whether a pre-existing factory then in operation was intended to be exempted from taxation, by looking alone to its first sentence, it must certainly vanish when the next sentence is read, which, by express enumeration, excludes all pre-existing factories, except such as come within the terms of that sentence. Affirmed.

(71 Miss. 981)

PEAVEY et al. v. WOODS.

(Supreme Court of Mississippi. March 12, 1894.)

TAXATION—REDEMPTION OF LANDS SOLD.

Under Laws 1876, §§ 48, 49,—providing that lands sold to the state for taxes may be redeemed by payment of the amount due to the sheriff, who shall give a duplicate redemption receipt therefor, pay the county treasurer the amount due for county taxes, and forward to the auditor the redemption receipt, with such payment indorsed thereon, and that the auditor shall execute a release of the lands, and send it to the sheriff, to be delivered to the redemptioner upon surrender of the duplicate redemption receipt,—payment to the sheriff of the amount due, and taking a duplicate redemption receipt, will not operate as a redemption, though the sheriff pay the county treasurer and auditor the amount due, if no release is executed.

Appeal from chancery court, Jackson county; W. T. Houston, Chancellor.

Bill brought by C. H. Woods against F. H. Peavey and others. Decree for complainants. Both parties appeal from the decree. Reversed, and bill dismissed.

Appellee, claiming to be paramount owner of a large tract of pine lands, exhibited his bill to cancel the tax titles of the appellants as clouds upon his title. The answer traversed all the material allegations of the bill.

Appellee derived his title to the lands in controversy as follows: Two patents from the United States to the state of Mississippi, under the act of September 28, 1850; deed from the state of Mississippi to W. B. Hamilton; deed from Hamilton to the Mississippi & Alabama Turpentine Company, a corporation under the laws of this state; deed from J. C. Clark to Mrs. Rebecca Hamilton, under execution in the case of *Rebecca T. Hamilton v. Mississippi & Alabama Turpentine Company*, from the circuit court of Jackson county; deed from Mrs. Rebecca Lee (formerly Mrs. Hamilton) and her husband, P. H. Lee, to Fred Lehrkin; deed from F. Lehrkin to C. H. Woods, appellee. Defendants derive their title as follows: Tax sale to the state by the tax collector of Jackson county on March 1, 1875; deed from the auditor of public accounts of Mississippi to R. A. Belch; deed from R. A. Belch to G. W. Carlisle; and deed from Carlisle to defendants. As the question as to whether the land was ever redeemed from the state by any of the mesne conveyances is the only one of importance, it is not necessary to give other facts relied on by counsel for complainant. In December, 1876, P. H. Lee, husband of Rebecca Lee (formerly Rebecca Hamilton), got a certified copy of the amount of taxes for which the lands were sold, and all taxes that had accrued, from the chancery clerk of Jackson county, and presented it to the sheriff of said county, and took from him a duplicate redemption receipt, and paid the taxes for which the lands were sold, and all accrued taxes; and these redemption receipts are made exhibits to complainant's bill. John H. Clark, who was sheriff of Jackson county in 1876 and 1877, testified that a part of the money to redeem the lands was paid to him in the latter part of the year 1876, and the balance February 6, 1877, by P. H. Lee or his attorney, and he forwarded the money to the auditor, and that he paid the taxes due to the state to the auditor, and the county taxes to the county treasurer, and that all the taxes due on these lands, according to the certificate of the chancery clerk, were paid to him by P. H. Lee. There was a decree in favor of complainant for a large proportion of the lands, but giving some of it to defendants. Complainant appealed, and defendants prosecute a cross appeal.

Nugent & McWille, for appellants and cross appellees. Calhoon & Green and C. H. Woods, for appellee and cross appellant.

CAMPBELL, C. J. There is nothing in this record to support a claim by either party, based on any statute of limitations or lapse of time, as provided for by section 1709 of the Code of 1871; and the only question is as to title conferred by the several grants mentioned in the pleadings, and who has it, as between the parties to this suit. In view of the allegation of the bill that the lands

were all sold for taxes in 1875, and struck off to the state as purchaser, and that the sheriff and tax collector made and certified a list of said lands as sold to the state, which list is in the record and conforms to law, whereby the title of the lands was vested in the state, the only question to be decided is whether the allegation of the bill that the lands were redeemed, and the title of the state, acquired by said sale and list, was extinguished. If so, the title claimed by the complainant becomes a matter for consideration. If not, the title of the complainant falls, in any view of the sufficiency of the evidence, to maintain his derangement through successive conveyances set forth and relied on by him. As the bill avers the sale to the state for taxes on March 1, 1875, and claims a redemption of the lands from the state, the validity of its title by virtue of that sale is not open to controversy; but, in view of the argument of counsel on both sides as to this, we remark that if the state's title depended on the certification of the list of lands sold to the state, and made and certified by the collector to the clerk, and by the clerk to the auditor, there is no valid objection to the list here involved, for the act of December 22, 1874 (Acts Sp. Sess. p. 14), required the list of all lands sold for taxes to be returned by the tax collector to the circuit clerk, who, under the then existing laws, was the officer charged with the disposal of lands after they were sold for taxes. He was the proper person to certify the list to the auditor, if it was to be so certified. The first Monday of March, 1875, was the proper time for a sale for taxes, as we assume, under Act Jan. 26, 1875 (Acts, p. 124); and the list made and certified, under his hand, to be correct, by the tax collector, and returned to the circuit clerk, showing the lands struck off to the state, must be held to have vested title in the state, and if that title was not afterwards extinguished by redemption, as claimed by the bill, complainant has no cause. There is a good deal to suggest the improbability of what is claimed to have been done, looking to the alleged redemption of the land; but, accepting as true all that is testified to on this subject, it must be held to fall far short of a redemption of the land. There is no such thing as an equitable redemption of land sold for taxes. It could occur only according to law. The law of 1876¹ (sections 48, 49, p. 129, of the Acts) prescribed the terms on which the state's title could be acquired. The officers whose acts were to ef-

¹ Laws 1876, §§ 48, 49, provide that lands sold to the state for taxes may be redeemed by payment of the amount due thereon, to the sheriff, who shall give a duplicate redemption receipt therefor, pay the county treasurer the amount due for county taxes, and forward to the auditor the redemption receipt, with such payment indorsed thereon, and that the auditor shall thereupon execute a release of the lands, and send it to the sheriff, to be delivered to the redemptioner upon surrender of the duplicate redemption receipt.

fect redemption were agents of the state only to execute the law, and could not bind the state except in conformity to law. And if it be true, as Clark thinks, that he, as sheriff, sent the money to redeem the land to the auditor, that did not redeem it. The auditor had no authority to receive the money, and, if he did, that did not bind the state. The law mentioned contains specific provisions for extinguishing the state's title, and only by conformity to them could the title of the state be acquired. The law is not shown to have been complied with, and the title vested in the state by the sale for taxes and the list returned by the collector was in the state until it parted with it to him under whom defendants claim. Reversed and bill dismissed.

WOODS, J., disqualified.

(71 Miss. 624)

FOSTER v. GULF COAST CANNING CO.
et al.

(Supreme Court of Mississippi. Feb. 19, 1894.)

QUIETING TITLE — STATUTE OF LIMITATIONS — EFFECT OF DECREE IN PARTITION — WHEN APPLICABLE.

Code 1880, § 2693, containing the statute of limitations of two years, and section 2568, establishing the effect of a final decree in partition proceedings, do not apply to a bill for the cancellation of certain deeds clouding complainant's title to an undivided interest in certain lands, though many years prior thereto there was a decree, to which complainant, then a nonresident infant, was not a party, partitioning such lands on the case then made.

Appeal from chancery court, Harrison county; W. T. Houston, Chancellor.

Bill by Mary J. Foster against the Gulf Coast Canning Company and others. From a judgment sustaining a demurrer to and dismissing the bill, complainant appeals. Reversed.

Bill in chancery by appellant against appellees, the Gulf Coast Canning Company, M. Grimovich, J. B. Sayer, J. Covacevich, and Peter Stojcich, seeking to have canceled certain deeds as clouds upon her title. The bill avers that appellant is the only child and heir of H. B. Balfour, and that she was one of the complainants to the bill filed in the suit of M. Musson et al. v. H. G. Blackman et al. in the United States circuit court for the southern district of Mississippi, which was afterwards consolidated with that of Byrne, Vance & Co. v. W. S. Balfour et al. That in said consolidated cause said court rendered a final decree, by which it was ordered that the lands of the estate of W. S. Balfour, deceased, lying in Bolivar, Madison, and Harrison counties, should be sold by a commissioner of said court, for division among the parties interested therein. That the lands were sold by said commissioner: To Byrne, Vance & Co. an undivided one-half interest; to Estelle De Gas and Estelle J. Balfour an undivided one-fourth interest;

to Mary J. Foster, complainant herein, and her mother, Susan D. Balfour, as the widow and heir at law, respectively, of H. B. Balfour, an undivided one-fourth interest. That this sale was afterwards ratified and confirmed by said court, and deeds were accordingly made to each of the purchasers, by which it is claimed that the legal title to an undivided one-fourth interest in the lands was vested in complainant. That said lands were in fact inherited by complainant from her said father, H. B. Balfour, deceased, and that the purpose of the suit in the United States circuit court was to recover the lands themselves specifically for the heirs of H. B. Balfour and the heirs of J. D. Balfour, deceased. That H. B. Balfour died intestate. That the said commissioner executed deeds whereby he conveyed to said purchasers, in the proportions and for the purposes above stated, the said lands in Harrison county, described in the bill. That the deeds to the lands in Madison and Bolivar counties were identical in their provisions, and were duly filed for record; but that the deeds to the land in Harrison county, although duly executed, were never filed for record, and had been lost, and vested in complainant one-fourth interest in said lands in fee. That after the decree confirming the aforesaid deed, and after said deeds were delivered and said court adjourned, at its next succeeding term a petition was filed in said court for the purpose of divesting complainant of her title in said lands, and vesting them in the administrator of her father, the late H. B. Balfour; and that said court did at such subsequent term, solely on ex parte proceedings, cause a decree to be entered canceling the aforesaid deed, which had been executed, conveying to complainant her interest in said lands, and directed that another deed be made for the lands, under which decree the commissioner conveyed the lands as follows: To Byrne, Vance & Co. an undivided one-half interest; to M. Musson, as executor of the estate of J. D. Balfour, an undivided one-fourth interest; to A. S. Duncan, administrator of the estate of H. B. Balfour, an undivided one-fourth interest,—which deed was afterwards confirmed by said court. That, after these deeds were made, M. Musson went into possession of all the lands, and held them in trust for complainant and others, and did not make any claim to the lands until after the execution of deeds hereinafter mentioned. That, in the prosecution of the suits in the United States circuit court, said M. Musson advanced to complainant money necessary to pay the expenses of said litigation to recover her interest in said lands,—about \$750; and, after the determination of said suit, said M. Musson was anxious to obtain reimbursement of said expenses, and applied to said A. S. Duncan, administrator, for repayment, and said Duncan did, at the request of M. Musson, in December, 1876, con-

vey to the said M. Musson the undivided one-fourth interest in said lands in Bolivar, Madison, and Harrison counties which had been conveyed to him by the commissioner of the United States circuit court. And that one of the pieces of property was sold by said M. Musson four years after he acquired same, and the one-fourth interest of complainant was sold for \$20,000. The bill charges that M. Musson had notice of complainant's title, and should be held a trustee for her benefit, and that said M. Musson entered into possession of the interest of complainant soon after the execution of the deed to him by said Duncan, administrator, and has held the same through himself and his vendees ever since adversely to complainant, and has refused to acknowledge her rights to said lands in any manner; that M. Musson, by quitclaim deed, conveyed to Estelle J. Balfour, his minor granddaughter, his undivided one-fourth interest in all the lands hereinbefore described; that M. Musson, in said deed, sets out fully the title acquired by him from said administrator, Duncan, thus giving notice to Estelle J. Balfour of complainant's title; that Estelle J. Balfour died while a minor, intestate, leaving, as her sole surviving heirs, her minor half brother and sister Odille and Gaston Musson; that in July, 1885, said minors, by their mother, as tutrix, filed a bill in the chancery court of Harrison county, setting forth that they were the owners of a one-half undivided interest in the said lands, and how they had derived their title to same, and that certain other parties, whom they made defendants, were the owners of an undivided half interest; and that the said lands were indivisible in kind, and praying a decree of sale thereof and a division of the proceeds according to law; that a decree was rendered on this bill, by which it was ordered that said lands be sold by a commissioner, and the proceeds divided between the parties to the cause; that accordingly a sale was made of the whole lands; and that the whole of said lands were purchased by the Gulf Coast Canning Company; and that this sale was afterwards confirmed by said chancery court. The bill charges that the Gulf Coast Canning Company only took such title as was had by Odille and Gaston Musson, and were affected with notice of complainant's title, and held title as trustee for complainant. The bill avers that certain parcels of these lands were at different times conveyed by the Gulf Coast Canning Company to the other defendants in the bill. The bill asks for an accounting of the rents and profits, and a cancellation of the several deeds as clouds upon her title. Defendants demurred to the bill, because "(1) it appears on the face of the bill that the object thereof is to procure an examination and alteration or reversal of a decree made upon a former bill, and that said bill herein filed was not filed within

two years after the date of the final decree in the cause instituted by the filing of the said former bill;" (2) "it appears on the face of said bill that the suit herein brought has for its object the recovery of property sold by order of this court, and that said suit has not been brought within two years after possession taken by the purchasers under said sale."

Fred Clark and E. E. Baldwin, for appellant. Nugent & McWille, for appellees.

WOODS, J. The demurrer is founded upon a total misconception of the character of complainant's bill. It is not a bill of review, in any sense. It is an original bill, for cancellation of certain deeds clouding complainant's title to an undivided interest in the lands named. While it is true that many years ago there was a decree of the chancery court partitioning these lands, on the case then made, still it is obvious that complainant was then a nonresident infant, of tender years, and was not a party to that proceeding. Her interests were wholly unaffected by that decree. Neither the statute of limitations of two years, contained in section 2693, Code 1880, nor section 2568, establishing the effect of a final decree in partition proceedings, has any application in the case presented by the present bill of complaint. Far within the 10-years limitation, complainant has begun her action to clear her title and assert her rights, and the respondents must make answer. It may be proper to remark that the important question involved in the case at bar has been adjudicated in the case of *Musson v. Mercantile Co.* (decided March, 1893, by this court) 12 South. 589. Decree reversed, demurrer overruled, and cause remanded, with leave to defendants to answer in 30 days after mandate filed in court below.

(71 Miss. 608)

HOME INS. CO. OF NEW YORK v. DELTA BANK.

(Supreme Court of Mississippi. Feb. 19, 1894.)

FIRE INSURANCE—INVENTORY—SELLER'S INVOICE.

1. A defendant who has demurred to the reply, and, the demurrer being undisposed of, has rejoined, has waived his demurrer.

2. An invoice of goods purchased is not an inventory of stock to be produced under the "iron-safe clause" of a fire policy.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

"To be officially reported."

Action by the Delta Bank against the Home Insurance Company of New York on a fire policy. Judgment for plaintiff. Defendant appealed. Affirmed.

Mrs. R. Stein, who was a merchant at Greenwood, owned two stores,—one a grocery, and the other a dry-goods store,—and a separate set of books was kept for each

store, and they were run as separate businesses. Both the stores were insured with appellant for \$2,000. On the night of January 30, 1893, they were both destroyed by fire. Appellant was promptly notified of the loss, and sent their general agent and adjuster to Greenwood to adjust the loss. The policy contained what is called the "iron-safe clause," as follows: "The assured under this policy hereby covenants and agrees to keep a set of books showing a record of business transacted, including all purchases and sales, both by cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such inventory and books securely locked in a fire-proof safe at night, and at all other times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where the business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and, in the event of failure to produce the same, the policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." Immediately on the arrival of the adjuster, he was notified by Stein that the inventory was lost, but he demanded the books, and took and kept them several days, and had Stein to procure for him duplicate invoices of the goods that had been bought just before the fire, the originals of which had been burned. After several days' examination of the books and papers produced, the general agent told Stein that the policy would be paid. Payment of the policy was afterwards refused. The policy was assigned to the Delta Bank, who instituted this suit to recover the amount of the policy. Appellant pleaded the general issue and a special plea, in which it was charged that there had been a failure to comply with the iron-safe clause. Appellee filed three replications to the special plea. One of these admitted the failure to produce the inventory, but denied that the books required to be kept had not been kept and produced when demanded, and one of the replications charged that the condition of the iron-safe clause had been waived by reason that appellant promised to take advantage of that clause when he was notified of the loss of the inventory, and afterwards, on making an examination of the books, promised Stein to pay the loss. The other replication charged substantial compliance with the iron-safe clause, as the books and invoices produced showed all that the inventory would show. Issue was taken on these replications, after a demurrer had been overruled, which the record does not show was disposed of. From a verdict and judgment for plaintiff, defendant appealed.

Calhoon & Green, for appellant. Rush & Gardner, for appellee.

CAMPBELL, C. J. The appellant, having demurred to the replications, and, without the demurrer having been disposed of, rejoined, must be held to have waived the demurrer. Besides this, the question raised by the demurrer was fully presented in the trial of the issues of fact, and no harm was suffered by the defendant by the failure to obtain a ruling on the demurrer it presented. Conceding that error was committed in the trial of the issues joined, and that the plaintiff was not entitled to recover for the loss of the "dry-goods and general merchandise stock," because of the breach of the "iron-safe clause" of the policy, it seems to us that a recovery was rightly had for the loss on the "grocery department." As to that, there was no breach of the condition of the policy in the matter which is claimed to be fatal to recovery for the loss in the other department. The grocery business was begun March 11, 1892, and no inventory of the grocery stock had been taken, and therefore there was no inventory to be preserved and produced, as required by the policy. The invoice of the goods by which they were purchased was not the sort of inventory contemplated by the policy, and its nonproduction was not a breach of it. The evidence shows the loss of goods in the grocery department covered by the policy sued on, to an amount sufficient to entitle to recover the sum of the policy; and while it appears that there was another policy on the goods covered by this, as we know nothing more of that, and have to deal only with this, that presented no reason for denial of recovery on this.

We observe the fact that there was no motion for a new trial, and that the case is before us on a special bill of exceptions; but it specifically informs us that it contains "all the evidence in the case," and therefore, with all the evidence in the case before us, and seeing that upon that a proper result was reached, even though by wrong methods or by accident, it is right to maintain it. Affirmed.

ILLINOIS CENT. R. CO. v. VARNADORE. (Supreme Court of Mississippi. Feb. 19, 1894.)

INJURY TO BOY ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a boy only nine years old, while walking on a railroad track, which is usually so used by the people of that neighborhood, is run over by a train running at a rate of speed prohibited by ordinance, whether he was guilty of contributory negligence is for the jury.

Appeal from circuit court, Copiah county; J. B. Chrisman, Judge.

Action by G. W. Varnadore, minor, etc., against the Illinois Central Railroad Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Suit by appellee against appellant for personal injuries. The declaration of plaintiff

alleges that on the 26th day of March, 1892, while defendant's servants were negligently running its locomotive and cars within the corporate limits of the town of Wesson at a greater rate of speed than six miles per hour, said locomotive and cars struck the plaintiff, and ran over his foot, ankle, and leg, and injured it so that plaintiff had to have it amputated, and charged that the injury was caused by the negligence of defendant's servants, in running said locomotive and cars at a greater rate of speed than six miles per hour, and in failing to ring the bell and sound the whistle. Defendant pleaded the general issue, with notice that evidence would be offered to show that plaintiff was guilty of contributory negligence, in that he was jumping on a rapidly-moving freight train, and fell under the wheels, and was injured, without any fault of defendant, and he was a trespasser on defendant's track, and not at a crossing. Evidence for plaintiff was to the effect that plaintiff, a boy nine years of age, had been sent on an errand to the business portion of the town by his mother; that the railroad track was usually traveled by the people going to that part of the town from the locality where plaintiff lived; that, on his return home, plaintiff was going rapidly down the railroad track, south, when he saw a train of cars rapidly approaching, going north, and while attempting to get off the track he stumbled and fell, and the locomotive and cars ran over his ankle, and crushed it; that said train was running over six miles per hour in the corporate limits of Wesson, and no bell was rung or whistle sounded. The engineer and fireman both testified that no boy was on the track, ahead of the engine, on the day the accident occurred, at Wesson, and they knew nothing of the accident until they reached the station above, when they were told about it by the conductor. The conductor testified that he saw a number of boys trying to catch on to the cars as they went into Wesson that day, and that he saw a boy get hurt by a car running over him, and that it was a car nearer the caboose than the engine. From a verdict for plaintiff for \$2,000, defendant appealed.

Mayes & Harris, for appellant. Willing & Ramsey, for appellee.

COOPER, J. By the instructions, the court below fairly and correctly submitted to the jury the principles of law applicable to the facts claimed by the parties plaintiff and defendant to have been by them, respectively, proved. The only point upon which we have doubted is whether the plaintiff was entitled to have submitted to the jury the question of his freedom from contributory negligence. But, in view of the fact that at the time of the injury the plaintiff was but little above the age of nine years, we have reached the conclusion that the inquiry was properly submitted to the jury. The judgment is affirmed.

WEBB et al. v. FRIERSON et al.
(Supreme Court of Mississippi. April 2, 1894.)

EXECUTION—CLAIMS OF THIRD PERSONS.

Where timber, cut and cribbed, which is levied on under an execution against the vendor, was sold to claimants before the judgment against the vendor was rendered, and the sale is evidenced by a bill of sale, a peremptory instruction for claimants is proper.

Appeal from circuit court, Tallahatchie county; R. W. Williamson, Judge.

"Not to be officially reported."

Action by Frierson, Flautt & Co. against J. L. Webb & Co. From a judgment for claimants, defendants appeal. Affirmed.

At the January, 1893, term of the circuit court of Tallahatchie county, Miss., J. L. Webb & Co. recovered a judgment against H. R. Jenkins. In a short time thereafter, execution was issued on said judgment, directed to the sheriff of Tallahatchie county, who executed it by levying on some ash and cypress timber in the possession of Jenkins, who had cut and cribbed it in Leflore county. Appellees claimed the timber by virtue of a sale to them of said timber by Jenkins before the judgment was rendered. On the trial of the claimants' issue, claimants produced in evidence a bill of sale to the timber, dated prior to the rendition of said judgment. The court gave a peremptory instruction to find for the claimants. There was a verdict and judgment accordingly, from which plaintiffs appealed.

S. R. Coleman, for appellants. A. H. Longino, for appellees.

WOODS, J. The all-sufficient ground for an affirmance of the judgment appealed from in this case is that, before judgment in favor of appellants against Jenkins was entered, the property had been sold to appellees, and title thereto fully vested in them. Affirmed.

(71 Miss. 902)

BRAMLETT v. WETLIN.

(Supreme Court of Mississippi. April 30, 1894.)

EXECUTION SALE—RIGHTS OF PURCHASER—ASSIGNMENT OF LIEN—RECORD.

1. Code 1892, § 2461, requiring the transfer of a record debt to be entered on the record, does not apply to the transfer of a vendor's lien made before the Code became operative.

2. A purchaser at an execution sale acquires no greater interest than the judgment creditor had.

Appeal from chancery court, Wilkinson county; Claude Pintard, Chancellor.

Bill by G. A. Wetlin against D. C. Bramlett and another. From a decree for complainant, defendant Bramlett appeals. Affirmed.

On February 2, 1887, J. H. Jones sold and conveyed to F. A. Leak a certain tract of land in Wilkinson county, Miss., reserving a vendor's lien on the land to secure the unpaid purchase money. The notes for the purchase money were assigned by Jones to G. Lindenmeyer, who assigned one of them, on

which there was a balance due, to appellee, Wetlin, February 7, 1887. A. E. Morgan, administratrix, recovered a judgment against said Leak, which was enrolled. D. C. Bramlett, appellant, purchased this judgment from A. E. Morgan. There was no record of the assignments of the purchase money note, but these assignments were made before the Code of 1892 went into effect, and the Code went into effect before Bramlett purchased the judgment. Bramlett notified Jones that he was negotiating for the purchase of the judgment, and asked him if the purchase money on the land had been all paid. Jones replied that it had been paid, and, at Bramlett's request, entered a memorandum on the record so stating. Bramlett then purchased the judgment, had execution issued on it, and levied on the land, and advertised it for sale. After the land had been advertised, but before sale, Bramlett received notice of Wetlin's claim. The land was sold, and Bramlett purchased it. This is a bill filed in the chancery court of Wilkinson county by G. A. Wetlin against appellant and F. A. Leak to foreclose his lien. Leak did not answer, and a decree pro confesso was rendered against him. Bramlett answered, setting up his purchase in good faith for value. There is no conflict in the testimony. A decree was rendered for Wetlin, foreclosing his lien, from which Bramlett appealed.

A. G. Shannon, for appellant. J. H. Jones, for appellee.

CAMPBELL, C. J. Bramlett was neither a subsequent creditor nor purchaser, within the meaning of section 2461 of the Code of 1892. The statute has reference to one who becomes a creditor of the holder of the subject of the lien subsequent to the assignment not noted on the record, or a purchaser for value, without notice, of the subject of the lien, after the assignment. By purchasing, Bramlett got the right of the judgment creditor only, and he was not a subsequent creditor, but a prior one; and, by purchasing at the sale under the execution, he acquired no higher right, for it has been often decided in this state that a purchaser at execution sale acquires just the interest of the defendant in the execution, subject to all the equities of third persons. But section 2461 did not apply to the assignment involved in this case, because it was made before the Code of 1892 became operative, and it had no effect on the past transaction. Affirmed.

(104 Ala. 191)

NASHVILLE, C. & ST. L. RY. CO. et al. v. HAMMOND et al.

(Supreme Court of Alabama. June 21, 1894.)

APPEAL—REVIEW—EJECTMENT—EVIDENCE—ACKNOWLEDGMENT OF DEEDS—SUFFICIENCY—INSTRUCTIONS.

1. Where it is clear from the transcript that the case was tried on other issues than

that of the general issue, though the pleadings did not show them, the court will review the rulings of the trial court growing out of such issues.

2. In ejectment, where plaintiff claims through mesne conveyances from one H., and it appears that H. went into possession in the year 1851, and that he and those claiming under and through him by regular conveyances have been in continuous possession ever since, a deed dated in the year 1851, purporting to convey land to H., is competent, when offered merely as color of title.

3. In ejectment, in which an original deed is competent evidence, the record of such deed is admissible, where the party offering it testifies that at one time he had the original in his possession, but did not have it at the time of trial, and that he had made diligent search, and could not find it, and did not know where it was.

4. In ejectment, plaintiff offered in evidence a deed acknowledged as follows: "State of Alabama, Etowah County. Before me, P., an acting notary public in and for said county and state, personally appeared H. and wife, E., with whom I am personally acquainted with, and they have, on the day and date the above conveyance was signed, sealed, and delivered, acknowledged same to be their voluntary act. This 4th day of December, in the year 1872. [Signed] P., Notary Public & J. P." Held, that it was properly admitted, in that, though the acknowledgment was in some respects defective, the signature and certificate of the magistrate was sufficient as an attesting witness; it having been shown at the trial that he was then dead, and his handwriting and the genuineness of the signature having been fully established.

5. A charge that, if those under whom defendant claims went into possession under gift of right of way from H., the common source of title of plaintiff and defendant, plaintiff cannot recover unless he was in possession, under claim of right, for "more than 10 years" before suit, is erroneous, in that under it more than 10 years of adverse holding is necessary.

6. A charge that if W., in consideration that defendant's railroad would run the way it did, gave it a right of way over his land, then the law implies, in the absence of any agreement designating the amount, that a strip 100 feet in width is meant, is erroneous.

7. A charge that merely running a fence across defendant's roadbed, not then in use, or cultivating the same at broken intervals, does not, without more, constitute adverse possession in plaintiff, is erroneous, as invading the province of the jury.

8. A charge assuming as true a controverted fact is erroneous.

9. A charge that if W. gave defendant a right of way over his land if it would build a road on a certain line, and defendant did so, locating the line of its road, staking and cutting out the right of way, grading the railroad ready for ties, and completing it as soon as it was able, such grading of railroad and cutting out right of way was the commencement of an adverse possession of the same by defendant, and that it could not be ousted or disseised by W. by fencing and cultivating said right of way, is erroneous, where the uncontroverted evidence shows that the road was not constructed through for 25 years after the line was run out and staked.

Appeal from circuit court, Etowah county; John B. Tally, Judge.

Ejectment by W. B. Hammond and others against the Nashville, Chattanooga & St. Louis Railway Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

This was an action to recover a certain de-

scribed tract of land. The property involved was a strip of land about one-half mile long and 50 feet wide; being the 50 feet next adjoining one side of the roadbed of the Tennessee & Coosa Railroad Company, which was claimed by the defendants to be the right of way of said company. This road was used and operated by the Nashville, Chattanooga & St. Louis Railway Company. The plaintiffs and defendants trace their titles from the same source. On the trial of the case, as is shown by the bill of exceptions, the plaintiffs offered in evidence the record of a deed from one Thomas M. Barker to Richmond Hammond, conveying the property sued for, together with other lands. This deed was recorded in the book of deeds in the probate office of Etowah county. J. D. Hammond, one of the plaintiffs, testified that he, at one time, had the original of this deed in his possession, but did not have it at the time of the trial; that he had made diligent search among his papers, and could not find the said original deed, nor did he know where it was. The defendants objected to the introduction of the record of said deed. The court overruled their objection, and allowed the deed to be read to the jury as evidence of color of title, and the defendants duly excepted to this ruling. This deed bore date of January 17, 1851.

The testimony for the plaintiffs tended to show that the said Richmond Hammond went into possession of the property immediately upon the execution of the deed to him, and continued in possession thereof until his son, W. C. Hammond, went into possession, in 1854 or 1855, as owner, by direction of said Hammond, and said W. C. Hammond continued to exercise acts of ownership over said land until the conveyance to him by defendant. The plaintiffs then offered to introduce in evidence a certified copy of the deed executed by said Richmond Hammond to W. C. Hammond, March 27, 1861, conveying the land involved in this controversy, and which was purchased by said Richmond Hammond from Barker. Upon the defendants objecting to the certified copy on the grounds that the original had not been accounted for, the plaintiffs introduced John D. Hammond as a witness, who testified that he once had possession of the original deed, and had searched for the same in his house, and through his desk where his papers were usually kept, but had not been able to find the original; that this original deed was delivered to him when he purchased the lands conveyed therein from W. C. Hammond. Other witnesses also testified that at one time the said deed had been in their possession, and they too had made a thorough search for the same, but had not been able to find it. Upon this proof the plaintiffs offered the certified copy in evidence, and the court overruled the objection of the defendants that the original deed had not been sufficiently accounted for, and the defendants duly ex-

cepted. W. C. Hammond went into possession of the lands conveyed by this deed, and continued in possession thereof until he sold the said lands to J. D. Hammond. The plaintiffs then offered in evidence a deed from said W. C. Hammond and wife to J. D. Hammond, which was executed on December 28, 1872. The certificate of acknowledgment of this deed was in the following language: "The State of Alabama, Etowah county. Before me, H. W. Pickens, an acting notary public in and for said county and state, personally appeared W. C. Hammond and wife, E. W. Hammond, with whom I am personally acquainted with, and they have, on the day and date the above conveyance was signed, sealed, and delivered, acknowledged the same to be their voluntary act. This 4th day of December, in the year one thousand eight hundred and seventy-two. [Signed] H. W. Pickens, Notary Public & J. P." The plaintiffs introduced one L. E. Hamlin as a witness, who testified that he knew H. W. Pickens, who certified to the acknowledgment of said deed; that the said Pickens was now dead, and that the witness was acquainted with his handwriting; and that the signature "H. W. Pickens," to the certificate of acknowledgment of the deed offered in evidence, was the handwriting of the said Pickens. The defendants objected to the introduction of said deed in evidence upon the ground that there was no sufficient acknowledgment to the execution of said deed, and no proof that the deed had been executed. The court overruled this objection, allowed the deed to be read in evidence, and to this ruling the defendants duly excepted. Under this deed the said J. D. Hammond went into possession of the property conveyed therein, and continued in such possession until he conveyed the same on February 14, 1876, to his children, who, with said J. D. Hammond, are the plaintiffs in this suit. This deed from J. D. Hammond to his children was introduced in evidence without objection. The evidence for the plaintiffs tended to show that the said Hammond had, from the date of the execution of said deed, been in possession of the property, for his wife and children, up to the time of his wife's death.

The testimony for the defendants tended to show that this roadway was constructed in 1856 and 1857; that it was built through the land of W. C. Hammond, who owned the land at that time, with his consent; that the said Hammond, at the time of the survey of the road, stated to the representatives of the Tennessee & Coosa Railroad Company that if they would build the road along a certain route indicated, through his property, he would give them the right of way thereto; that in obedience to this direction the road was built according to the route designated, and is now situated thereon; that after the building of the roadway the said Tennessee & Coosa Rail-

road Company cleared its right of way of 50 feet on each side of the track, and exercised such acts of ownership over said right of way as was customary for railroads to do; and that the said company had been in possession thereof from that time to the present. In rebuttal to this evidence, the evidence for the plaintiffs tended to show that neither of the said Hammonds had ever conveyed by deed the right of way of 50 feet on either side of the track of the Tennessee & Coosa Railroad Company, and that neither of them had ever agreed with the railroad company that it should have the right of way of 50 feet on either side of the track; that the several owners of the land through which this right of way ran had cultivated the land sued for at different times; that their tenants had at times cultivated the same up to and including the roadbed; and that they had been in possession thereof continuously from the date of the execution of the deed from Barker to Richmond Hammond.

The charges which were given by the court at the request of the plaintiffs are not set out in the bill of exceptions. The defendants requested the court to give the following written charges, and separately excepted to the refusal to give each of them as asked: (1) "If the jury believe from the evidence that defendants, or those under whom they claim, went into adverse possession of the roadbed and right of way in 1856 or 1857, then the fact that the tenants of plaintiffs or their vendors built a fence across the track, and cultivated said track at intervals, their holding adverse, of itself, does not divest the title of defendants, acquired by their adverse holding, if the jury believe they so held." (2) "If the jury believe from the evidence that those under whom defendants claim went into possession of the lands in controversy under gift of right of way from William C. Hammond, then plaintiffs cannot recover, unless they were in open, notorious, and continuous possession, under a claim of right, for more than ten years before the bringing of this suit." (3) "If the jury believe from the evidence that William C. Hammond, in consideration that the railroad would run the way it did, gave them a right of way over his land, then the law implies, in the absence of any agreement designating the amount, that a strip one hundred feet in width, or 50 feet each way from the center of the track, is meant." (4) "Merely running a fence across the roadbed of defendants, not then in use, or cultivating the same at broken intervals, does not, without more, constitute an adverse possession in the plaintiffs." (5) "Plaintiffs have not shown such paper title as entitles them to recover, unless they were themselves in adverse possession of the lands sued for, openly, notoriously, and continuously, and in hostility to defendants or those under whom they claim, for more than ten years before the bringing

of this suit." (6) "If the jury believe from the evidence that defendants, or those under whom they claim, put the roadbed and right of way where it now stands in consideration of the offer of William Hammond to give them the right of way if they would put it there instead of at another place, where they had surveyed it, then this adverse possession begun at once, and is presumed to continue, and the burden is then on plaintiffs to show by a preponderance of evidence that it has terminated." (7) "If the jury believe from the evidence that at the time of the making of the deed by John D. Hammond, in 1876, to his children, defendants, or those under whom they claim, were in adverse possession, then said deed is absolutely void, and plaintiffs cannot recover." (8) "If the jury believe from the evidence that at the time of the execution of the deed from W. C. Hammond and wife to J. D. Hammond and wife, in 1872, defendants, or those under whom they claim, were in adverse possession, then said deed is void and plaintiffs cannot recover." (9) "The court charges the jury that if they believe from the evidence that the said W. C. Hammond gave the Tennessee & Coosa Railroad Company a right of way over his land if it would build the road on a certain line, and the railroad company did locate the line of its road on said line, did stake and cut out the right of way, and did grade the railroad ready for cross-ties, and did complete the railroad from Gadsden to Guntersville as soon as it was able, then such grading of railroad and cutting out right of way was the commencement of an adverse possession of the same by the railroad company, and it could not be ousted or disseised by W. C. Hammond by fencing and cultivating said right of way. And if the jury believe from the evidence that the said Hammond did not notify said company, either by words, or some other acts other than the fencing and cultivating said right of way, then he did not hold the land in adverse possession to Tennessee & Coosa Railroad Company. And the same results will apply to J. D. Hammond and the other plaintiffs, if the jury believe from the evidence they did nothing more than rent out, fence, and cultivate the land, and in such case the verdict of the jury should be for defendants." (10) "The court charges the jury that if they believe from the evidence that W. C. Hammond gave the right of way to the Tennessee & Coosa Railroad Company, provided that the company would build the railroad on a certain line, and the company did grade the road, did cut the right of way one hundred feet wide, and put down the pegs, then this gave the company an easement of right of way over said land, and the same was adverse to said easement against said Hammond; and the fact that Hammond merely fenced the right of way, and cultivated the same, then these acts did not constitute an

adverse possession in Hammond, unless he gave company notice that he intended to hold the right of way adverse to company, and held it in adverse possession for ten years; and, if Hammond has not given such notice, then the railroad company could terminate such use and possession of Hammond when it needed the right of way for railroad purposes, and in such case the jury should find for the defendants."

O. R. Hundley and W. H. Denson, for appellants. Dortch & Martin, for appellees.

COLEMAN, J. This is a statutory action of ejectment instituted by appellees to recover a certain parcel or strip of land described in the complaint. The record proper does not contain any plea of the defendants. The judgment entry is: "Come the parties by attorneys, and, issue being joined, thereupon came a jury," etc. The presumption is that issue was joined upon the general issue. There is a recitation in the bill of exceptions "that issue was joined upon the pleas of the statute of limitations of twenty years, and of ten years, and not guilty." Pleadings, and the action of the court upon them, do not constitute a part of the bill of exceptions. They should appear in the record proper. *Powell v. Henry* (Ala.) 11 South. 311; *Beck v. West*, 91 Ala. 312, 9 South. 199; *Powell v. State*, 89 Ala. 172, 8 South. 109; *Steed v. Knowles*, 97 Ala. 573, 12 South. 75. Where it is perfectly clear from the entire transcript that the case was tried upon other issues than that of the general issue, although the pleadings did not show them, this court has reviewed the rulings of the primary court growing out of such issue. *Farmer's Case* (Ala.) 12 South. 86.

The plaintiffs claim title by mesne conveyances from Richmond Hammond. The evidence shows that Richmond Hammond went into possession in the year 1851, and that introduced by the plaintiffs tends to show that he and they who claim under and through him by regular conveyances have been in continuous possession ever since. The court did not err in admitting the instrument, dated in the year 1851, signed by Barker, which purported to convey the lands to Richmond Hammond. It was offered merely as color of title. The grounds of objection are not stated, and, when considered in connection with the proof that Richmond Hammond went into possession in the year 1851 under his purchase from Barker, we can see no objection to it as evidence of color of title. The proof of the loss of the original deed, from Richmond Hammond to W. C. Hammond, dated in 1861, was sufficient to authorize the introduction of a certified copy. The court did not err in admitting the certified copy of the conveyance recorded in the probate office.

There was no error in admitting in evidence the deed of W. C. Hammond, executed

in 1872, to John D. Hammond and his wife, Fannie Hammond. The acknowledgment, in some respects, may have been defective, but the signature and certificate of the magistrate were sufficient as an attesting witness. *Torrey v. Forbes* (Ala.) 10 South. 320; *Merritt v. Phenix*, 48 Ala. 90; *Sharp v. Orme*, 61 Ala. 268; *Rogers v. Adams*, 66 Ala. 600. It was shown at the trial that he was then dead, and his handwriting and the genuineness of the signature was fully established.

Declarations of a party in possession of land, of the character in which he holds, made in good faith, are admissible in evidence upon an issue of disputed ownership, no matter who may be the party to the litigation. *Daffron v. Crump*, 69 Ala. 79; *Jones v. Pelham*, 84 Ala. 210, 4 South. 22; *Humes v. O'Bryan*, 74 Ala. 64; *Lucy v. Railroad*, 92 Ala. 250, 8 South. 806; *Steed v. Knowles*, 12 South. 79, 97 Ala. 573. The declarations of W. C. Hammond, offered in evidence, come within this rule. The defendants' evidence tended to show that W. C. Hammond agreed in parol that, if defendants would grade their road on a certain line, he would give them the right of way; that in pursuance of this agreement the defendants, and those from whom they derive title, constructed their railroad on the line designated; that they took possession of the right of way, 100 feet in width, under said agreement, in the year 1854, and have held adverse, continuous possession ever since, claiming the same in their own right. This evidence is controverted by the plaintiffs, both as to the agreement and as to the possession. The roadbed is not sued for, but the complaint embraces the land within 50 feet from the center of the track, and to the margin of the roadbed.

The charge given by the court, and the instruction given for the plaintiffs, though excepted to, are not in the record, and we cannot review them. Only the charges requested by the defendant and refused by the court are before us, and subject to review.

Titles to land do not pass by a mere parol gift, and possession under a parol gift for a period of time less than 10 years of adverse holding cannot defeat a recovery by the alleged donor or grantor, holding the legal title. The plaintiffs' evidence showed a legal title by regular conveyances from W. C. Hammond, and possession thereunder for 10 years. In such cases the burden is on the defendant to sustain the claim against plaintiffs' paper title, acquired by conveyance and possession. *Steed v. Knowles*, 12 South. 80, 97 Ala. 573. The first charge refused is not clearly stated. As we understand it, the legal proposition is that, if the defendants were in adverse possession in 1856 or 1857, no subsequent possession of plaintiffs, of whatever character or length of time, could divest the defendants of any right acquired by their adverse possession held during these years. Charge No. 2, re-

fused, asserts the law contrary to what has been stated. It is faulty for the further reason that under it "more than ten years" of adverse holding is necessary to give a perfect title. Charge No. 3 is misleading, and for this reason might have been refused. It is faulty in this: that it asserts that a grant of the right of way to a railroad, without description, implies that the grant embraces a width of 100 feet. In condemnation proceedings the statute limits the right of way to such "lands as may be necessary, not exceeding one hundred feet in width." Code 1886, § 1580, subd. 8; *Railway Co. v. Brown* (Ala.) 13 South. 70. Charge 4 invades the province of the jury, and asserts a contrary proposition to that declared in the opinion. Charge No. 5 was misleading, and clearly invaded the province of the jury. Charge No. 6 is subject to the criticism placed upon charge 2, in that it requires an adverse holding of "more than ten years." It does not assert the law applicable to the facts of this case, where it appears the defendants had no paper title, and to defeat plaintiffs' recovery it was necessary to show a legal title acquired by adverse possession. The proposition of law asserted in charge 6 is contrary to the principles declared in this opinion, and is further objectionable in that it assumes as true a fact controverted,—that William Hammond did offer to give the right of way in consideration, etc. A charge which instructs the jury that their verdict must be controlled by "a preponderance" of evidence may be refused. *Vandeventer v. Ford*, 60 Ala. 610; *Acklen v. Hickman*, Id. 568; *Street v. Sinclair*, 71 Ala. 111. Charges 7 and 8 ignore the evidence tending to show continuous possession by plaintiffs from and after 1876 to 1891,—a period of more than 10 years. In addition, the evidence shows that W. C. Hammond executed a deed in the year 1872, and not 1876. Charges 9 and 10 were properly refused. They are argumentative and misleading, and invade the province of the jury. The uncontroverted evidence shows that the road was not constructed through for about a quarter of a century or more after the line was run out and staked. The plaintiffs, if their testimony is believed, exercised many acts of ownership not predicated in the charge. We find no error in the record. Affirmed.

(104 Ala. 58)

Ex parte ELYTON LAND CO.

(Supreme Court of Alabama. June 22, 1894.)

APPEALABLE JUDGMENT—DECREE IN ACTION FOR DOWER.

Where a widow prayed that dower be assigned, that an account of rents and profits and of the improvements be taken, and for general relief, and the court decreed that she was entitled to the relief prayed, and ordered a reference, such decree was "final," within the meaning of Code, § 3611.

Petition by the Elyton Land Company for a writ of mandamus to compel William W.

Wilkerson, judge of the city court of Birmingham, Ala., to prescribe the amount of an appeal bond in a certain action to which petitioner is a party, and in which such court had rendered a certain decree adverse to petitioner. Writ granted.

Alex T. London, for petitioner. Brooks & Brooks, for respondent.

BRICKELL, C. J. Rebecca E. Denny filed her original bill in equity in the city court of Birmingham, against the heirs at law of her deceased husband, Joab Bagley, the Elyton Land Company, and others, alleging that her said husband died, intestate, in April, 1875, seised in fee of a described tract or parcel of lands, of and in which dower had not been assigned to her; that, after his death, the Elyton Land Company had entered upon and taken possession of the lands, and made improvements thereon; that certain other persons, who were made defendants, entering under said company, were in possession of parts of said lands, and had made improvements thereon. The prayer of the bill is that dower in the lands be assigned to the complainant; that an account be taken of the mesne profits or rents of the lands, from the commencement of the possession of the Elyton Land Company; that it be ascertained what parts of the lands the defendants entering under the company occupied, and that an account of the rents and profits thereof be taken; that an account be taken of the improvements made upon the said lands, and by whom made; that one-third of the rents be decreed to be paid the complainant, with the interest thereon, in such proportions by the several defendants as may be deemed just; and for general relief. The city court rendered a decree ascertaining and declaring that the husband, Joab Bagley, at the time of his death, was seised in fee of the lands, and further declaring that the complainant was entitled to the relief prayed for, and to be endowed in and of the lands. A reference was ordered to ascertain the parts of the lands which had been granted by the Elyton Land Company to the several defendants entering under it; the improvements these defendants had severally made; whether dower by metes or bounds, in these several parts of the lands, could be assigned; further, to take an account of the annual rents and profits of the remainder of said lands—First, exclusive of the improvements thereon made after the death of the husband; second, including the improvements,—and to ascertain what part, if any, of the said lands is woodland, of but little rental value. The Elyton Land Company, desiring to appeal from the decree and to supersede its execution, applied to the judge of the city court to prescribe the amount of the bond to be executed pursuant to the statute. Code, § 3625. The judge, not deeming the decree final, authorizing an appeal, refused to prescribe the amount of the

bond. Thereupon the company applied to this court for a mandamus to compel the judge to prescribe the amount of the bond.

The equity of the original bill on which the decree was rendered involved the concurrence and coexistence of these facts: The marriage, the seisin of the husband during coverture, his death, and the possession of the lands, claiming to be tenants of the freehold, by the defendants charged to be in possession and so claiming. These facts constitute the equity of the case. They embrace the substantial merits of the controversy. From them arise the material issues of fact and of law upon which the legal and equitable rights of the parties depend. The decree ascertains and declares the concurrence and coexistence of these facts, and from them deduces the legal conclusion which is expressed that the complainant is entitled to be endowed of the lands, and entitled to the relief prayed for in and by the original bill. The decree thus settles "all the equities of the case," as that term is employed in our decisions, leaving the court to pursue such other and ulterior proceedings as may be necessary to execute the decree, securing to the complainant the full possession and enjoyment of the rights to which she is entitled.

There are certain interlocutory orders or decrees specified in sections 3612-3614 of the Code which the court of chancery or the chancellor, sitting in term time or in vacation, may render, from which an appeal to this court may be taken. Excepting these orders or decrees, it is only the final decree of the court of chancery which will support an appeal. Code, § 3611. Taken in a strict, technical sense, the final decree of a court of chancery is the sentence of the court, finally and conclusively determining all the matters in controversy, disposing entirely of the cause, leaving nothing further for the court to do. Such is not the meaning of the term "final decree," as it is employed in the statute. The test of the finality of a decree to support an appeal is not whether the cause remains in fieri, in some respects, in the court of chancery, awaiting further proceedings necessary to entitle the parties to the full measure of the rights it has been declared they have, but whether the decree which has been rendered ascertains and declares these rights. If these are ascertained and adjudged, the decree is final, and will support an appeal. 1 Brick. Dig. pp. 89, 90, §§ 85-87; *Jones v. Wilson*, 54 Ala. 50; *Malone v. Marriott*, 64 Ala. 486; *Walker v. Crawford*, 70 Ala. 567; *Randle v. Boyd*, 73 Ala. 282; *Cochran v. Miller*, 74 Ala. 50; *Adams v. Sayre*, 76 Ala. 509. We repeat, the decree before us finally and conclusively ascertains and adjudges the existence of every material fact upon which the right of the complainant to the relief sought depends. If it had been adjudged that any one of these facts did not exist, the adjudication would have

been fatal to her right to relief. The decree adjudging the existence of these facts removes them from the pale of further controversy in the city court. The term of that court having passed, except upon a petition for rehearing, filed within the time prescribed by the rules of chancery practice, the court is powerless to reconsider or modify the decree. *Cochran v. Miller*, supra.

Whether dower should be assigned by metes and bounds, or whether compensation should be decreed in lieu of such assignment; which of the defendants should be charged with the payment of rents, for what parts of the lands, and in what proportions; whether the rents should be computed on the basis of the enhanced value of the lands because of the improvements, or without regard to such improvements,—were incidents consequential to the decree the court had rendered, adjudging that the complainant was entitled to be endowed of the lands, essential to the execution of that decree, and to confer upon her the possession and enjoyment of the rights the decree adjudged she was entitled to have and enjoy. In this respect the decree bears a close resemblance to the numerous decrees which have been before this court, and adjudged final, supporting an appeal, though a reference to the register of matters of account was made, or a reference to ascertain the amount due the complainant.

While we are constrained to declare the decree is final, and will support an appeal, we feel it our duty to say that it would be a better practice if the courts exercising chancery jurisdiction would not render such decrees. The purpose of the statute in limiting the right of appeal to final decrees is obvious. It was intended to save the delay and expense of several appeals, having the whole case, and every matter of controversy in it, decided on a single appeal. The purpose of the statute would be accomplished if the chancellor, or the judge exercising chancery jurisdiction, when he reaches the conclusion that a complainant is entitled to relief, would, in an interlocutory decree, announce the opinion formed, making such other interlocutory orders or decrees to secure the complainant the full measure of relief the case may render necessary, and withholding a final decree until these interlocutory orders or decrees have been executed; then, in one final decree, adjudicate every disputed matter, rendering the whole revisable on one appeal. Thereby the cause would be kept under the control of the court, and there would be but one decree, having the elements of finality. *Jones v. Wilson*, supra; *Forgay v. Conrad*, 6 How. 201. As this case stands, and as was true of the numerous cases to which we have referred, we have a decree which is partly final and partly interlocutory,—final so far as it adjudges and determines the existence of the material facts on which the right of the

complainant to relief depends; interlocutory as to the further proceedings which are necessary to the execution of the decree. From the present decree an appeal lies, because the equities of the case are determined by it. From the decree which may be rendered hereafter, on the further proceedings, an appeal will also lie. And thus the court is necessitated "to revise litigated cases by piecemeal,"—a necessity which would have been avoided if the decree settling and determining the equities of the case had been withheld until the court was ready to dispose of the case and all matters of controversy it involves entirely, leaving no room for further judicial action.

The rule nisi must be made absolute, and a peremptory mandamus must issue, in accordance with the prayer of the petition.

(102 Ala. 371)

SULLIVAN v. SULLIVAN TIMBER CO.

(Supreme Court of Alabama. June 5, 1894.)

CORPORATIONS—ACTIONS AGAINST—VENUE.

1. Under Const. art. 14, § 4, providing that no foreign corporation shall do any business in the state without one known place of business and an authorized agent therein, and that such corporation may be sued in any county where it does business, and Code, § 2642, providing that any corporation may be sued in any county in which it does business by agent, a foreign corporation having a known place of business in the state is not subject to a personal action in a county beyond such place of business, unless it was doing business in such county at the time suit was commenced.

2. Care of unused property and payment of taxes thereon, on which payment is essential to preserve the owner's title, are not the transacting of business in the county where such property is situated, within Const. art. 14, § 4, and Code, § 2642, such as will give the courts of such county jurisdiction of a personal action against the company.

Appeal from circuit court, Conecuh county; John R. Tyson, Judge.

Action by J. J. Sullivan against the Sullivan Timber Company on an account stated, and for work and labor done. From a judgment for defendant, plaintiff appeals. Affirmed.

Stallworth & Burnett and Troy & Watts, for appellant. Gregory L. & H. T. Smith, for appellee.

BRICKELL, C. J. The appellant, by summons and complaint, commenced an action against the appellee, averred to be a corporation under the laws of the state of Florida, doing business in the county of Conecuh. Service of summons was made in that county upon J. W. Black, the president of the company. The complaint contains two counts,—the one, for an account stated; the other, for work and labor done. The defendant appeared and pleaded in abatement, alleging that it had a known place of business, and an authorized agent therein, in the city of Mobile, and that, at the time of the com-

mencement of the suit, it was not doing business in the county of Conecuh. To this plea, the plaintiff demurred, assigning three causes. The first and second were that the plea did not negative the fact that the defendant was doing business in the county of Conecuh when the contracts were made on which the suit is founded; the third, that it did not appear from the plea that the court had not local jurisdiction of the action. The demurrer was overruled, and issue was taken on the plea. The defendant introduced evidence showing that its principal place of business was in Mobile, where it had authorized agents. It owned a sawmill in the county of Escambia, and a railroad running therefrom, three or four miles into the county of Conecuh, and a derrick in that county, which had been used for the purpose of supplying the mill with logs. In consequence of litigation, the operation of the mill had been stopped prior to the commencement of the suit, and after its stoppage the company had not done any business in Conecuh county. The plaintiff introduced evidence showing that, at or about the time of the commencement of the suit, the defendant had a person in possession and taking care of the railroad and derrick; and that, subsequent to the commencement of the suit, an agent of the company paid the taxes on its property in Conecuh county. This was all the evidence, and, at the request of the defendant, the court instructed the jury to find the issue for the defendant. The rulings on the demurrer and the instruction given to the jury form the matter of the assignments of error. It is apparent the case draws in question the construction of the last clause of the fourth section of the fourteenth article of the constitution, and of the statute (Code § 2642). The section of the constitution, in its entirety, reads: "No foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process on an agent anywhere in the state." The statute reads: "A foreign or domestic corporation may be sued in any county in which it does business by agent." The section of the constitution and the statute (which, in so far as it relates to foreign corporations, is merely affirmatory of the constitution) are remedial, intended to supply defects or correct mischiefs in the pre-existing state of the law; and in their construction we are to consider what was the law before the constitution was adopted and prior to the enactment of the statute, what were the defects it was intended to supply or the mischiefs it was intended to correct.

By the common law, to maintain a personal action against a corporation, there must have been service of process upon its head or principal officer within the jurisdiction of the sovereignty from which corporate exist-

ence was derived. The officer upon whom, in the sovereignty of its creation, service could be legally effected, binding the corporation, it may be, could be found in another jurisdiction, but he was not deemed to bear with him his official functions, and service upon him there effected would not bind or affect the corporation. Whatever of legal proceedings could be pursued against the corporation elsewhere than within the sovereignty of its creation must have been authorized by legislation of the forum in which such proceedings were instituted. *St. Clair v. Cox*, 108 U. S. 354, 1 Sup. Ct. 354; *Aldrich v. Anchor Coal & Development Co. (Or.)* 32 Pac. 756; *McQueen v. Manufacturing Co.*, 16 Johns. 5; *Peckham v. Haverhill*, 16 Pick. 274, 286; *Moulin v. Insurance Co.*, 24 N. J. Law, 244; *Camden Rolling-Mill Co. v. Swede Iron Co.*, 32 N. J. Law, 15. Upon principles of comity, there was acquiescence in the maintenance of suits in this state by foreign corporations, and the making by them of such contracts as they had by the law of their creation capacity to make, if thereby our own laws or public policy were not offended. *Lucas v. Bank*, 2 Stew. (Ala.) 147; *Hitchcock v. Bank*, 7 Ala. 386; *Mayor v. Rogers*, 10 Ala. 37; *Telegraph Co. v. Pleasants*, 46 Ala. 641; *Eslava v. Ames Co.*, 47 Ala. 384; *Exporting Co. v. Locke*, 50 Ala. 332; *Thorington v. Gould*, 59 Ala. 461. But there was no statute providing for or regulating suits against them, except the statute authorizing the issue of an attachment for the seizure of property belonging to them, found in the state. Code 1852, § 2513; Rev. Code 1867, § 2938; Code 1876, § 3263; Code 1886, § 2940.

Private corporations created and organized for the transaction of business and the derivation of pecuniary profits are in this country, it is said, mainly the growth of the last 75 years. In *McKim v. Odom* (1828) 3 Bland, 407-418. It was said by Bland, Ch., that no instance of such a corporation in colonial times could be found. *Cook, Stock, Stockh. & Corp. Law*, § 1. The increasing number of such corporations, and the variety and extent of the business they were created and organized to transact, their presence by agents, either by acquiescence or by legislative permission, in other states, in the exercise of their general powers, making contracts, acquiring and disposing of property, rendered the rules of the common law to which we have referred the source of frequent inconvenience and injustice, compelling a modification or relaxation of them. The principle came to be accepted that if a foreign corporation sent its agents into another state, and there, by acquiescence or legislative permission of the state, engaged in the transaction of business, upon all causes of action there arising it became subject to suit in such mode as the law of the state provided, or, if there was no special provision for such suits, in the mode prescribed for suits against domestic corporations of like

character. *Moulin v. Insurance Co.*, supra; *St. Clair v. Cox*, supra; *Railroad Co. v. Harris*, 12 Wall. 65; *Railway Co. v. Whitton*, 13 Wall. 270; *Ex parte Schollenberger*, 96 U. S. 369; *Aldrich v. Anchor Coal & Development Co.*, supra. But if the corporation was not engaged in the transaction of business, or had not property within the state which could be reached by attachment, though its head or principal officer may there have had his personal residence, or may have been found there casually, there could not be a valid service of process compelling it to appear; and, without a voluntary appearance, there could be no judgment rendered which would bind or affect it. The period of time at which it must have been engaged in the transaction of business within the state, to authorize a personal action against it, by the service of process on its principal officer or other agent, was the commencement of the suit. The fact that, at some time anterior, the corporation may have been engaged in business or may have had agents within the state, and though, at such time, the contract was made, or the cause of action arose, on which the suit was founded, was not controlling or material. The modification or relaxation of the common-law principle was rested upon the theory that the corporation, by entering the state by its agents, engaging in the transaction of its corporate business, gave to itself "a species of locality in the nature of a domicile," and was presumed to have assented to be sued in the courts of the state, as if it were a domestic corporation. *Rolling-Mill Co. v. Swede Iron Co.*, supra; *Aldrich v. Anchor Coal & Development Co.*, supra; *Ex parte Schollenberger*, supra. As is well observed in *Lattimer v. Railway Co.*, 43 Mo. 109: "The well established and settled principle is that, to give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of the jurisdiction, or some property or chose in action of his must be found there upon which the court can proceed in rem. Every attempt on the part of one nation or state, by its legislature, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation, and all judicial proceedings in virtue thereof are held utterly void. This proceeds upon the known maxim, 'Extra territorium jus dicenti impune non paretur.'" The presence of the corporation by its agents, engaged in the transaction of corporate business, was the essential fact which drew it within the jurisdiction of the courts of a state other than the state of its creation, to entertain a personal action against it. The fact must have existed at the commencement of the suit, or the jurisdiction could not exist. If the fact did not then exist, there could be no legal service of process, and there could be no valid operative judgment rendered. It was only

by comity that foreign corporations not engaged in interstate or foreign commerce, or not the agencies of the national government, were permitted to make contracts and carry on business within this state. The state had the power to exclude them absolutely, or to prescribe the terms and conditions upon which, within its jurisdiction, it was permissible for them to make contracts or exercise their general powers. The first clause of the section of the constitution which is under consideration prescribes inflexibly, as the condition upon which a foreign corporation may do business within this state, that it shall have "at least one known place of business and an authorized agent or agents therein." The succeeding clause declares that "such corporations" (by which we understand not any and every foreign corporation, but the corporation which has designated for itself "a known place of business and an authorized agent or agents therein") may be sued in any county where it does business.

When the constitution is read in the light of the pre-existing law, we understand what were the defects and mischiefs it is intended to supply and correct, the changes it is intended to make, and the scope and extent of its provisions. By comity or mere acquiescence, a foreign corporation may not now make contracts from which it can derive rights or benefits, or transact any part of the business for which it was organized. The condition upon which it may do business, fixed and prescribed by the constitution, is inflexible, and is unalterable by legislation. *Farrior v. Security Co.*, 88 Ala. 275, 7 South. 200; *Security Co. v. Ingram*, 91 Ala. 337, 9 South. 140; *Nelms v. Mortgage Co.*, 92 Ala. 157, 9 South. 141. The corporation, having fixed for itself a known place of business, and placed therein authorized agents, thereby gives to itself a locality or domicile, and, so long as it continues there to do business, may be sued as a domestic corporation may be sued at its domicile or principal place of business. The liability to suit does not now rest upon the theory that the corporation, by sending its agents into the state for the transaction of business, is presumed to consent to be sued here. The assent is expressed in the condition upon which it can legally transact corporate business within the state. It is not the purpose of the constitution to confine the corporation in the transaction of business to the locality or domicile it may designate as its "known place of business." The constitution speaks in recognition of the known fact that the business foreign corporations are created and organized to transact is varied, entering into nearly all the industries, commerce, and interests of the country; that, in the course of the transaction of its business, the corporation would probably send its agents into other counties, beyond "the known place of business" it had designated, for the transaction of such corporate business as was intrusted to them. In such coun-

ties, while doing business there, the constitution subjects the corporation to suit, as well as within its domicile or "known place of business." But it must be observed that the essential fact upon which the liability to suit in other counties depends is that it "does business" in such counties; as the essential fact rendering it liable to a personal action in the courts of the state prior to the constitution was that it was doing business within the state. The material changes which the constitution works are that the corporation becomes liable to suit in any county in which it does business, and the process may be served, compelling it to appear, upon an agent anywhere in the state. The words of the statute are plain and unambiguous. There is no room for construction or interpretation, or for an inquiry into the policy of the provision or the motives which it may be supposed induced its adoption. It speaks of the present, not of the past or of the future. The words "does business" are equivalent in meaning to, and expressive of the same thought as, the words "doing business." Unless we deflect these words from their plain and usual signification, or import into the constitution words not found there, we are constrained to the conclusion that a foreign corporation, having a known place of business in the state, is not subject to a personal action in a county beyond such place of business, unless, at the time of the commencement of suit, it was doing business in such county, and that it is immaterial that the contract was made or the cause of action arose on which the suit is founded at some past time, when the corporation was doing business in such county. There was no purpose to compel a corporation to a continuance of business at a place because at some time it had transacted business there. There is not a word found in the constitution which would justify the imputation of such a purpose to its framers. Such a purpose would as illy comport with the principles of natural justice as a purpose to constrain a natural person to a continuance of a particular occupation because he once pursued it, or to its continuance in a particular locality because he had there pursued it. With full knowledge that corporations, of necessity or from mere convenience, are frequently changing their places of business, the provision of the constitution was framed. The hardships or inconveniences which it is supposed may result if they are not permanently subject to suit in a particular locality, upon causes of action there arising, because they had there transacted business, are the hardships or inconveniences, and no other, which may result if a natural person change the county or state of his residence. The plea in abatement negatives the fact that the corporation, at the commencement of suit, was doing business in the county of Conecuh, and affirms that it then had in the city of Mobile a known place of business, and an authorized agent therein. It was not

necessary that the plea should negative the fact that the corporation was doing business within the county when the cause of action arose. That fact is not, within our view, controlling or material; and the court below did not err in overruling the demurrers to the plea.

When a foreign corporation "does business" within the state, of necessity the business is done by and through agents; and the necessity is recognized by the constitution and by the statute. It is not within the purview of either that the corporate organization, or its head or principal officer, will migrate into the state. The corporation dwells in the sovereignty of its creation, and its organization there remains, as defined and declared by the law from which corporate existence is derived. It is contemplated that in this state, and in more than one of its counties, the corporation may have a visible existence by the presence of agents authorized to act for it, exercising such of its powers as may be intrusted to them, making such contracts and transacting such business as may fall within the scope of the authority conferred. The mere presence of an agent within the state, or within a particular county, authorized to transact particular business, not involving an exercise of the corporate powers or franchises, not a part of the business the corporation was created and organized to transact, is not within the proper meaning of the phrases "do business" or "does business," as employed in the constitution and the statute. 2 Beach, Priv. Corp. §§ 416, 800; Morgan v. White, 101 Ind. 413; Clews v. Iron Co., 44 Fed. 31; Bentliff v. London, etc., Corp., Id. 667; Carpenter v. Air-Brake Co., 32 Fed. 434; St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., Id. 802; U. S. v. American Bell Tel. Co., 29 Fed. 17. In Beard v. Publishing Co., 71 Ala. 60, it was decided that the company, having an agent in the state to receive subscriptions to the newspaper it was publishing, and to collect such subscriptions, was not doing business, in the meaning of the constitution; and it was said: "There must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created, to bring the case within the clause;" referring to the first clause of the fourth section. In Christian v. Mortgage Co., 89 Ala. 198, 7 South. 427, it was held that the prosecution or defense of an action in the courts of the state is not the doing of business, within the meaning of the constitution; and according to all the authorities, construing similar constitutional or statutory provisions, having in view the like objects or purposes, there are many acts of business a foreign corporation may do without coming within the constitutional or statutory provision. 2 Mor. Priv. Corp. §§ 661, 662. The real test is that applied in Beard v. Publishing Co., *supra*,—is the corporation engaged in the transaction of business, or any part thereof, it was created and

organized to transact? If it be, it "does business," within the meaning of the constitution. If it be not,—if the act it is doing or has done is not within its general powers and franchises,—it is not the business to which the constitutional requirement is directed.

When the suit was commenced, the company had an agent or employé in possession and care of the line of railroad it had constructed in the county of Conecuh, and of the machine it had used in the loading of cars with timber. The railroad and the machine were mere adjuncts or appurtenances to the sawmill it had operated in the county of Escambia. The operation of the mill had been suspended, and the railroad and machine were unemployed. The care and protection of unused property, or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed the exercise of corporate powers or franchises, nor the transaction of the business, or any part thereof, for which the company was created and organized. These acts did not confer upon the courts of the county jurisdiction to entertain a personal action against the company. That jurisdiction, under the undisputed evidence, pertained only to "the known place of business" the company had designated. We find no error in the instruction given the jury, and the judgment of the circuit court must be affirmed. Affirmed.

(108 Ala. 605)

SLATER v. ALSTON et al.

(Supreme Court of Alabama. June 20, 1894.)

EXECUTION—VALIDITY OF SALE.

Two executions were issued on a judgment against defendant; one being sent to the sheriff of C. county, and the other to the sheriff of S. county. The latter returned the execution "Satisfied" after the former had levied on defendant's land and advertised it for sale, and, the costs of the levy and advertisement not having been paid by the day advertised for the sale, the former sold the land to satisfy them. *Held*, that the return and satisfaction of the judgment by the sheriff of S. county was not a satisfaction of the execution directed to the sheriff of C. county, and that the sale was valid.

Appeal from circuit court, Choctaw county; James T. Jones, Judge.

Ejectment by James A. Slater against Martin Alston and others. From a judgment for defendants, plaintiff appeals. Reversed.

The appellant, James A. Slater, brought a statutory action of ejectment on September 16, 1893, against the appellees, for the recovery of certain lands specifically described in the complaint. The defendants pleaded the general issue, and the facts disclosed on the trial under the issue thus formed are sufficiently stated in the opinion. At the request of the defendants, the court gave the general affirmative charge in their behalf. There were verdict and judgment for the defendants. The plaintiff on this appeal, pro-

ecuted by him, assigns as error the giving of the general affirmative charge by the court for the defendants.

R. P. Roach, for appellant. W. F. Glover, for appellees.

COLEMAN, J. The plaintiff, Slater, brought suit in ejectment to recover certain lands described in the complaint. The plaintiff's title depends upon the validity of the sheriff's deed. The material facts are substantially as follows: George E. Crawford & Co. recovered a judgment against the defendant Alston in the circuit court of Sumter county on the 17th day of October, 1889; and on the 7th day of November, afterwards, the clerk of the circuit court issued two executions, one of which was placed in the hands of the sheriff of Sumter county, and the other sent to the sheriff of Choctaw county. On the 20th day of December, 1889, the sheriff of Sumter county returned the execution received by him "Satisfied in full," and on that day paid the money into court. Before the return of the execution "Satisfied" by the sheriff of Sumter county, the sheriff of Choctaw county levied the execution received by him on the lands in controversy, and had the same advertised for sale in a newspaper published in Choctaw county. Before the day of sale the sheriff of Choctaw county was notified that the judgment and costs recovered by the plaintiffs in execution had been fully satisfied, but the additional costs which accrued in consequence of the levy and advertisement by the sheriff of Choctaw county, not being included in the bill of costs indorsed on the execution delivered to the sheriff of Sumter county, were not paid; and, these additional costs not having been paid by the day advertised for the sale by the sheriff of Choctaw county, he proceeded to sell the lands for such unsatisfied costs. Slater, the plaintiff, became the purchaser at the sheriff's sale, and upon payment of the purchase money the sheriff executed to him a deed. It was admitted as true that the proceedings of the levy under the execution, the advertisement and sale by the sheriff, and the deed from the sheriff, were regular on their face, and that the purchaser, Slater, had no knowledge of the satisfaction of the judgment and costs by the sheriff of Sumter county. In the case of *Boren v. McGehee*, 6 Port. (Ala.) 432, it was held "that an execution issued upon a judgment which had been satisfied, but of which satisfaction no entry is made on the record, is not void, but voidable merely." This rule has been declared in the subsequent cases of *Steele v. Tutwiler*, 68 Ala. 110, and *Cowan v. Sapp*, 74 Ala. 44, 47. "To authorize a recovery on a sheriff's title, there must be a judgment, execution, levy, and sale, and the execution of a sheriff's deed." *Carrington v. Richardson*, 79 Ala. 101, 104; *Ware v. Bradford*, 2 Ala. 876.

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The question recurs as to whether the return and satisfaction of the judgment by the sheriff of Sumter was in fact a satisfaction of the execution in the hands of the sheriff of Choctaw county, by whom the sale was made. We think not. It is not denied that the land had been levied upon by the sheriff of Choctaw county, and duly advertised, and the cost of advertising had accrued prior to the satisfaction of the execution in the hands of the sheriff of Sumter county, and had not been paid. Code, § 2908, requires the advertisement of land for sale under execution, and section 666 regulates the price to be paid for such advertisement. It was the duty of the sheriff to levy and advertise, and the charges which accrued were legitimate costs. If the sheriff of Sumter county had made the levy and advertised the lands, any payment to him which did not include such costs would not have satisfied the execution, so as to prevent a sale for that purpose. The court in which the judgment was obtained and to which the execution was returnable, upon motion and notice and proper showing, was fully authorized to set aside the sale and quash the execution, but unless this was done the authority of the sheriff of Choctaw county to sell the land to satisfy the costs not paid continued in force. *Cowan v. Sapp*, 74 Ala. 44; *Ray v. Womble*, 56 Ala. 32; *Building Co. v. Moore*, 9 Port. (Ala.) 679. The sale of the land was voidable upon motion of the defendant in execution, seasonably made, in the court to which the execution was returnable, or he might obtain relief in a court of equity, upon proper averments sustained by proof. Without some order or decree vacating the sale, the title of the purchaser entitled him to recover the lands. This is the rule in this state, although a different rule prevails in some other courts. The court erred in giving the affirmative charge for the defendant. Reversed and remanded.

(102 Ala. 469)

McCALLEY v. OTEY et al.

(Supreme Court of Alabama. June 12, 1894.)

TENDER—SUFFICIENCY—DISMISSAL OF APPEAL—ACCEPTANCE OF DECREE.

1. Payment into court of less than the amount due will not stop the running of interest.

2. An appeal on the ground that the amount paid into court and adjudged to appellant was not the full amount due will not be dismissed because appellant withdraws the amount adjudged him by such decree.

Appeal from chancery court, Madison county; Thomas Cobbs, Judge.

Action by Octavia A. Otey and others against Charles S. McCalley. Decree for plaintiffs. Defendant appealed. Modified.

The bill in this case was filed by the appellees against the appellant, and sought to have enjoined a threatened sale of land under a power contained in a mortgage, and prayed to be allowed to redeem under the

mortgage. The original bill was filed on July 19, 1889. This is the third appeal in said cause. The facts of the case are set out in full in the last report of the case, as found in 12 South. 406. That appeal was taken from a decree of the chancellor, in not allowing to the mortgagee interest on the mortgage debt after the first tender, which was made on December 31, 1887. This court reversed that decree, and decided that there had not been a sufficient tender to the mortgagee to stop the payment of interest on the mortgage debt, and that he was therefore entitled to interest thereon. On the remandment of the cause, John M. Hampton was examined orally, and testified that he kept the same amount of money tendered on December 31, 1887, in readiness to pay up to the time he brought it into court. On cross-examination, he testified that he had a part of the money himself, and the balance of the money he obtained from his father; and that after the money was refused when tendered on December 31, 1887, and on January 2, 1888, he kept the money he had, and returned that which he had obtained from his father. This witness also said that he was willing and prepared to pay the amount tendered to McCalley at any time after said tender of December 31, 1887, up to the time the money was paid into court, but that he expected to borrow a part of the amount from his father to make the payment, if the tender was accepted. Upon the final submission of the cause, the chancellor decreed that the amount paid into court, to wit, \$1,318.46, was not sufficient to pay the sum due, computing the interest from the date of the maturity of the debt, from January 1, 1888; and that the amount tendered had not been kept continually ready for payment to the mortgagee from the date of the tender; and that, therefore, the complainant was liable for the interest on the debt from the date of its maturity until the money was paid into court, on March 21, 1890, and computed the interest due thereon. It was further decreed that the sum of \$1,318.46, which had been paid into court, less the cost of the suit, was the property of Charles S. McCalley, and the register was ordered to pay the same over to him. This decree was rendered on September 23, 1893. The sum adjudged by the decree to belong to said McCalley was paid over to the attorney of said McCalley, who gave his receipt to the register therefor. The decree of the chancellor allowing the said Charles S. McCalley, the mortgagee, interest only up to March 21, 1890, the day of the payment of the sum into court, is assigned as error on this appeal, brought by said McCalley, his contention being that he should be allowed interest up to the time of the rendition of the decree. After the cause was brought here on appeal, the appellee moved to dismiss the said bill, on the ground that the appellant, after the rendition of the decree from which the appeal is taken, has, under

and by virtue of said decree, withdrawn from the court the money tendered and deposited in the court by the appellees, and that, therefore, the appellant has ratified said decree, acquiesced therein, and is estopped from complaining of the same.

R. C. Brickell, W. A. Gunter, and Lawrence Cooper, for appellant. Tancred Betts, for appellees.

COLEMAN, J. The facts of the case fully appear in the opinion and report of the case in 12 South. 406. After the remandment of the cause, the chancery court permitted the introduction of evidence upon the question of tender, and, upon the submission of the cause upon this question, ascertained that the tender had not been kept good, and decreed that the amount paid into court on the 21st of March, 1890, was not the amount due respondent. The court allowed interest on the debt to the 21st of March, 1890, the date that the money was paid into court, and refused to allow interest to the date of the decree. In this the court erred. The amount paid into court was not the full amount due, and the respondent was under no legal obligation to accept anything less than his entire debt. The fact that the complainant must lose the interest upon the money during the time it was in court cannot be attributed to any fault of the respondent. To make a plea of tender available to stop the accumulation of interest, it is indispensable that the entire amount due be tendered. The court should have allowed interest on the principal (\$1,200) to the 23d day of September, 1893, the date of the rendition of the decree. The motion to dismiss the appeal upon the ground that the appellant had accepted payment of the amount of the decree of the court must be overruled. This case is clearly within the principle declared in the case of *Phillips v. Towles*, 73 Ala. 406; 1 Brick. Dig. p. 104, § 308. The principal (\$1,200) was admitted in complainant's bill to be due, and it was clearly shown that the amount tendered had not been kept good. Under no circumstances could the appellant be entitled to less than that decreed him. In fact, we hold that the error of the court consists in not decreeing to him the full amount of his claim. The case of *Hanson v. Todd*, 95 Ala. 328, 10 South. 354, has no application, as will be seen by an examination of the case of *Phillips v. Towles*, supra, and cases cited. A decree will be here rendered in favor of appellant for the further sum of \$344, to be paid with the interest which may accrue to him as a condition precedent to the cancellation of the mortgage and the redemption of the land; and, unless paid within 60 days from the rendition of this decree, the appellant, upon his motion in the court in which the cause is pending, may have the injunction granted in this cause, and made perpetual by the chancery court, dissolved, so that the mortgagee

(appellant) can proceed to foreclose his mortgage or collect the decree of this court in his favor by execution, or as he may be advised. Corrected and rendered in part, and remanded.

BRICKELL, C. J., not sitting.

(102 Ala. 475)

INDEPENDENT PUB. CO. v. AMERICAN PRESS ASS'N.¹

(Supreme Court of Alabama. Feb. 14, 1894.)

CERTIORARI—WHEN LIES—JUDGMENT OF JUSTICE—SERVICE OF SUMMONS ON CORPORATION—ABSENCE OF PROOF—PETITION FOR WRIT—SUFFICIENCY—DISCRETION OF COURT.

1. Where, in an action in justice's court against a corporation, the return of the constable is "executed by summons," a judgment by default against defendant, which contains no entry showing who was served with notice, as required by Code 1886, § 2657, is void, and certiorari is the proper remedy. Stone, C. J., dissenting.

2. Code 1886, § 3405, providing that on appeal from a justice the case shall be tried de novo, without regard to any defect in the summons or other process or proceedings before the justice, affords defendant no remedy for the error committed in such case. Stone, C. J., dissenting.

3. Code 1886, c. 13, § 3158, has not changed the principles of pleading and procedure which have always applied to the writ of certiorari, so as to permit an issue of fact to be made up in the supervisory court to supply an omission in the record proceedings, or to show that the record or recitals of the court in which the judgment was rendered are not true.

4. Where a transcript from a justice is made a part of a petition by defendant for certiorari to review such proceedings, and the return of the constable shows affirmatively a want of proper execution of the summons, and the judgment fails to show any proof of service on defendant, such petition is not insufficient, though it fails to show that defendant has a good defense to the action. Stone, C. J., and Head, J., dissenting.

5. The discretion of a court to grant the writ of certiorari is exhausted when the writ is granted; and, after the case is brought before the court, the petition must be adjudicated on its merits, as shown by the transcript. Stone, C. J., dissenting.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Petition by the Independent Publishing Company for a writ of certiorari to review the proceedings of a justice of the peace in rendering judgment by default against petitioner, and in favor of the American Press Association. From a judgment sustaining a motion to dismiss the writ theretofore issued, petitioner appeals. Reversed and rendered.

On April 4, 1888, the appellant in this case, the Independent Publishing Company, filed the following petition, addressed to the judge of probate of Madison county: "Your petitioner, the Independent Publishing Company, a corporation duly incorporated under the laws of the state of Alabama, respectfully shows that on the 23d day of March, 1888, a judgment was rendered against your petitioner in a certain cause, wherein the

American Press Association is plaintiff, and your petitioner is defendant, for the sum of ninety-one and 80-100 dollars debt, and two and 35-100 dollars costs, before Robert W. Figg, a justice of the peace in and for said county and state. Petitioner avers that said judgment was rendered by default, and without any proof of service upon said corporation, as the law directs and requires; and petitioner avers that it did not enter any appearance in said cause by attorney or otherwise; and petitioner further avers that no summons was served upon any officer or agent of said company, as required by law. A copy of said judgment entry is herewith filed, marked 'Exhibit A,' and prayed to be taken and considered as part of this petition. Petitioner avers that execution has been issued on said alleged judgment, and levied upon its property; and that after the levy of said execution, and on the 30th day of March, 1888, it filed the following motion in said cause, limiting its appearance therein for the purpose of said motion, viz.: "The American Press Association v. Independent Publishing Company. In Justice's Court, Robt. W. Figg, Esqr., Madison Co., Ala. Comes the defendant, and moves the court to set aside the judgment heretofore rendered in this cause, and, for grounds of this motion, states that said judgment was by default, and no proof was made of service of the process, and that, therefore, said judgment is void. Said judgment was by default, and was entered and recorded without proof being made that the person upon whom the summons and complaint was served was at the time of its service such officer or agent of said company as process could be served upon, wherefore said judgment is void. Humes, Walker, Sheffey & Gordon, Attorneys for Defendant." Said motion was on the same day denied and overruled; and plaintiff avers that it has a clear legal right to have said judgment set aside, and tried in said justice's court; and plaintiff avers that it has no other adequate legal remedy by which to obtain said clear legal right except by the common-law writ of certiorari; and petitioner avers that said judgment so rendered is absolutely null and void. The premises considered, your petitioner prays that said American Press Association be made a party defendant hereto, and that, to this end, subpoena and all other needful process issue to it; that said Robt. W. Figg, justice of the peace, as aforesaid, be required to send up to the circuit court of said county all the records, papers, and proceedings in said cause, and that he be required, commanded, and directed to abstain from all further proceedings therein until the further order of said circuit court; and your petitioner prays that said Isham J. Watkins, constable as aforesaid, be commanded and directed to abstain from all further proceedings in said cause until the further orders and directions of said court; and your petitioner prays that upon

¹ Rehearing pending.

the hearing of this petition, that said judgment be vacated, set aside, and held for naught, and be declared as absolutely null and void; and petitioner prays for such other, further, and different relief as the facts and equities of the case may require." In response to this petition, the probate judge ordered that, upon the petitioner's entering into a bond in the sum of \$188.30, a writ of certiorari issue, in accordance with the prayer of the petition. The bond was duly executed, and the writ of certiorari was issued and executed upon the said Robert W. Figg, justice of the peace. The American Press Association moved the court to dismiss and quash the writ of certiorari, which had been granted, on the following grounds: "(1) Because no notice was given of the application for said writ of certiorari to the American Press Association or attorney; (2) because said writ of certiorari was granted in a case not authorized by law; (3) because the Independent Publishing Company was represented by counsel on the day set for the hearing of said cause in the justice's court, applied for a continuance of the cause, which was denied by the court; (4) because the said Independent Publishing Company had the right of appeal from said judgment; (5) because service was made on R. E. Pettus, the president of said Independent Publishing Company; (6) because there are no errors of law apparent on the face of the record, which require this court to correct." The cause was submitted to the court on this motion, together with the return of the justice of the peace to the writ of certiorari, which included the summons and complaint, with the indorsement by the constable thereon, the judgment rendered, and the motion made by the defendant to vacate and set aside said judgment, and the transcript of the proceedings in the justice's court. The court granted the motion, and ordered the certiorari dismissed, and rendered judgment against the defendant and the sureties on the certiorari bond. The present appeal is prosecuted by the Independent Publishing Company, and the judgment of the court in dismissing the certiorari is assigned as error.

Humes, Sheffey & Speake, for appellant.
William Richardson, for appellee.

STONE, C. J. The American Press Association brought suit against the appellant, before a justice of the peace, on a money demand less than \$100. The suit was instituted by summons and complaint, in statutory form, as prescribed in this state. There was a return indorsed on the summons in these words: "Executed by summons on Mar. 15, 1888. [Signed] J. Watkins, Con." Immediately below the signature of the constable we find these words: "Summon R. E. Pettus, W. E. Pettus, and M. O. Pettus, incorporators." What these words import is not clearly shown. It is possible, if not prob-

able, that these were the persons on one or more of whom service was directed to be made. We cannot, in the teeth of the return, suppose that service was not made on some person. The justice rendered judgment by default against the Independent Publishing Company, but he made no note or memorandum showing that any proof was made before him as to how or on whom service was made. The defendant being a corporation, it follows that service could be made only on some officer or agent of the corporation, as prescribed in section 2657 of the Code of 1886. When a corporation is the party sued, there cannot be a literal service of process on the defendant. Only some officer or agent can be summoned. *Id.* And, inasmuch as the court cannot judicially know who are officers or agents of the corporation, the return of the officer, "Executed" or "Served," in such case, does not per se prove that service has been properly perfected. There must, in addition to the return of service, be independent proof made that the person served was "president," "secretary," or "agent," etc., as the case may be, to authorize a judgment by default. *Earbee v. Ware*, 9 Port. (Ala.) 291; *Norwood v. Riddle*, 1 Ala. 195; *Lyon v. Lorant*, 3 Ala. 151; *Railroad Co. v. Cole*, 6 Ala. 655; *Railroad Co. v. Whorley*, 74 Ala. 264; *Insurance Co. v. Fowler*, 76 Ala. 372; *Railroad Co. v. Carr*, *Id.* 388.

The cases we have cited establish two propositions by the uniform rulings of this court: First. That, in suits against corporations, it is error to render judgment by default against the corporation on service effected on a person as officer or agent of the corporation without first making proof that he was such officer or agent. In the absence of such proof, it is not shown that service was made on any person the law authorizes to receive service or to represent the corporation. Second. A judgment rendered without such proof, though irregular and reversible, is not on that account void. It is so far a judgment that an appeal will lie to review it. That is shown by the cases cited above, to which others might be added. And in those cases where the requisite proof was not shown to have been made we did not pronounce the proceedings void; we did not quash the proceedings. We reversed and remanded the cases, that a further trial might be had. If, on such remandment, the necessary proof should be made, and judgment again rendered, we apprehend no one would contend that such judgment would be void, or even reversible. The very remandment of the cases for further trial was the equivalent of an affirmation by this court that the proceedings were not void. Void proceedings are never remanded for further trial.

Another argument—possibly a stronger one—against the contention that the judgment we are considering is void: Even after appeals to this court from judgments of the

lower courts, if there has been a failure to make proof of service of process in cases requiring such proof, the courts appealed from have permitted proof of service to be made after the appeal was taken, and have amended the judgments *nunc pro tunc*, showing that proof of service had been made; and this court, on having the amended judgment certified up in obedience to certiorari, has uniformly affirmed such judgments. Not the judgments as originally appealed from. They were erroneous, and would have been reversed. The judgments affirmed were the amended judgments,—amended on proof made after the appeals were taken. *Moore v. Horn*, 5 Ala. 234; *West v. Galloway*, 33 Ala. 306; *Ware v. Brewer*, 34 Ala. 114; *Woodward v. Clegge*, 8 Ala. 317; *Cunningham v. Fontaine*, 25 Ala. 644; *Harris v. Martin*, 39 Ala. 556; *Seymour v. Harrow Co.*, 81 Ala. 250, 1 South. 45. Could a stronger argument be made that judgments thus imperfectly entered are not void, but simply reversible? The cases we have cited arose on appeals from judgments of circuit and chancery courts to this, the supreme, court; while in this case the judgment complained of as imperfect was rendered by a justice of the peace. But this can make no difference in the principles applicable to the two classes of cases. No argument can be sound which would attempt to draw a distinction between defects of the kind we are considering when found in the judgments of courts of record, and similar errors found in judgments pronounced by justices of the peace. Such defect or error could not be simply a reversible error when found in the judgments of the higher and more learned tribunals, and yet, when committed by justices of the peace, absolutely destroy and annul the entire proceeding. To declare such rule would establish an unauthorized distinction where no difference can be shown. It would declare a severe rule of accuracy in proceedings before a justice of the peace, against the express language and policy of our statutes. Instead of requiring great strictness in adjudicating justices' proceedings, our statute (Code 1880, § 3405) declares that, on appeals from justices' judgments, "all such cases must be tried *de novo*, and according to equity and justice, without regard to any defect in the summons, or other process, or proceedings before the justice." This statute, without material change, has been the law of this state ever since December 14, 1819, when the act "to regulate the proceedings in the courts of law and equity in this state" was approved. *Toulm. Dig.* p. 186, § 36, on page 189. See, also, *Id.*, top page 511, section 3. It has been many times passed upon in this court. The statute, so long retained as a part of our judicial system, clearly shows that, in reviewing or passing upon justices' proceedings, only such defects as deprive parties of their just and equitable rights can be regarded as entitled to consideration.

Railroad Co. v. Seale, 59 Ala. 608; *Abraham v. Alford*, 64 Ala. 281; *Burns v. Howard*, 68 Ala. 352; *Harsh v. Heflin*, 76 Ala. 499; *Solomon v. Ross*, 49 Ala. 198.

Let us present this argument in another form. It cannot be questioned that, in enacting this healing clause of the statute of 1819, the intention of the legislature was not to give greater potency and effect to errors committed in justices' proceedings than were awarded to similar errors committed by courts of record. On the contrary, in declaring that, on appeals from judgments of justices of the peace, the cases should be tried *de novo*, without regard to any defect in the summons or other process or proceedings, the almost universal want of legal knowledge in these inferior tribunals was had in contemplation. The manifest intention was not to deal severely with proceedings had before them; hence it was declared that, on appeals from their decisions, only questions of "justice and equity" should be inquired into, "without regard to any defect in the summons, or other process or proceedings" that may have occurred during the progress of the suit in that court. The argument of appellant is that, because the legislature has taken from it the right to have the error complained of reviewed and redressed on appeal to a higher court, this necessarily arms it and all similar suitors with the right to invoke the common-law writ of certiorari; the contention being that to deny to it this writ is to withhold from it all redress for this manifest error. What is common-law certiorari, and, in the absence of statute, what relief can be granted under it? "It is not a writ of right, except when made so by statute, or when issued at the instance of the sovereign power. * * * It will not be granted unless required to do substantial justice. * * * It does not lie when an appeal, writ of error, or other mode of review is given. * * * This writ does not lie to correct mere irregularities in the proceedings of the inferior jurisdictions." 3 Am. & Eng. Enc. Law, pp. 63, 64; 2 Wait, Act. & Def. 136, 137; *City Council v. Belser*, 53 Ala. 379. "The judgment on the hearing is that the proceedings below be either quashed or affirmed in whole or in part." 3 Am. & Eng. Enc. Law, 66; *Town of Camden v. Bloch*, 65 Ala. 236; *McAllilley v. Horton*, 75 Ala. 491. "But a writ of common-law certiorari can only be availed of, to review erroneous decisions or proceedings of inferior courts or tribunals, in cases where there is no other available remedy, and where otherwise injustice will be done." 2 Wait, Act. & Def. 134, 135; *Dean v. State*, 63 Ala. 153. In the new work, *Harris on Certiorari* (section 2), speaking of the grant of this writ, that author says: "The application is addressed to the sound judicial discretion of the judge or court, who may grant or refuse it, as to him may seem proper and right, upon the facts of the particular case as shown by the petitioner." Before the statutory amend-

ment, there was, under this common-law writ, no power to correct or amend imperfections or defects. The judgment must be either an affirmance or a quashal.

We have stated the principles which govern the common-law writ of certiorari, its limits, and the relief obtainable under it. Those principles remained the law of Alabama, at least until February 29, 1879, when the law was changed by statute approved that day. Sess. Acts 1878-79, p. 150; Code 1886, §§ 3158, 3159. Before that time the healing remedial statute of 1819 had been in force nearly 60 years. During all that time the defect complained of in this case was irremediable by process of appeal to a higher court. If the argument of appellant be sound, during all those years the common-law writ of certiorari was open to parties aggrieved by imperfect entries of judgments in justices' courts,—open to them solely because the legislature, in attempting to heal such defects, had denied to suitors the right to avail themselves of them by process of appeal to a court of record. This is so because, in the absence of that statute, a party thus aggrieved would have had a remedy by appeal,—an available remedy, without resorting to this extraordinary writ,—and hence would not have been entitled to the common-law writ of certiorari. *Bryant v. Stearns*, 16 Ala. 302; *Benton v. Taylor*, 46 Ala. 388; *Dean v. State*, 63 Ala. 153; *Crowder v. Fletcher*, 80 Ala. 219; *Faust v. Mayor, etc.*, 83 Ala. 279, 3 South. 771; *Railroad Co. v. Christian*, 82 Ala. 307, 1 South. 121; and many authorities cited. Can it be inferred—is it logical to infer—that, because the legislature interdicted the right to revise such errors or mistakes on an appeal to a higher court, they conferred the right to resort to common-law certiorari in such conditions,—that inflexible writ which during all that time could only end in affirming the judgments of justices of the peace, or in declaring them null and quashing them? Can remedial legislation lead to such destructive results as this? It is not my intention to comment at this time on the act approved February 12, 1879. This case may be disposed of without any reference to it.

The judgment which gave rise to this proceeding was rendered by the justice March 23, 1888. Soon afterwards (March 30, 1888) the defendant corporation, the Independent Publishing Company, filed a written motion before the justice "to set aside the judgment" on the following grounds: "That said judgment was by default, and no proof was made of the service of the process, and that, therefore, said judgment was void. Said judgment was by default, and was entered and rendered without proof being made that the person upon whom the summons and complaint were served was at the time of the service such officer or agent of the company as process could be served upon, wherefore said judgment is void." The justice overruled this motion. It will be observed that in this motion it is not denied, but is

impliedly admitted, that there was service of the summons, and that it was served on the proper person. The only complaint is that no proof was made of the service, and for that reason it was alleged that the judgment was void. In the sworn petition for certiorari, filed April 4, 1888, the defect complained of is thus expressed: "Petitioner avers that said judgment was rendered by default, and without any proof of service upon said corporation, as the law directs and requires; and petitioner avers that it did not enter any appearance in said cause, by attorney or otherwise; and petitioner further avers that no summons was served upon any officer or agent of said company, as required by law." We may well inquire, why this difference of language between the motion made before the justice to set aside the judgment and the sworn application to the court for the writ of certiorari? In the motion the complaint was, not that there had been no service, but that no proof had been made of the service. Was not that an implied admission that service had been made? Nor does the application for the writ deny categorically or by fair interpretation that service had been made. Its language is: "Petitioner further avers that no summons was served upon any officer or agent of said company, as required by law." Is this a denial that service had been made? Is it not simply an averment that service was not made in a lawful manner, thus undertaking to aver a legal conclusion, without stating wherein it fell short of legal requirements? If the last four words, "as required by law," had been omitted, the sentence would be complete, and would contain a denial that any officer or agent of the company had been served or notified. The averment is insufficient, and would be bad in any form of pleading. 18 Am. & Eng. Enc. Law, 567; 2 Brick. Dig. p. 332, § 32. It is a cardinal rule in granting or withholding common-law certiorari, as has been already said, that it "is not a writ of right, except when made so by statute, or when issued at the instance of the sovereign power; but it rests in the sound discretion of the court to grant or refuse it under the circumstances of the case. It will not be granted unless required to do substantial justice." 3 Am. & Eng. Enc. Law, 63; *Duggen v. McGruder*, 12 Am. Dec. 527, and elaborate note; *French v. Town of Barre*, 58 Vt. 567, 5 Atl. 568; *State v. Kemen*, 61 Wis. 494, 21 N. W. 530; *Cobb v. Lucas*, 15 Pick. 1, 7; *Hyslop v. Finch*, 99 Ill. 171; *Gager v. Supervisors*, 47 Mich. 167, 10 N. W. 186; *Edgar v. Greer*, 14 Iowa, 211.

The circuit court dismissed the certiorari, in response to the motion made therefor, and it is our duty to presume that he rightly ruled, unless error is affirmatively shown. In *Harris on Certiorari* (section 15) is this language: "Where the writ is applied for, and it appears by the showing made by the applicant that no injustice has been done, or is likely to be done, the writ should be refused,

although there may be irregularity in the proceedings." Section 55: "The issuance or the refusal to issue the common-law writ of certiorari is a matter entirely within the discretion of the court or judge to whom the application is made, and the courts of New York adhere to this rule with commendable tenacity; and when the supreme court exercises this discretion, either in refusing to grant the writ or in quashing the same, the discretion will not be reviewed on appeal." Section 138: "But, in the exercise of that discretion, the court will examine all the circumstances; and if it appears that substantial justice has been done, without violating any important rules of proceedings, they will refuse to grant the certiorari, although there exist some technical or formal errors and unimportant departures from the regular rules of practice; and, upon such inquiry, the court may receive extrinsic evidence, not for the purpose of contradicting the record,—if that contains affirmative defects, it is incurable,—but to supply omissions, and to show that there was a more perfect compliance with the rules of law than the record shows, and that real justice has been done between the parties." Section 81: "This motion [a motion to dismiss] may be interposed at any stage of the proceedings in the superior court, that court having jurisdiction over its own writ, and having a discretion to grant or refuse the writ. It is a continuing discretion over the writ, and the court may at any time before final judgment quash, dismiss, or supersede the writ." The principles last above quoted are fully sustained by decisions in Massachusetts and New York,—two states confessedly among the foremost in reputation for judicial eminence. I think them alike conservative and sound, and believe they furnish a precedent it would be wise to follow. I think it would be eminently safe for us, like Massachusetts, to hold that, on trials under the writ of common-law certiorari, proof may be received, not to disprove the truth of recited facts in the return made, "but to supply omissions, and to show that there was a more perfect compliance with the rules of law than the record shows."

While this proceeding in certiorari was pending in the circuit court, the justice of the peace who had rendered the judgment attempted to remedy the imperfection in the judgment entry, but it does not appear that any notice was given to the Independent Publishing Company of such intended action. He did amend the entry on his docket by causing it to affirm that the summons "was served on R. E. Pettus, president of the Independent Publishing Company." He also so altered it as to make it declare that on the day set for the trial—March 23, 1888—the Independent Publishing Company appeared by counsel, and moved for a continuance, on account of the absence of M. H., its leading counsel. He certified these amended entries to the circuit court, but the

court disallowed the amended return, possibly because the amendment had been made without notice to the adversary party. The circuit court dismissed the certiorari, in response to a motion made therefor, but the particular ground stated above was not specially assigned as a reason therefor. It is, however, embraced in the second of the grounds: "Because said writ of certiorari was granted in a case not authorized by law." As I understand and interpret the language of the petition, it falls to make a case which calls for a writ of common-law certiorari. True, we have a statute which requires that, when demurrers are interposed, special grounds must be assigned, and only the grounds assigned can be considered. We have no such statute in reference to motions; and, when a motion is granted which would have been justified on any ground or for any reason, it is not material to inquire whether the correct, or, indeed, any, reason was assigned for invoking or granting the court's action. A correct order made will be permitted to stand, even when an insufficient or false reason is given for the making of it. *Green v. Casey*, 70 Ala. 417; *Sessions v. Boykin*, 78 Ala. 328. My own opinion is that the circuit court, in the exercise of a sound discretion, rightly dismissed the certiorari, for the following reasons: First. The petition does not aver positively or by fair interpretation that the summons was not in fact served, and served on the proper agent or officer of the defendant corporation. Second. It is not claimed or averred that the defendant did not have notice of the suit, and of the time set for its trial; nor is it denied that defendant owed the debt for which the judgment was rendered. These should have been averred positively; and, in the absence of such positive averment, the petition failed to make a case for which the judge, in his discretion, should have awarded or entertained a certiorari. Third. If the judgment was unjust or for too great an amount, the defendant could have obtained ample redress by an appeal to a higher court, when and where he would have been entitled to a trial *de novo* on the merits of the case. Fourth. I maintain that the statute of 1819 (Code 1888, § 3405) had a broader policy and aim than simply to prescribe that appeal causes from justices' judgments should "be tried *de novo*, and according to equity and justice, without regard to any defect in the summons or other process or proceedings before the justice." Its purpose was to deal charitably with that necessary body of magistracy, because of their known or presumed want of knowledge of the law, and to overlook all defects in their proceedings, provided the ends of justice and equity have been accomplished. I cannot assent to the proposition that, because the legislature took away all right to raise such questions on appeal from justices' judgments, they thereby intended to arm, and did arm, suitors in those inferior courts with the power, by the su-

pervisory writ of certiorari, not to reverse and correct the erroneous rulings, but to quash and annul them, for errors which would only suffice to reverse the judgments of the higher courts.

It is objected to the summation of principles I have declared, Nos. 1 and 2, that the defects in the petition for certiorari were not assigned in the motion as grounds for quashing or dismissing the certiorari, and that for this reason the circuit court erred in granting the motion. I think there is nothing in this objection. When an order is made by the court which is correct in itself, having a sufficient fact to rest on, it does not matter whether any reason, or even an insufficient or erroneous reason, is assigned for the ruling. This is the rule when the order is granted. It will not be reversed. *Green v. Casey*, 70 Ala. 417; *Sessions v. Boykin*, 78 Ala. 328; *Ezell v. State* (Ala.) 15 South. 810. When, however, the motion is denied or overruled, the rule is different. The court is not bound to look beyond the grounds specified in the motion in search of some ground on which to base affirmative action. If the specified grounds contain no merit, the court need not look beyond them, but may overrule the motion. In such case it is the fault of the movant that he does not direct the attention of the court to the true ground which entitles him to relief. To hold otherwise might lead to a reversal, on a ground which the court never considered or even thought of. *Sessions v. Boykin*, 78 Ala. 328; *Baker v. Boon* (Ala.) 13 South. 481; 3 Brick. Dig. p. 389, § 364.

If relief be granted in this case, it will establish a precedent which, in my judgment, will lead to very disastrous results. There is no estimating the number of judgments rendered by justices of the peace which are so incomplete in some respects as that, under the principles of the common-law writ of certiorari, if permitted to be invoked in their severity, they would be quashed. Shall we establish such precedent? Can we afford to announce such doctrine as the solemn judgment of this court?

Some expressions in *Railroad Co. v. Brannum*, 11 South. 468, 96 Ala. 461, are not reconcilable with some expressions in the foregoing opinion. The correctness of the judgment pronounced by this court in that case need not be controverted. The suit was brought against Morrow, agent, and the judgment was by default, and against the railroad company,—an entire change of parties. The error was irremediable, and the judgment fatally defective. The proceedings were rightly quashed. 1 Brick. Dig. p. 113, § 68. My own opinion is that the judgment of the circuit court ought to be affirmed.

HEAD, J., expresses his own views, and the remaining members of the court concur in the opinion of COLEMAN, J.

Reversed and rendered.

COLEMAN, J. The suit began in a justice's court against appellant, a corporation. The return made by the officer executing the summons is as follows: "Executed by summons on Mar. 15, 1888. [Signed] J. Watkins, Con." Judgment by default was rendered by the justice against the corporation, but there is no entry showing who was served with notice, or that the person served, if any, "was president or other head thereof, secretary, cashier, station agent, or any other agent thereof," as required by section 2657 of the Code. The defendant applied by petition to the circuit court for the common-law writ of certiorari, and prayed that the judgment be quashed. There are many decisions in our court where, from like irregularities, cases were brought to this court by appeal; and in every instance, unless the defect was remedied in the trial court by amendment nunc pro tunc, the case was reversed and remanded, although the error was apparent on the record. On appeal to this court a judgment merely reversing the cause was the proper judgment. See following authorities: *Lyon v. Lorant*, 3 Ala. 151; *Railroad Co. v. Cole*, 6 Ala. 855; *Railroad Co. v. Whorley*, 74 Ala. 264; *Insurance Co. v. Fowler*, 76 Ala. 372; *Railroad Co. v. Carr*, Id. 388. In no case reported, which we have been able to find, where the defendant resorted to the common-law writ of certiorari to redress the error, was there a judgment of reversal. The proper and only judgment which could be rendered where the cases were brought up by the common-law writ of certiorari, instead of by appeal, would be a judgment of affirmance, or one quashing the judgment. The cases cited in which the remedy invoked was by appeal are not authority to show that a like judgment of reversal merely would have been rendered if the common-law writ of certiorari had been invoked. It needs no argument to show—in fact, the proposition is conceded—that the remedy by the common-law writ of certiorari was available to reach such a defect as that which exists in the present case. At common law and by the practice of this court, as we have said, the judgment on the writ of certiorari would be to quash or affirm the judgment. The question, then, is directly presented whether section 3158, c. 13, of the Code changes entirely the principles of pleading, rules of evidence, and principles of procedure which have always applied to the common-law writ of certiorari, and permit an issue of fact to be made up in the supervisory court to supply an omission in the record proceedings, or to show that the record recitals of the court in which the judgment was rendered are untrue. Chapter 13, which contains section 3158 of the Code, referred to above, is one of general provision, and has no more reference to procedure in courts of justice of the peace or courts of limited jurisdiction than in the circuit or other higher courts of record of general jurisdiction. It seems manifest that if

the judgment had been rendered in the circuit court, upon a like return made by the sheriff, and the defendant had applied to this court for a writ of certiorari to bring up the record, this court would have ordered the judgment and proceedings to be certified. Upon such an order from this court, would it be possible for the plaintiff to make an issue of fact, and have the same tried and determined upon parol evidence in the court below? That court could have no such power. Its duty would be to comply with the order of this court, and send up the record as it existed. True, all courts have the authority to amend their records *nunc pro tunc* in proper cases, but no issue of fact to be established by extrinsic parol proof would be permissible, nor could an amendment *nunc pro tunc* be made upon parol proof. It seems clear that the construction contended for under section 3158 of the Code cannot be applied to the common-law writ of certiorari, by which a defect apparent on the record in the circuit or other higher courts is sought to be reached and remedied by a writ from this court. We think there is another reason fatal to the contention. The only evidence of the execution of the summons is the return of a proper officer. Although, under proper circumstances, a return by the officer that a summons has been personally served may be falsified, in no case will a personal judgment be upheld, in a direct proceeding questioning its validity, in the absence of record evidence showing that the court had jurisdiction of the defendant. A valid personal judgment cannot be rendered without record evidence that the defendant has been notified by a proper officer in a legal way. The return of the proper officer to this effect is sufficient. An appearance by the defendant or by counsel in court, of which there is record evidence, is sufficient; but parol proof cannot be received to establish either the one or the other. Moreover, the court in which the proceedings were had is the only court which has the authority to amend its record *nunc pro tunc*. Without proper service or a legal appearance, of which there is record evidence, the court is without jurisdiction of the person. To give to section 3158 the construction contended for would be to strike down all these elementary principles and safeguards of the law, and have the effect to permit the circuit court, upon parol proof, to amend the records *nunc pro tunc* of the justice's court, and this court to amend the records of the circuit court upon parol evidence. It amounts to this, and nothing less. Of course, it must be understood that we are treating of the common-law writ of certiorari granted in this case for error apparent, which justified its issuance, and not to the statutory writ of certiorari, by which a cause may be brought from a justice's court to the circuit court, after the five days in which an appeal may be taken have expired, for any sufficient cause showing why the appeal was not prose-

cuted within the time fixed by the statute. Upon a sufficient showing, without reference to any error of record apparent, the writ may issue, and the case be brought up. It is tried under the statute *de novo*. But this section of the Code (3405) can have no reference to the proceedings under the common-law writ of certiorari, which is granted only in proper cases for error of record apparent, upon which the only proper judgment is to affirm or quash the proceeding. This question has been directly passed upon by this court. *Ex parte Madison Turnpike Co.*, 62 Ala. 94; *Camden v. Bloch*, 65 Ala. 236. It has never been held in this state that a trial *de novo*, upon the merits of the case or extrinsic evidence, was permissible to supply an omission or cure an irregularity apparent upon the record in a case brought up to a superior court by the common-law writ of certiorari. On the other hand, the reverse has been adjudicated and declared to be the law. The very question arose in the case of *Camden v. Bloch*, 65 Ala. 236. Other cases could be cited. We do not feel authorized to give the statute this construction, and more especially as section 3166, contained in chapter 13 of the Code, provides: "The common law, as now in force in this state, touching any of the matters embraced in this chapter, is not repealed, but left in full force." If it be conceded that a person has no right to the common-law writ of certiorari, when he has a complete remedy by appeal or by the statutory certiorari, we hold in the present case that rule would not apply, for this reason: For the defect in the record, at common law, the petitioner had the right to have the judgment of the supervisory court quashing the judgment of the lower court. He was not required to resort to any supposed remedy, the result of which necessarily destroyed this legal right. The common-law writ of certiorari was the only remedy left to him by which the defect in the judgment could be reached, and a judgment quashing it could be rendered. If he resorted to an appeal, he made himself a party, brought himself into court, and, after being compelled to secure the debt by his appeal bond in order to obtain the appeal, must then submit to a trial *de novo*, without having a judgment, void for want of legal notice, quashed. So long as the return made by the officer executing the writ of summons in the justice's court remained as it was, and there was no proof showing the party served was a person mentioned in the statute as a proper person upon whom service could be rendered, it is apparent upon the record that the justice's court did not have jurisdiction of the defendant, and the judgment was improperly rendered. There was no power in the circuit court to amend the record brought up by the common-law writ of certiorari, or to hear parol proof to supply the omission or cure the defect. The circuit court should have granted the petition, and quashed the judg-

ment of the justice's court. The same principle was settled in the case of *Railroad Co. v. Brannum* (Ala.) 11 South. 468, and we adhere to the conclusion reached in that case.

As to the insufficiency of the petition and the discretionary power of the court to grant or refuse the writ, we have but to say the petition, in our opinion, is not subject to criticism for insufficiency. A complete transcript of the proceedings before the magistrate is made a part of the petition, and was before the court, and the return of the constable shows affirmatively a want of proper execution of the summons, and the judgment fails to show any proof of service upon the defendant. Looking at the entire proceedings and judgment before the magistrate, there is no evidence to show that the court had jurisdiction of the person of the defendant, or any authority to render the judgment.

As to the discretion of the court to grant or refuse the writ, this discretion was exercised when the writ was issued. After the case had been brought before the court, the petition was for adjudication upon its merits, as shown by the transcript and record from the magistrate's court. In the case of *Myra Walden v. Imperial Life Ins. Co.*, appealed from Dale circuit court, the record shows that Myra Walden sued the defendant, a corporation, upon an insurance policy. The return of this sheriff is as follows: "Executed by serving a copy of the within summons and complaint on defendant, this 7th day of June, 1892." At the spring term, 1893, the plaintiff obtained a judgment by default for \$2,333.35. At the following term of the circuit court the defendant appeared, and moved the court to set aside and annul the judgment, because the defendant had not been served with a copy of the summons and complaint, as required by law, and had no notice of the pendency of the suit. This motion was granted by the court, and the judgment set aside and annulled. The plaintiff appealed the case to this court for revision, and submitted also a motion for the writ of mandamus to require the circuit court to set aside and annul the order by which the judgment in favor of the plaintiff had been set aside and annulled, and to reinstate the judgment. Upon motion of the appellee, this court dismissed the appeal, and denied the motion for the writ of mandamus. The facts of the case cited and the ruling of this court adjudicated the questions before us. If the judgment by default was merely irregular, and not void, the circuit court had no authority, at a subsequent term or any other term, to vacate and annul it. If the judgment was merely irregular, this court would have entertained the appeal, and reversed the case. On the other hand, if the judgment was merely irregular, and not void, and the circuit court had no jurisdiction at a subsequent term to set it aside and vacate it, and if appeal would not

lie, then the writ of mandamus was the proper remedy, and the circuit court would have been required to reinstate the judgment. The very fact that this court held that neither an appeal nor a mandamus would lie necessarily determined the proposition that the judgment in default was void, and that, upon its annulment, there was no final judgment which would support an appeal. The questions are precisely the same in principle in both cases. The appeal in case of *Myra Walden v. Imperial Life Ins. Co.* being dismissed, it has not been reported, but it is an adjudicated case, and as binding as any other decision, and, in our opinion, is right on principle. It was decided by a full court, all concurring.

There was no demurrer or objection for insufficiency, and no motion to dismiss or quash the writ as having been improvidently granted. No such question was before the court. The writ was dismissed for some one of the reasons assigned in the motion, and there is but one entitled to any consideration, and that is that the publishing company had the right to appeal. We have shown that this motion ought not to prevail. This court will therefore render the judgment the circuit court should have rendered, and set aside and vacate the judgment rendered by the justice of the peace. Reversed and rendered.

HEAD, J. I concur in the opinion of the chief justice that a person seeking, by common-law certiorari, to avoid a judgment obtained against him, in a case like the present, should show, in his application for the writ, that he has a meritorious defense to the action which he had no opportunity to make. My position is this: Certiorari is a discretionary writ, designed to accomplish justice; and although the proceedings of the inferior tribunal, sought to be reviewed, which resulted in the judgment complained of, abound in errors and irregularities which it is the nature of this remedy to redress, yet, if it should appear that the judgment sought to be avoided is manifestly the same as would have been obtained had the proceedings been strictly legal and regular, the court would not lend its aid, by this discretionary writ, to set it aside. It would be opposed to the purposes for which the remedy was invented (which, as I have indicated, are to enforce substantial justice, and prevent injustice) to permit it to be used to avoid proceedings which involve no real detriment to the party moving. This being the spirit and purpose of certiorari, I think the applicant for it, in a case like this, should show, in his application, under oath, to the judge to whom he applies, not only the errors complained of, but, as terms upon which the discretion of the judge will be exercised in favor of awarding the writ, that he has a meritorious defense which he had no reasonable opportunity to make. This is the rule,

as I understand it, which equity has adopted when her courts are invoked to vacate judgments as having been unlawfully obtained; and the same spirit pervades our several statutory provisions for reviving litigation once determined by final judgment. If it be omitted, the writ of certiorari will be the efficient means of setting litigation on foot, and accomplishing the vacation of judgments for irregularities which wrought no substantial injury whatever,—ends opposed to the spirit of the remedy. I think the judge, in granting the writ without this showing, grants it improvidently. Nor does the discretion stop with the judge who awards the writ. When the proceeding comes on before the court, the court, if moved thereto, may inquire and determine whether it was improvidently granted or not, and, finding that it was, may quash it for that reason. In the present case, if my view is right, the petition is defective for non-conformity to the rule I express. The writ should not have been granted in the first instance, and, being granted, the court, if it had been moved thereto, should have quashed it. But no such motion was made. The parties tried the cause upon the merits of the proceedings before the justice of the peace brought up for review in return to the certiorari. The question, therefore, as to sufficiency of the showing made in the petition for the writ in respect of the matter above discussed is not before us for revision.

There was a motion in the circuit court to quash the writ, which was granted; but that motion went to the merits or validity of the judgment sought to be set aside, and not to the quashing of the writ as having been improvidently granted, on account of the omission I have suggested. The writ being retained for hearing and disposition upon its merits, I concur in the opinion of Justice COLEMAN as to the rules and principles which govern its disposition. It is insisted, in the opinion of the chief justice, that a judgment against a corporation, rendered upon the sheriff's or constable's return, without proof being made before the court that the person served was at the time an agent or officer of the corporation authorized by law to receive service, is voidable merely, and not void. But for the peculiar rule obtaining in Alabama, and nowhere else, of which I am aware, which requires such proof to be made before the court, in aid of the officer's return, such a status as a return of service of mesne process, voidable on the face of the record, is not conceivable. The purpose of service and return thereof is sole; it is to confer jurisdiction of the person of the party sued upon the court. When the return is made, it is the record upon which rests the evidence of the court's jurisdiction of the person. It imports the same verity, and is as conclusive, as any other part of the record. To confer jurisdiction the return must, of course, show with reasonable certainty the facts, and all the facts, essential

to such jurisdiction. If it falls in this, even in the slightest material particular, the court cannot accept it as evidence of jurisdiction. It is a nullity. A judgment by default rendered upon it is void upon the face of the record. On the other hand, if it shows all the essential facts, jurisdiction is conferred, and the sole purpose accomplished. There is no middle ground. The return, on the face of the record, is, necessarily, complete and perfect, or an absolute nullity. Whether the suggestion of the chief justice, that the omission of the record to show that the peculiar Alabama rule in respect of the proof required to be made in aid of the return was complied with, renders the judgment voidable merely, I do not think it necessary to decide in this case; for I understand the writ of certiorari is grantable as well when the court proceeded irregularly to judgment as when it was without jurisdiction. It is a question of much importance, and I prefer to express no opinion upon it until it is expressly raised and argued. I desire, however, as the subject has been discussed in the opinions of my brothers, to make some observations, as merely suggestive, upon the general law of service upon corporations, and judgments thereon, and to refer to the origin and growth of the Alabama rule requiring the return to be aided by other proof of its verity. Under the general law prevailing everywhere else than in this state (unless changed by statute), there is no distinction, in the verity accorded a sheriff's return, in suits against corporations and against individuals. In the former, if there be no statute prescribing the particular officers or agents upon whom the service shall be made, it must be made upon the head or principal officer of the corporation. 1 Tidd, Pr. marg. p. 121, and notes; Ang. & A. Corp. (2d Ed.) 508, note; Mor. Corp. § 521. If regulated by statute, the service must be upon the officer or agent, so provided. The return must show clearly upon what officer or agent service was made, and the character of the office or agency. The time, place, and manner of service should be clearly stated. 22 Am. & Eng. Enc. Law, 184 et seq., and notes. A return thus complete imports absolute verity, and is just as unassailable as a perfect return in case of an individual. By it the court acquires jurisdiction of the person, and its judgment is conclusive. If the return is untrue, if the person returned as served was not in fact the officer or agent of the corporation, as represented, the remedy of the corporation, if injured, is against the sheriff; and sometimes equity lends its aid to relieve. 1 Tidd, Pr. (Am. Notes) p. 122; 22 Am. & Eng. Enc. Law, 192 et seq., and notes. Extraneous evidence will not be received to aid the return. See note, 1 Tidd, Pr. 122, supra.

But we come to the Alabama rule. It began with the case of *Bank v. Walker, Minor*, 391. By statute, a bank was liable to summary judgment, on motion, for the amount

of its bank notes, payment of which had been refused on presentation. The statute made service of notice of the motion on the president or cashier of the bank sufficient to make the bank a party defendant. The sheriff returned, in proper form, that he had served the notice on "Wm. G. Hill, cashier of the bank." The court, by Judge Gayle, said: "By the record it is not shown that it appeared to the satisfaction of the court that Hill was such cashier. It seems to us that the official duties of the sheriff did not require him to certify in his return who was the cashier. His return proved only that service was made on a particular individual, not that such individual was cashier. He being only an agent of the bank, his identity must be ascertained, as other facts are, by proof. The sheriff might serve the notice on a stranger, having no connection with the bank; and judgment might thus, on motion, be rendered against the corporation, without an opportunity of making defense." No authorities are cited. Judge Crenshaw dissented. He said: "I concur with the majority of the court in thinking that, as this is a summary and extraordinary remedy, the record should show that the plaintiff, in the motion, had complied with all which the statute requires to entitle him to the remedy. But I think that the plaintiff has done all this in the present case. I cannot think it was contemplated by the statute that the plaintiff should prove that the person on whom the notice was served was the cashier." The error of the conclusion of the majority, it seems to me, is obvious. It is not only opposed to the authorities to which I have referred, which accord verity to the return showing service upon the proper agent of the corporation, and which exclude extrinsic proof that such person was not the agent, but to reason also. When a suit is instituted, jurisdiction of the person of the defendant must in some way be obtained. The law charges the sheriff or constable, as the case may be, with that duty. That officer is thus authorized, and it is his official duty, to investigate and ascertain who the defendant—who the party intended to be sued—is; to identify him as the real defendant and serve the process upon him; and when he performs that duty, and makes return, in proper form, he thereby makes a record as unassailable as any record the judge can make. The evils of a false return, suggested by Judge Gayle, may as readily occur in a suit against an individual as a corporation. Suppose a suit against John Smith, for instance, and there are a dozen persons by that name in the county. The sheriff, by mistake, serves the process on a John Smith other than the person really sued, and returns that he has served it upon the defendant, John Smith, upon which judgment is rendered. The judgment is conclusive upon the real defendant. The sheriff is responsible to him for the mistake, just as he would be as if, having a writ of arrest against John Smith,

he arrests the wrong person, though bearing that name. He is bound to know who the party to the process is. In case of a corporation, the agent provided by law to receive service is, for the purpose of service, the defendant itself. The sheriff must and may identify him, just as he would an individual defendant, and there is no reason why the duty may not be as well performed. But, again, suppose the rule laid down by Judge Gayle be sound. It results, logically, that a sheriff's return cannot bring a corporation into court. The defendant cannot be regarded as before the court, because the return itself is inefficacious to show that the person served, as agent, was in fact agent. The court must regard that he was not an agent. The rule necessarily proceeds upon that presumption. Then, is it not manifest that the proceeding instituted by the court by which evidence is taken to prove that he was such agent is purely *ex parte*? Can such a proceeding, to which the corporation is not a party, and hence without opportunity to be heard, to cross-examine the witnesses, or introduce rebutting evidence, be binding on the corporation? If not, then of what value is the proof? What does it legally add to the verity of the return? The rule was next declared in *St. John v. Bank*, 3 Stew. 146, where Judge Crenshaw simply followed the former decision without further discussion. It was next declared in *Lyon v. Lorant*, 3 Ala. 151, without discussion or the citation of authorities, but evidently following the former cases. Then, in *Railroad Co. v. Cole*, 6 Ala. 655, and *Iron Co. v. Spradley*, 42 Ala. 24, and many subsequent cases, down to the present day, it has been treated as the settled rule, upon the authority of these cases, without being discussed or questioned, until it must now be regarded as a settled rule of practice in this state. But the question raised by the chief justice, whether the omission from the record of the required proof renders the judgment void, or merely erroneous and reversible, is an open question. Will it be regarded as an essential to jurisdiction, or will it be so tempered as to leave the sheriff's return efficacious to confer jurisdiction, and the rule itself one merely of practice, intended as a safeguard against mistakes of the sheriff, hence failure to observe it a mere irregularity?

(103 Ala. 383)

SCOTTISH UNION & NATIONAL INS. CO. v. DANGAIX.

(Supreme Court of Alabama. June 5, 1894.)

INSURANCE—ACTION TO RECOVER RETURN PREMIUMS—SUFFICIENCY OF PLEA—RES JUDICATA.

1. In an action against an insurance company, by the assignee of claims for return premiums on policies, to recover such return premiums, a plea denying plaintiff's ownership of the claims, not verified as required by Code, p. 810, rule 29, is demurrable.

2. Where the complaint contains separate counts for each of such claims, a plea alleging

that plaintiff has heretofore recovered judgment for a portion of the account against defendant for such claims, which judgment has not been reversed, is demurrable for failure to show which of the claims were embraced in such judgment.

3. In such action a plea alleging that the policies were procured by plaintiff as defendant's agent, for the procurement of which plaintiff reserved a portion of the premiums paid; that plaintiff, after ceasing to be defendant's agent, procured the holders to cancel the policies, and bought the unearned premiums, in violation of defendant's rights,—states no defense, since the allegations of the complaint that the policy holders could cancel their policies at any time, and immediately afterwards demand the return of their unearned premiums, are not denied, and since their assignee has the right to sue for such unearned premiums if they have such right.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by W. J. Dangaix against the Scottish Union & National Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover certain return or unearned premiums on policies of insurance, which had been issued by the defendant corporation to different persons, the holders of said policies having canceled them, as allowed under the terms of the policies, and demanded the return of a certain proportion of the premiums paid. The plaintiff claimed as assignee of these various policy holders. The action was commenced on March 15, 1893. The complaint contained 75 counts. Each of the first 73 counts sought to recover separately the amount of the return or unearned premiums due to individual policy holders, after the cancellation of their respective policies, which claims for the unearned premiums had been regularly transferred and assigned to the plaintiff. The seventy-fourth and seventy-fifth counts sought to recover the aggregate amount due to the several policy holders upon such cancellation. The defendant pleaded the general issue, and the following special pleas: (1) "For answer to the complaint the defendant says it is not indebted in manner and form as stated in the plaintiff's complaint." (2) "For further answer to the complaint the defendant says the plaintiff is not the owner of the account, or claim sued on." (3) "For further answer, the defendant says that the policies of insurance named in the complaint were procured by the plaintiff as the agent of the defendant, and were issued by the defendant through the plaintiff as their agent, and for the procurement of the policy holders named in the complaint, the plaintiff secured from the defendant a portion of the premiums paid by said policy holders on said policies of insurance, which said portions of said premiums are still held by the plaintiff; and the defendant avers that the plaintiff, after he ceased to be defendant's agent, procured said policies of insurance to be canceled for the purpose of depriving the defendant of the benefits thereof, and then bought the unearned

premiums in violation of the right of the defendant, which he had no lawful right to do; and hence the defendant avers that plaintiff never procured any lawful title to said claims for unearned premiums, and has no right to maintain this suit thereon." (4) "For further answer, the defendant says the plaintiff has heretofore brought suit for a portion of the account held against the defendant on account of cancelled policies and the return of unearned premiums thereon, in the justice's court, before L. J. Haley, a notary public and ex officio justice of the peace, who had jurisdiction of the parties and of the subject-matter of the suit, and judgment was rendered by said L. J. Haley, N. P., ex off. justice of the peace, against this defendant, for eighty-one dollars and seventy-four cents (\$81.74) and costs of suit, and said judgment is still subsisting and unreversed, and the plaintiff cannot now have or maintain the above suit, which is for a part of the same account held by plaintiff against the defendant at the time said suit was instituted by the plaintiff against the defendant before said L. J. Haley, notary public and justice of the peace." The plaintiff demurred to the second plea, on the ground that it was not verified by affidavit as required by law. To the third plea the plaintiff demurred upon the grounds: (1) That it presents no defense to the plaintiff's cause of action. (2) That it does not deny the averments of the complaint. (3) That said plea sets up no matter which precludes or estops the plaintiff's recovery. (4) That the plea sets up no duty, which plaintiff owed defendants, the violation of which would preclude the plaintiff's recovery. (5) That the averment of the plea that the plaintiff never procured any lawful title to the claim sued upon, was a conclusion of law. To the fourth plea the plaintiff demurred on the ground that it was not shown which of the claims sued upon in the present action were embraced in the judgment of the justice of the peace. The demurrers to these several pleas were sustained, and issue was joined upon the pleas of the general issue. The plaintiff was the only witness examined on the trial of the cause, and his testimony tended to show that the several claims sued on had been regularly transferred to him by the policy holders; that the policies so issued gave to the holders thereof the privilege of canceling their policies, and upon such cancellation they were entitled to a certain proportion of the premiums which had been previously paid; that the plaintiff was formerly the agent of the defendant company, and as such agent procured the several policy holders to take out their policies in the defendant company. The contention of the defendant on the trial was, that the policies, which had been canceled by the respective holders, had been obtained through the agency of the plaintiff when he was the agent of the defendant company; that a few days after the plaintiff ceased to be the agent

of the defendant company, he persuaded the several policy holders to cancel their policies held in the defendant company, and induced them to take in their stead policies issued by another insurance company of which the plaintiff was the agent; and that the claims sued upon were the claims due to the several policy holders upon the cancellation of their policies, which had been canceled at the instance of the plaintiff. These facts were sought to be brought out upon the trial of the cause, by several questions propounded to the plaintiff as a witness on his cross-examination. Each of such questions was separately objected to by the plaintiff, and the court sustained each separate objection, and to each of these several rulings of the court the defendant separately excepted. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the court upon the evidence and the rendition of judgment in behalf of the plaintiff.

Lane & White, for appellant. John P. Tillman, for appellee.

HARALSON, J. 1. The demurrer to the second plea was properly sustained, for that the plea denied the ownership of the claims sued on, and was not verified as required by rule 29, page 810 of the Code.

2. There was no error in sustaining the demurrer to the fourth plea. Each cause of action in the complaint (73 in number) is distinct and separate from every other one, as much so, as if 73 promissory notes had been declared on, separately, in the same complaint. The principle which forbids the splitting of the same cause of action by bringing two or more suits upon it, has no application here, as the theory, on which the plea is filed, assumed.

3. The real contest in this case, evidenced by the procedure in the court below and the arguments filed in the cause, was upon the demurrer to the third plea,—as to whether or not the facts therein set up, and as pleaded, constitute a good defense to this action, and preclude a recovery by the plaintiff. The bill of exceptions states, that “the plaintiff introduced in evidence each one of the several policies named in the complaint, separately, together with the receipt for the return of the premiums and the authority to collect the same by the plaintiff indorsed on it, and a transfer and assignment of Dangaix, Crowder & Co., to the plaintiff of all their interest in said return premiums. Plaintiff also proved the other averment in said complaint.” This statement shows that every allegation in the complaint was proved; which entitles the plaintiff to a judgment, unless it appears that he is precluded by matters set up in said plea.

4. It is a principle of universal prevalence, that an agent must not put himself, during the agency, in a position which is adverse to that of his principal. 1 Pars. Cont. p. 93. This rule cannot, perhaps, be more comprehensively and concisely stated, than as we find it in the American notes to Keech v. Sandford, 1 White & T. Lead. Cas. Eq. 53: “Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject, antagonistic to the person with whose interests he has become associated.” Davis v. Hamlin, 108 Ill. 40. We have been unable to find any decided case, or to find the principle asserted in any text-book on agency, which lays down the proposition, that one who has acted as an agent of another, whose agency has terminated, may not, thereafter, if he act in good faith and without fraud, engage in business in competition with, and even to the injury of his former principal. The law has not attempted to prescribe rules for the conduct of one who leaves the service of his first employer and enters that of another. The only restraint the law lays on the retiring agent is, that he must tell the truth when he speaks of his former employer and his business, and shall be guilty of no fraud or deceit at his expense, for the profit of himself or another. If he does, he is personally responsible for the damage he causes. An insurance agency is a profitable and useful business employment. A good and capable agent of the kind often controls a large patronage and enjoys a valuable good will, which he may use or sell. If he should cease to represent one company, and engage to represent another, to the great disadvantage of the first, there is no law to prevent his doing so. Every one who employs an agent does so with the certain knowledge that his agency may terminate at any time, except in so far as it is restrained by contract, and that the agent may transfer himself, with all his information, skill and patronage, to another rival in business, or set up on his own account, in a competing line. Such persons are hired, often, in consideration of the trade that follows them, and this is legitimate, to the extent that it is fairly influenced.

5. We have thus stated the law as favorably as may be to the claims of the plaintiff. On the other hand, it is certainly true, that there are obligations which continue and follow an agent after the termination of his agency. We have a fair illustration of this principle in Edmonstone v. Hartshorn, 19 N. Y. 9, which was a suit by an agent for his salary. It was shown that he had been employed by the defendant to reside in the island of Cuba, as his agent for procuring orders for the manufacture of engines; that he was to be paid \$2,400 per annum in equal

monthly installments; that after remaining in Cuba some eight months, plaintiff returned to New York and presented his bill to defendant for the residue of his salary. It was shown in defense, that when the plaintiff left Cuba, he was engaged in a negotiation with a Mr. Bequir for the construction by defendant of a steam engine to be set up on his plantation; that several letters had passed between Bequir and the plaintiff in reference to the character and price of the engine, and the time of delivery. The terms proposed by the plaintiff were accepted by Bequir, in a letter written before the plaintiff left Cuba, but not received by him until after his arrival in New York, and the presentation by him to the defendant of his claim for his unpaid salary; that a few days afterwards, the plaintiff gave the order for the construction of Bequir's engine to a rival establishment by which it was constructed, and the defendant could have complied with Bequir's order within the time limited by it for delivering the engine, and that the profit would have exceeded the entire amount of the plaintiff's salary. Judgment was rendered for the plaintiff. On appeal, that judgment was reversed,—five out of the eight judges concurring. It was held, that if the plaintiff on his arrival in New York, desired to take no further care of defendant's business, it was his plain duty to have communicated to him the fact that such a corporation existed; and when in New York, he received Bequir's letter of the 8th of June, with which, except as agent of defendant, he had no concern, he should have transmitted it or communicated its contents to him, and to that extent, at least, he had a duty unperformed which he remained bound to perform to defendant though his agency was at an end. The court held he was not entitled to recover. In the case of *Insurance Co. v. Anderson* (Super. N. Y.) 6 N. Y. Supp. 507, the defendants had been the agents of the plaintiff, and as such, insured Hoe & Co., with the plaintiff company, issuing to them two policies to run for three years. By the agreement between plaintiff and defendants, the latter were to receive 30 per cent. on all premiums received by them on policies issued through their agency. They received this per cent. on the premiums for these two policies, for the entire term they were to run. Before the expiration of the policies, defendants left the service of plaintiff and became the agents of another insurance company, and solicited Hoe & Co. to cancel their policies with plaintiff, and take others in their new company, which they did, and plaintiff, retaining the customary short rate, for which the policies provided in case the insured should at any time desire to cancel them, paid the balance of the premiums to the insured. The plaintiff sued the defendants for damages for procuring the cancellation of the policies. The court held that the defendants were, under the terms of their contract, liable to plaintiff for 30 per cent. of

the returned premiums, and it was no error to so direct. This case on appeal was affirmed, the court holding, that the power of an agent to create rights by contract for his principal includes an implied duty to observe, and not to defeat or destroy them. *Id.* (N. Y. App.) 29 N. E. 231.

6. Under the policies described in the complaint, it is not denied that the policy holders had the absolute right to a cancellation of their policies at any time, and were further entitled, by the terms of their contracts of insurance, to have their unearned premiums refunded to them, immediately upon the cancellation of their policies. This was their legal right, and however wrong and inexcusable in a moral and legal sense it may have been for the plaintiff, to induce them to cancel their policies and insure with him in other companies, this could not affect their right to cancel, if they elected to exercise it. It is certainly true, that having exercised it, they could have brought and maintained their respective suits against defendant, to recover these premiums, on its refusal to pay them. If the policy holders had the right to sue, they had the right to sell and transfer their causes of action to another; and to sustain this plea, we would have to deny their assignee the right to sue, which, without more, under the established rules of pleading, we cannot do. There was no error in sustaining the demurrer to this plea, nor in excluding the evidence offered on the trial to support its averments. The facts set up in said plea were not available under the general issue.

7. The authorities to which we have referred, maintain the principle, to which we give sanction, that when the plaintiff procured these policies to be issued by the defendant company, and was paid by it to procure them, there was an implied obligation on him, supported by the consideration he had been paid by defendant, as binding as if it had been expressed, and which was continuous during the life of the policies, even after the termination of his agency, that he would not deprive defendant of the fruits of the services it had employed him to render. The policy holders, as we have said, had the unquestioned right to cancel their policies and demand repayment of their unearned premiums; and if they did so, of their own accord, at any time, whether before or after the termination of plaintiff's agency, the plaintiff was in no sense responsible for the act; but, for him, when he quit the defendant's employment, and for purposes of his own gain, to turn about and induce those who had insured with defendant, to cancel their policies and insure with him in another company, or in other companies, thereby depriving defendant of the benefits of premiums on policies which he, as its agent, had procured, for a certain per cent. of the premiums paid to and still retained by him, was a violation of duty he owed defendant, which finds no sanction in law. Such a

course is at war with all proper business principles. If the defendant had known that plaintiff would pursue this course, every one knows that it would not have employed him. We have felt impelled to say this much, lest a bare ruling on this plea might seem to imply a sanction to the course alleged to have been pursued by plaintiff to acquire the title to those causes of action, on which he has obtained a judgment which we affirm.

8. If the defense attempted to be set up in said plea, had been presented by a plea of

recoupment properly pleaded; or, if on a proper statement of the facts in a plea to show the fraud, supported by affidavit, it had been made to appear that the transfer to him of these causes of action had been fraudulently procured, by plaintiff, and denying his right and title to them, it might have been, that a defense would have been presented in such form as to resist the assault of a demurrer. But, this we need not decide, since such pleas are not before us. Affirmed.

END OF CASES IN VOL. 15.

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